

Professional Perspective

U.S. Customs Targets Use of Forced Labor

Jennifer Diaz and Denise Calle, Diaz Trade Law

**Bloomberg
Law**

[Read Professional Perspectives](#) | [Become a Contributor](#)

Reproduced with permission. Published January 2021. Copyright © 2021 The Bureau of National Affairs, Inc.
800.372.1033. For further use, please visit: bna.com/copyright-permission-request

U.S. Customs Targets Use of Forced Labor

Contributed by *Jennifer Diaz* and *Denise Calle*, *Diaz Trade Law*

Importers not adequately auditing their supply chains for use of forced labor are at risk of administrative and criminal enforcement. Imported merchandise produced with forced labor is subject to the Department of Homeland Security (DHS) enforcement. Such enforcement includes U.S. Customs and Border Protection's (CBP) right to detain, exclude, and/or seize imported goods and Homeland Security Investigation's potential criminal investigation. This article provides an overview of CBP's current enforcement environment in targeting and combatting the use of forced labor, practitioner's tips to avoid the use of forced labor, and tips on how to best defend against CBP enforcement actions.

Background

Currently, forced labor is the third most lucrative illicit trade, behind only drugs and weapons, and has an annual trade value of roughly **\$150 billion**. In 2020, over 40 million people around the world were victims of some type of forced labor, including modern slavery and human trafficking.

Previously, under the “consumptive demand” clause in [Section 307 of the Tariff Act of 1930](#), the U.S. effectively allowed for the importation of goods that had been partially produced by forced labor. However, since the enactment of the [Trade Facilitation and Trade Enforcement Act of 2015](#), which eliminated the “consumptive demand” clause, DHS and its enforcement agencies have been greatly increasing measures to combat forced labor.

Section 307 of the Tariff Act of 1930 (19 U.S.C. 1307) prohibits the importation of all goods and merchandise mined, produced, or manufactured wholly or in part in any foreign country by forced labor, convict labor, and/or indentured labor under penal sanctions, including forced child labor.

CBP combats import risks, detects high-risk activity, deters non-compliance, disrupts fraudulent behavior, and thoroughly investigates allegations of forced labor. CBP's [Forced Labor Division](#), established in 2017 within the Office of Trade, leads enforcement of the prohibition against importing goods made with forced labor. The division actively works to curb the illicit practice by examining various supply and investigating allegations of forced labor around the globe.

[According to CBP](#), the agency does not target whole product lines or industries, rather it focuses on information regarding specific actors and their merchandise based on allegations received from industry and other sources, including CBP's [E-allegation Portal](#). The agency acts on information concerning specific manufacturers/exporters and specific merchandise. Allegations may be reported anonymously.

The more detailed and timelier the information that is provided, the more likely the enforcement action can be successful. As an incentive for the trade community to assist, CBP will compensate parties that provide original information that leads to the recovery of any penalty, fine, or forfeiture of merchandise. The parties are eligible to seek compensation of up to \$250,000, under 19 U.S.C. § 1619.

Withhold Release Order(s)

Pursuant to 19 C.F.R. § 12.42(e), if CBP is presented with reasonable, not necessarily conclusive, evidence of forced labor, CBP's commissioner may issue a Withhold Release Order (WRO). A WRO directs CBP officers at all ports of entry to withhold release of goods originating from a listed company or country. If CBP has conclusive evidence—i.e., probable cause—to make a determination that the merchandise in question was, in fact, produced whole in part by forced labor, the commissioner will publish a formal finding in the in the Customs Bulletin and Federal Register, per 19 C.F.R. § 12.42(f). Shipments subject to WROs may be subject to exclusion from entry.

These targeted sanctions have been especially effective at identifying certain nations, industries, and companies that employ forced labor. CBP provides the public with a [list of all WROs](#) and the findings of the investigations. Importers should take caution when sourcing similar products from the relevant entities/countries. The majority of WROs (14 out of the 25) implemented since 2016 have been directed at Chinese entities, including nine new WROs since 2019.

WROs Directed at Chinese Entities

Although China is the U.S.'s number-one trading partner, the increasing number of WROs being issued against Chinese manufacturers evidences the potential high use of forced labor. The impositions of WROs against China saw a recent uptick as a result of a July 1, 2020 seizure of hair products arriving from China. Following this seizure, CPB issued a Xinjiang Supply Chain Business [advisory](#), cautioning U.S. stakeholders—businesses, individuals, academic institutions, research service providers, and investors—that continue to operate business with entities in Xinjiang.

The Xinjiang Supply Chain Business advisory is only one recent example of the U.S.'s commitment to curbing forced labor. For instance, the [Uyghur Forced Labor Prevention Act](#) was introduced on March 12, 2020 amid growing concerns that certain items from China were being produced with forced labor. The bill explicitly identifies producers of textiles, electronics, food products, shoes, tea, and handicrafts, as documented in the Congressional-Executive Commission on China's [2019 Annual Report](#). Listed below are some key findings included in the Uyghur Forced Labor Prevention Act:

- There is a very high risk that many factories and other suppliers in the Xinjiang Uyghur Autonomous Region are exploiting forced labor, according to [reports](#) from researchers, media, and civil society groups. Audits to vet products and supply chains in the Xinjiang Uyghur Autonomous Region are not possible because of the extent to which forced labor has flooded the regional economy.
- The [bill](#) lists companies that are or have been suspected of directly employing forced labor or sourcing from suppliers that are suspected of using forced labor.

Practitioner Tips: Mitigating Forced Labor Risk

According to CBP, importers must exercise reasonable care and due diligence to ensure that forced labor is not included in any aspect of their supply chain. Under section 484 of the Tariff Act, 19 U.S.C. § 1484, the importer of record is responsible for using reasonable care to enter, classify, and determine the value of imported merchandise and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met.

CBP's [amended reasonable care checklist](#) extends an importer's responsibility to ensure it has taken reliable measures to ensure imported goods are not produced wholly or in part with convict labor, forced labor, and/or indentured labor, including forced or indentured child labor.

The following are compliance tools for practitioners to use when assisting importers in vetting their supplier chains for forced labor:

Understand the Timely and Costly Detention Process

The following details CBP's [detention process](#) for merchandise related to forced labor and imported in violation of 19 U.S.C. §1307:

1. **Receipt of Allegation or Self-Initiation.** The provisions of 19 C.F.R § 12.42 detail who may submit information.
2. **CBP Evaluation.** CBP must determine or establish reasonable suspicion to issue a Withhold Release Order (WRO) or conclusively demonstrate that merchandise is prohibited to publish a finding.
3. **Commissioner Review of WRO Issuance.** If commissioner approves a WRO, CBP detains subject merchandise.
4. **Issuance of WRO.** Port directors instructed to withhold release of subject merchandise.
5. **Detention of Merchandise.** CBP begins to detain all shipments within WRO parameters.
6. **Export, Contest, or Protest.** Importer may export, contest, or protest; CBP may release or exclude.
7. **Finding/Customs Bulletin and Federal Register.** If a finding is published, subject merchandise that has not been released from CBP custody shall be treated as an importation prohibited by 19 U.S.C. § 1307.

8. **Seizure: Subsequent FPF Process.** CBP will seize merchandise. Violator may petition for the release of merchandise.

9. **Judicial Forfeiture.** CBP will commence summary forfeiture proceedings.

A Reasonable Care Checklist

Importers are required to use reasonable care when in entering merchandise into the U.S. CBP released a [Reasonable Care Checklist to Include Forced Labor](#). This resource tool assists importers in determining whether reliable measures have been taken to ensure imported goods are not produced wholly or in part with convict labor, forced labor, and/or indentured labor (including forced or indentured child labor. Tip: Practitioners should [ask importers these 12 questions](#).

Conduct an Internal Risk Assessment

Importers must include forced labor into their internal risk assessment. Developing a written standard of procedure (SOP) for identifying the potential use of forced labor in an importers supply chain is crucial is evidencing an importer's use of reasonable care. Provided below are tips on tools to use when conducting a forced labor risk assessment and topics that should be included in an importer's written SOP:

- Consider using the Department of Labor's (DOL) application "[Sweat & Toil](#)" to educate on child labor.
- Request a certified statement from the importer's supply chain business partners attesting to their non-use of child labor.
- CBP recommends evaluating the [International Labour Organization's](#) 11 indicators of forced labor:

1. Abuse of Vulnerability	7. Intimidation & Threats
2. Restriction of Movement	8. Retention of Identity Documents
3. Withholding Wages	9. Debt Bondage
4. Deception	10. Abusive Working & Living Conditions
5. Isolation	11. Excessive Overtime
6. Physical & Sexual Violence	

- CBP recommends reviewing the DOL's [Comply Chain](#) principles to create a social compliance system as a best business practice.

Audit an Importer's Supply Chain and Import History

- Contract a third-party auditor specialized in forced labor and CBP requirements.
- Conduct an audit of import records on an annual basis
 - Tip: Use CBP's [Automated Commercial Environment \(ACE\)](#) for reports.
- Evaluate supply chain business partners annually or as needed to ensure they continue to not use force labor.

Practitioner Tips for Importers Subject to WROs

If a [shipment has been detained under a WRO](#), meaning CBP has reasonable evidence that indicates that imported goods are made with forced labor, importers have the following options:

- Importers may export the detained shipments or contend that the goods were not made with forced labor.

- To obtain release of shipments subject to WRO, importers must submit, within 3 months following the importation, a certificate of origin and a detailed statement demonstrating that the subject merchandise was not produced with forced labor—e.g., a supply chain audit report.
 - If the proof submitted by the importer is deemed satisfactory, CBP will release the goods.
- Tip: Identifying the local port and proactively communicating with the detaining officer or supervisor at the outset of the detention period may speed up the review and admissibility determination process. Practitioners can request the rationale for detention and provide proof of compliance.
 - If the proof submitted does not establish the admissibility of the merchandise, or if none is provided, CBP will exclude the shipment.

If the manufacturer of the detained imported good is listed on a WRO that is publicly listed on Customs Bulletin and Federal Register—meaning CBP has issued a finding based on conclusive evidence, i.e., probable cause that the imported goods are made with forced labor—importers have the following option:

- Submit, within 3 months following the importation, a certificate of origin and a detailed statement demonstrating that the subject merchandise was not produced with forced labor, e.g., a supply chain audit report.
 - If the proof submitted by the importer is deemed satisfactory, CBP may release the goods.
- Tip: Identifying the local port and proactively communicating with the detaining officer or supervisor at the outset of the detention period may speed up the review and admissibility determination process. Practitioners can request the rationale for detention and provide proof of compliance.
 - If the proof submitted does not establish the admissibility of the merchandise, or if none is provided, the merchandise shall be seized for violation of 19 U.S.C. §1307, for goods subject to a finding only.

Opportunity to Modify or Revoke

Whether a WRO or finding has been issued, CBP offers an [opportunity to modify or revoke](#). WROs have no expiration date and stay in effect until they are revoked. WROs may be revoked if CPB is presented with sufficient evidence that substantially proves that the “subject merchandise was not made with forced labor, is no longer being produced with forced labor, or is no longer being, or likely to be, imported into the U.S.”