

## Import Best Practices Under New Uyghur Forced Labor Law

By **Rachel Alpert and Grace Signorelli-Cassady** (January 19, 2022, 3:19 PM EST)

On Dec. 23, 2021, President Joe Biden signed the Uyghur Forced Labor Prevention Act, or UFLPA, into law.[1]

The act's stated purpose is:

To ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market.

It does so by targeting forced labor in China through multiple means, including by mandating broad prohibitions on the importation of all goods from Xinjiang.

Now it is more critical than ever for companies to know and document every step of their supply chains, to ensure that forced labor is not involved at any point.

### Presumption Prohibiting Entry of All Items From Xinjiang

Of greatest significance for companies importing goods into the U.S., Section 3 of the act requires that the commissioner of U.S. Customs and Border Protection apply a presumption that forced labor was involved in the production of "any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part" in Xinjiang, or produced by Xinjiang entities, which the Forced Labor Enforcement Task Force — established under the U.S.-Mexico-Canada Agreement Implementation Act — will identify.[2]

Upon implementation of the act, importers of record need to be prepared to overcome this presumption with clear and convincing evidence that their supply chains do not involve Xinjiang forced labor.

While Section 307 of the Tariff Act prohibits importing any product that was mined, produced or manufactured wholly or in part with forced labor, CBP has historically implemented this provision through the identification of company-specific withhold release orders or by findings of forced labor.

Recent exceptions to this targeted practice include a broad withhold release order issued in January 2021 on all cotton, tomatoes and downstream products manufactured in whole or in part in Xinjiang,



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and the presumption, under Section 321(b) of the Countering America's Adversaries Through Sanctions Act, or CAATSA, that all North Korean labor is forced labor.

The newly enacted legislation essentially serves to broaden an existing presumption applicable to Xinjiang cotton and tomato products to all products from Xinjiang.

However, unlike the CAATSA-based North Korea presumption, which prohibits any item produced by North Korean nationals or citizens, regardless of whether they are made in North Korea, the act's Xinjiang-based presumption is geographically limited to goods from Xinjiang and to certain Xinjiang entities.[3]

### **Overcoming the Presumption of Xinjiang Forced Labor**

As with withhold release orders, the act allows importers to overcome the presumption of forced labor applicable to items from Xinjiang if they can prove by clear and convincing evidence that the item in question was not the product of forced labor.

Specifically, the act allows an exception where the CBP commissioner determines that the importer has shown by "clear and convincing evidence that the good, ware, article, or merchandise was not mined, produced, or manufactured wholly or in part by forced labor," and that the importer of record has:

1. Fully complied with all guidance regarding diligence, goods and evidence issued by the task force; and
2. Responded to all inquiries for information regarding whether the item is the product of forced labor.

Whenever the CBP commissioner makes such an exception to the act's presumption that goods aren't allowed, the commissioner must, within 30 days, submit a report to certain congressional committees and the public, identifying both the excepted good and the relied-upon evidence.

Once implemented, such reports may provide helpful insights to importers seeking to overcome the act's Xinjiang forced-labor presumption.

### **Additional Steps to Prevent Entry of Items Produced With Forced Labor in China**

Several other provisions of the act also aim to ensure that items produced using forced labor in China do not enter the U.S.

Under Section 2 of the act, the task force will take a number of steps toward this end:

- Within 30 days after enactment of the UFLPA, the task force will solicit public comment on how to ensure items produced as a result of forced labor anywhere within China are not imported into the U.S. Businesses will have the opportunity to provide input into this process.
- Within 45 days after the close of the above comment period, the task force will conduct a public hearing and invite witnesses to testify regarding the use of forced labor in China and potential measures to prevent the importation of items resulting from such forced labor into the U.S.

Following the public comment period and hearing noted above, the task force will, in consultation with the secretary of the U.S. Department of Commerce and the U.S. Office of the Director of National Intelligence, develop a strategy to prevent items produced using forced labor in China from being imported into the U.S.

This strategy will provide important insights into forced labor practices and steps companies should take to ensure that their supply chains are free of such labor.

The strategy will include:

- An assessment of the risk of importing goods resulting from forced labor, including threats that could lead to the importation of such goods via third countries;
- A description and evaluation of various government labor schemes in which certain persecuted groups nonvoluntarily provide work or services, and a list identifying high-priority sectors for enforcement, including cotton, tomatoes and polysilicon — all industries with existing withhold release orders;
- A recommendation of steps that can be taken to ensure goods made in Xinjiang that enter the U.S. are accurately identified and traced;
- A description of legal and other steps, including pilot programs, that CBP can use to ensure that no goods wrongfully enter U.S. ports, along with a description of additional resources needed for this purpose;
- A guide for importers covering several topics, including due diligence, effective supply chain tracing and supply chain management measures; and
- A plan for coordinating and collaborating with appropriate nongovernmental organizations and private sector entities.

The foregoing steps will take place in the context of a multilateral diplomatic strategy for addressing forced labor in Xinjiang, as mandated in Section 4 of the act. This strategy is consistent with the approach the U.S. is already taking, in conjunction with its partners and allies, to encourage other countries to impose similar prohibitions on the importation of goods made with Xinjiang forced labor.

### **Prepare Now**

The broad Xinjiang forced-labor presumption takes effect on June 21 — 180 days following enactment of the UFLPA.

Taking steps now to ensure due diligence and to document supply chains is especially important for businesses in sectors the U.S. government has identified in its revised Xinjiang Supply Chain Business Advisory as industries using forced labor.

These include agriculture, cell phones, cleaning supplies, construction, cotton, electronics assembly, extractive such as copper and hydrocarbons, hair products, food processing, footwear, gloves, hospitality, metallurgical-grade silicon, noodles, printing products, renewable energy, stevia, sugar, textiles, and toys.[4]

Until CBP and the task force issue specific guidance implementing the act, engaging in human rights due diligence will help companies ensure that they remove Xinjiang forced labor from supply chains and appropriately document every step of their supply chains, so that they are prepared to overcome the future presumption of Xinjiang forced labor.[5]

The following lessons learned from U.S. Department of State guidance, CBP's implementation of the North Korea presumption, and the Xinjiang cotton and tomato withhold release orders, provide some best practices for companies to consider.

***Check suppliers for Xinjiang forced-labor warning signs.***

Warning signs include:

- Factories or processing locations in Xinjiang;
- At-risk locations outside Xinjiang, such as those near prison facilities, or those that mention an education or training center, coupled with poverty-alleviation efforts, ethnic minority graduates, reskilling vocational training or reeducation; and
- Companies near Xinjiang with high revenues but few employees paying into the government's social security insurance program.

***Comply with U.S. sanctions, export controls, and CBP and Labor Department guidance.***

The U.S. government has already sanctioned and designated numerous specific Xinjiang-based companies and products as associated with forced labor, including:

- Entities on the U.S. Department of the Treasury's Specially Designated Nationals and Blocked Persons List;[6]
- Industries identified by the U.S. Department of Labor under the Trafficking Victims Protection Reauthorization Act;[7]
- Companies designated on the U.S. Department of Commerce's Entity List;[8] and
- Companies and products under CBP withhold release orders.[9]

***Document the origin and method of production at each step in the supply chain.***

For goods subject to detention under a withhold-release order, CBP has suggested that companies provide supply chain maps that specify the locations of manufacturers, factories, farms and processing centers.[10]

In the context of the Xinjiang cotton and tomato withhold release orders, CBP instructs that companies provide supporting documentation that traces the supply chain from point of origin to the merchandise imported into the U.S.[11]

Multiple resources are available to businesses seeking to conduct supply chain due diligence, including

those described in an October 2021 CBP publication on due diligence in global supply chains.[12]

***Obtain clear copies of current and past employee identification.***

Documenting that employees and supply chain participants are not Xinjiang laborers can help overcome a presumption of forced labor for detained merchandise.[13]

***Institute explicit policies against forced labor and track implementation.***

CBP notes that copies of policies and evidence of their implementation are helpful to demonstrate how companies have addressed forced labor.[14]

CBP specifically suggests that a company code of conduct be shared with all suppliers in the global supply chain, and that it include specific language regarding minimum labor standards.[15] Companies should regularly update and review these policies.

***Conduct comprehensive external audits — but know their limits.***

Copies of recent unannounced third-party audits are included in CBP's list of documentation helpful in demonstrating how a company has addressed forced labor.[16]

While recognizing that due diligence best practices typically include on-site visits and audits, the State Department's Xinjiang Supply Chain Business Advisory notes that third-party audits alone are not a sufficient due diligence program "and may not be a credible source of information for indicators of labor abuses in the region." [17]

The implementation strategy required under the act and its associated guidance will be developed in the coming months.

However, given the complexity of global supply chains, businesses should establish the building blocks of their human rights and supply chain compliance policies and processes now. This will provide a strong foundation on which to implement future compliance measures to prevent items produced using prohibited forced labor in China from being imported into the U.S.

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[1] Uyghur Forced Labor Prevention Act, 117th Congress (2021-2022), Library of Congress, <https://www.congress.gov/bill/117th-congress/house-bill/6256/text>.

[2] Establishment of the Forced Labor Enforcement Task Force Under Section 741 of the United States-Mexico-Canada Agreement Implementation Act, 85 Fed. Reg.

30587, <https://www.federalregister.gov/documents/2020/05/20/2020-10993/establishment-of-the-forced-labor-enforcement-task-force-under-section-741-of-the-united-states->.

[3] Countering America's Adversaries Through Sanctions Act FAQs, U.S. Department of Homeland Security (Feb. 11, 2021), [https://www.dhs.gov/news/2021/02/11/countering-america-s-adversaries-through-sanctions-act-faqs#:~:text=CAATSA%20Section%20321\(b\)%20provides,the%20evidence%2C%20and%20generally%20means.](https://www.dhs.gov/news/2021/02/11/countering-america-s-adversaries-through-sanctions-act-faqs#:~:text=CAATSA%20Section%20321(b)%20provides,the%20evidence%2C%20and%20generally%20means.)

[4] Xinjiang Business Advisory, U.S. Department of State (July 13, 2021), <https://www.state.gov/xinjiang-supply-chain-business-advisory/>.

[5] See also, Rachel Alpert & Grace Signorelli-Cassady, 6 Ways To Excise Xinjiang Forced Labor From Supply Chains, Law360 (July 27, 2021), <https://www.law360.com/articles/1405852/6-ways-to-excise-xinjiang-forced-labor-from-supply-chains>.

[6] Specially Designated Nationals And Blocked Persons List (SDN) Human Readable Lists, U.S. Department of the Treasury (last visited Jan. 12, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>.

[7] List of Goods Produced by Child Labor or Forced Labor, U.S. Department of Labor (last visited Jan. 12, 2022), <https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods>.

[8] Entity List, U.S. Department of Commerce (last visited Jan. 12, 2022), <https://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list>.

[9] Withhold Release Orders and Findings, U.S. Customs and Border Protection (last visited Jan. 12, 2022), <https://www.cbp.gov/trade/programs-administration/forced-labor/withhold-release-orders-and-findings>.

[10] Helpful Hints for Submitting Proof of Admissibility and WRO Revocation/Modification Requests, U.S. Customs and Border Protection (Aug. 2020), [https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints\\_FactSheet\\_508comp\\_2\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints_FactSheet_508comp_2_0.pdf).

[11] Xinjiang Uyghur Autonomous Region WRO Frequently Asked Questions, U.S. Customs and Border Protection (last visited Jan. 12, 2022), <https://www.cbp.gov/trade/programs-administration/forced-labor/xinjiang-uyghur-autonomous-region-wro-frequently-asked-questions>.

[12] [https://www.cbp.gov/sites/default/files/assets/documents/2021-Oct/Slicksheet\\_Forced%20Labor\\_Due%20diligence%20global%20supply%20chains%20508%20Compliance.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2021-Oct/Slicksheet_Forced%20Labor_Due%20diligence%20global%20supply%20chains%20508%20Compliance.pdf).

[13] Our prior article illustrates the level of detail that is expected in this context. Rachel Alpert & Grace Signorelli-Cassady, 6 Ways To Excise Xinjiang Forced Labor From Supply Chains, Law360 (July 27, 2021), <https://www.law360.com/articles/1405852/6-ways-to-excise-xinjiang-forced-labor-from-supply-chains>.

[14] Helpful Hints for Submitting Proof of Admissibility and WRO Revocation/Modification Requests, U.S.

Customs and Border Protection (Aug. 2020), [https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints\\_FactSheet\\_508comp\\_2\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints_FactSheet_508comp_2_0.pdf).

[15] Responsible Business Practices on Forced Labor Risk in the Global Supply Chain, U.S. Customs and Border Protection (August 2018), [https://www.cbp.gov/sites/default/files/assets/documents/2018-Aug/CBP%20Responsible%20Business%20Practices%20on%20Forced%20Labor\\_v4%20%28FINAL%20with%20Publication%20Number%29.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2018-Aug/CBP%20Responsible%20Business%20Practices%20on%20Forced%20Labor_v4%20%28FINAL%20with%20Publication%20Number%29.pdf).

[16] Helpful Hints for Submitting Proof of Admissibility and WRO Revocation/Modification Requests, U.S. Customs and Border Protection (Aug. 2020), [https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints\\_FactSheet\\_508comp\\_2\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2020-Aug/Final%20Helpful%20Hints_FactSheet_508comp_2_0.pdf).

[17] Xinjiang Business Advisory, U.S. Department of State (July 13, 2021), <https://www.state.gov/xinjiang-supply-chain-business-advisory/>.