
Do You Need to Determine and Disclose the Labor Practices of Companies in Your Supply Chain?

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Slavery and child labor are condemned by all civilized societies as inherently evil. The raw materials of such labor, however, work their way into the supply chain and onto the retail and grocery food shelves throughout the United States. Two situations have become particularly notorious as of late. Parts of the Thai fishing industry rely on slave labor on small vessels to fish the South China Sea for forage fish. The fish are sold into the international seafood market and ultimately appear in such products as cat food, dog food, and animal feed. The other situation includes the use of child labor in Cote d'Ivoire on cocoa plantations. Cote d'Ivoire is the world's largest supplier of cocoa, which is used in the manufacture of chocolate. Worldwide sales of chocolate are estimated to be approximately \$100 billion.

California has enacted the "California Transparency in Supply Chains Act of 2010" ("Supply Chains Act") as a somewhat exploratory first step in the direction of discouraging the placement of products that use raw materials from slave labor and human trafficking onto California shelves. The Supply Chains Act applies to large companies with worldwide sales greater than \$100 million, selling on a retail basis into California. The Supply Chains Act requires covered companies to disclose the extent to which they (i) evaluate the risk of human trafficking and slavery in their supply chain; (ii) audit suppliers for human trafficking and slavery; (iii) require direct suppliers to certify that their products comply with laws prohibiting human trafficking and slavery; (iv) maintain internal accountability standards for employees or contractors who fail to meet company standards about human trafficking and slavery; and (v) provide training to employees and management so as to mitigate the risks of materials from human trafficking and slavery appearing in the supply chain. A covered company's disclosure must be placed on the homepage of the company's website.

Notably, the Supply Chains Act only requires transparency. It does not actually prohibit the sale of products resulting from slave labor or child labor into California, nor does the Act affirmatively require covered companies to take steps to minimize the use of slave labor or child labor in its supply chain. The Act does not require disclosure on the label of a covered company's products as a more direct means of informing California consumers of what they are buying. Indeed, a covered company's disclosure on its website that the company does nothing to minimize the risks of slave labor or human trafficking in its supply chain would comply with the Act.

Moreover, there is no private right of action under the Supply Chains Act. The only enforcement mechanism is an action for injunctive relief by the California Attorney General's office. One would assume that the Legislature sought to foster competition among covered companies to work to end slavery and human trafficking by taking action against those evils and disclosing that action on their websites.

Consumer class action lawyers cannot help but try. A handful of consumer class-action cases against the chocolate industry—all filed in federal court in California—have sought to impose liability on large companies that sell products sourced to slavery or child labor. Those cases

have brought the Supply Chains Act to the fore.

In *McCoy v. Nestlé USA*, for example, the plaintiff alleged, in essence, that as a consumer she desired to avoid chocolate that resulted from the use of child labor. She believed that there was a duty imposed on Nestlé to disclose on its label whether or not it had purchased cocoa that was produced by child labor. Ms. McCoy asserted a variety of legal theories by which to impose such a duty, including claims for false advertising and for unfair competition.

The district court rejected those claims and dismissed the case. The district court held that liability for failing to make a disclosure on a label had to be based either on an affirmative duty set out in a statute or on a false or misleading statement that was already on a Nestlé label regarding the use of child labor. Neither situation was present.

McCoy is now on appeal. In my opinion, the district court's analysis is sound. The nature and extent of disclosures on labels is predominantly the purview of legislatures and not of judges. The result is unlikely to be overturned by the Ninth Circuit Court of Appeals.

The district court's discussion regarding the Supply Chains Act was the more interesting aspect of the decision. Nestlé had asserted that the Supply Chains Act represented a "safe harbor" that should absolve it from any kind of liability as long as Nestlé complied with the disclosure requirements of the Act. The district court was unpersuaded. The court observed that the Act does not speak to labeling requirements at all, so there was little that would indicate that the Legislature intended the Act to be a safe harbor for covered companies.

Child labor and slave labor are unquestionable evils. That a major multi-national like Nestlé would try to use the Act to try to escape liability is unlikely to quell the desire of people who want to see slave labor and child labor ended for good. I would anticipate that the efforts to remove slave or child labor sourced products from California shelves will escalate.