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U.S. Legislation Requires Enhancements to Modern Slavery Compliance Procedures to Address North Korean Labor Risks

On August 2, 2017, the Countering America's Adversaries Through Sanctions Act was signed into law in the United States. The CAATSA restricts entry into the United States of goods made with North Korean labor, wherever located, and imposes sanctions on foreign persons that employ North Korean labor. Beginning in November, U.S. Customs and Border Protection began efforts to enforce the CAATSA, and further enforcement activity is expected. In addition, many large companies have begun to enhance their modern slavery compliance procedures to address the CAATSA, which in turn will affect the compliance procedures their supply chains need to implement. In this Alert, we discuss the CAATSA and takeaways for both U.S. and foreign companies.

Attorneys

[Colleen A. Conry](#)

[Andrew J. Dale](#)

[Michael R. Littenberg](#)

[Amanda N. Raad](#)

[Julia L. Chen](#)

[Brendan C. Hanifin](#)

[Joanna Torode](#)

New Presumption that All North Korean Labor – Wherever Located – Is Forced Labor

The CAATSA amended the North Korea Sanctions and Policy Enhancement Act of 2016 by adding a new Section 302A, which creates a presumption that goods made with North Korean labor involve the use of forced labor. More specifically, the CAATSA provides that any significant goods, wares, articles and merchandise mined, produced or manufactured wholly or in part by the labor of North Korean nationals or citizens are deemed to be prohibited under Section 307 of the Tariff Act of 1930 and will not be entitled to entry at any of the ports of the United States. Section 302A applies to North Korean nationals or citizens anywhere in the world.

If CBP finds evidence of North Korean labor, it will deny entry of the goods into the United States, which may include seizure of the merchandise. CBP also may refer the issue to Immigration and Customs Enforcement Homeland Security Investigations with a request to initiate a criminal investigation for violation of U.S. law.

Pre-Existing Prohibition on Forced Labor Under the Tariff Act

Section 307 of the Tariff Act prohibits the importation into the United States of goods, wares, articles and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor, forced labor or indentured labor under penal sanctions. Section 307 is not specific to North Korean labor.

When information reasonably but not conclusively indicates that merchandise within the purview of Section 307 is being imported, the Commissioner of CBP may issue a Withhold Release Order. To obtain entry of a shipment subject to a Withhold Release Order, the importer must, within three months, submit a certificate of origin and a detailed statement showing the merchandise was not produced with forced labor.

Until the first quarter of 2016, an exception to Section 307 – the “consumptive demand” clause – authorized U.S. customs authorities to allow goods made with forced labor to be imported into the United States if there was not sufficient domestic production of the goods to meet domestic demand. As a result of this exception, until early 2016, there were only 39 instances where goods were denied entry into the United States pursuant to Section 307 of the Tariff Act.

Effective March 11, 2016, the consumptive demand exception was repealed as part of the Trade Facilitation and Trade Enforcement Act of 2015. Since then, several shipments of goods have been subject to Withhold Release Orders under Section 307, including shipments of (1) calcium chloride and caustic soda, (2) potassium, potassium hydroxide and potassium nitrate, (3) stevia and its derivatives and (4) peeled garlic.

Rebutting the North Korean Forced Labor Presumption

The presumption under Section 302A can be rebutted. In order to rebut the presumption, the Commissioner of CBP must find, by clear and convincing evidence, that the goods, wares, articles or merchandise were not produced with convict labor, forced labor or indentured labor under penal sanctions.

Enforcement of the CAATSA to Date

On November 7, CBP issued a public notice reminding importers of their obligation to exercise reasonable care and take all necessary and appropriate steps to ensure that goods entering the United States comply with all laws and regulations, including Section 307 of the Tariff Act and the CAATSA.

In addition, CBP began outreach to individual importers. In order to assist CBP in its forced labor enforcement efforts, it sent requests for information to a significant number of importers, requesting the following information:

- Whether the importer has a due diligence program that includes examining whether supply chains are free from forced child, convict or forced labor?
- What supply chain audits have been done to ensure that the importer has an ethical (socially responsible) supply chain free of forced child labor and forced labor in order to ensure compliance with Section 307 of the Tariff Act?
- How the importer identifies whether or not its supply chains include goods made wholly or in part by North Korean laborers, wherever located?
- Whether the importer has conducted internal audits, and/or hired a third party to conduct an audit, to ensure there is no forced labor or forced child labor in its supply chain, and, if so, the dates of the audits, who conducted the audits, and what the findings were?
- Copies of all forced labor and forced child labor supply chain audits, including findings and recommendations.

Responses to these information requests were due in late November.

In addition, some importers have been asked for even more detailed information, including, in addition to the above:

- Information on manufacturers and suppliers in the supply chain, including contact information.
- Corrective action taken to address forced labor.
- Supply chain certifications received from manufacturers and suppliers.

Other Related Provisions of the CAATSA

Designation of Foreign Persons that Knowingly Employ North Korean Laborers

The North Korea Sanctions and Policy Enhancement Act of 2016 requires the Secretary of State, in coordination with other appropriate Federal departments and agencies, to submit to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives a report that details a U.S. strategy to promote initiatives to enhance international awareness of and to address the human rights situation in North Korea.

Among other things, the report is required to include a list of countries where North Korean laborers work, including countries where the governments have formal arrangements with the North Korean government or any person acting for or on its behalf to employ North Korean workers. The report must be submitted every 180 days. The most recent report was submitted on October 26.

The CAATSA added to the foregoing requirement, requiring that the report also include a list of foreign persons that knowingly employ North Korean laborers. In addition, pursuant to the CAATSA, the report is required to include a determination whether each identified person meets the criteria for sanctions under the Trafficking Victims Protection Act of 2000 or the North Korea Sanctions and Policy Enhancement Act of 2016.

Sanctions Against Foreign Persons that Employ North Korean Labor

Under the CAATSA, except in limited circumstances where there is reliable assurance that specified indicia of forced labor are not present, the President shall designate any foreign person identified in the report described above for the imposition of sanctions. The sanctions would block and prohibit transactions in property and interests in property of the person to the extent in the United States or within the possession or control of a U.S. person.

Compliance Takeaways

Assess the Risk of North Korean Labor in the Supply Chain. Areas of China and Russia in close proximity to North Korea are believed to present the greatest third-country risk of North Korean labor. However, other countries cited in the media and/or by U.S. government officials where North Korean labor is or recently has been present include the Gulf states, Malaysia, Malta, Mexico, Mongolia, Poland and Uruguay. In total, U.S. government officials have indicated that more than 40 countries have been identified as having, or as having had, North Korean forced labor. Many industries have been implicated.

Recent United Nations and European Union sanctions against North Korea, as well as action by the Chinese government, are believed to have at least in part reduced the presence of overseas North Korean labor. However, these do not negate the need for appropriate compliance procedures, since the risk has not been eliminated.

Enhance Compliance Procedures. Companies should consider whether to enhance supplier communications, supplier codes of conduct and manuals, supplier questionnaires and certifications, contractual terms and conditions, factory and other supplier audits, supplier intake procedures, training to specifically address this issue and/or migrant labor generally and risk mitigation procedures. Compliance procedures should be tailored to the individual company and the perceived risk.

To the extent that nationality information relating to workers is requested, applicable data privacy regulations also need to be taken into account. Anti-discrimination legislation and policies also need to be considered.

Expect More CBP Inquiries. Given recent events involving North Korea and related efforts to exert pressure on the North Korean government, companies should assume vigorous enforcement of the CAATSA. We expect that many companies that have already been contacted by CBP will receive follow-on information requests, as the comprehensiveness of the information provided to CBP varied greatly. In addition, as CBP continues to progress up the learning curve on this issue, we expect that additional companies will receive inquiries.

Inquiries also may arise out of allegations of forced labor submitted through CBP's eAllegation portal. Parties who provide original information that leads to the recovery of a penalty, fine or forfeiture of merchandise are eligible to seek compensation, which may be up to \$250,000.

Be Mindful of Other North Korean Sanctions. This Alert only discusses restrictions relating to North Korean labor in supply chains. There are other sanctions regarding North Korean persons, North Korean imports and exports and

non-U.S. persons, including financial institutions, doing business with North Korea, including recently adopted sanctions by the United States, the European Union and the United Nations. Members of the Ropes & Gray team advise on these as well.

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