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**FORCED LABOR**

Two experts on supply chain compliance discuss the recent order from Houston’s mayor to rid the city’s supply chains for goods and services of human trafficking and other forms of forced and coerced labor. The authors provide an overview of the order, a recent executive order from former President Obama, and list several anti-trafficking program best practices.

**Houston at the Compliance Vanguard: ‘Zero Tolerance’ For Human Trafficking in City-Purchased Goods and Services**



BY T. MARKUS FUNK AND THE HONORABLE VIRGINIA M. KENDALL

Houston, the “Magnolia City,” has squarely perched itself on the compliance world’s cutting edge. It, as a city, has taken a significant, innovative step to rid its many supply chains for goods and services of human trafficking and other forms of forced and coerced labor. And the impact of this proactive decision—particularly if emulated by others—is certain to be felt well beyond the city limits.

**Fighting Trafficking Through an Executive Order—the Context**

In the midst of recovering from one of the worst natural disasters in recent history, on Oct. 19, 2017, Houston Mayor Sylvester Turner (D), with immediate effect, signed his landmark “Zero Tolerance for Human Trafficking in City Service Contracts and Purchasing” Ex-

ecutive Order (EO 1-56). Houston’s “zero tolerance” approach in many ways mirrors President Barack Obama’s landmark 2012 Executive Order to Strengthen Protections Against Trafficking in Persons in Federal Contracts (Executive Order 13627; the final rule amends Federal Acquisition Regulation Subpart 22.17 and Contract 52.222-50).

Mayor Turner’s Executive Order puts America’s fourth-largest city in the compliance vanguard. It in many ways embodies the next evolutionary step in the global fight against trafficking: First, there were criminal laws (most notably the Trafficking Victims Protection Act (TVPA) of 2000, as amended). Next came along supply chain transparency/disclosure enactments (like the California Transparency in Supply Chains Act and the UK Modern Slavery Act) and the vastly expanded anti-trafficking provisions for federal government contractors. Finally, observers introduced supplemental model laws and guidelines, including Uniform Act for the Prevention of and Remedies for Human Trafficking, the ABA Model Business and Supplier Policies on Labor Trafficking and Child Labor, and the proposed Corporate Transparency Act.

The timing of Mayor Turner’s Order has the dual effect of showing that the mayor of a large municipality understands that, beyond the inherent ethical problems with purchasing tainted products from overseas, his residents right at home are at risk of exploitation due to the increase in need for goods and services necessary to rebuild after the flooding. While the Order was contemplated prior to Hurricane Harvey’s devastation, it certainly sends a shot across the bow to those who might consider exploiting Houston residents in their time of

## Human Trafficking's Impacts

- Over 20 million victims annually around globe (USDOJ estimate)
- \$38 billion criminal industry
- Second to narcotics (surpassing arms smuggling)
- Heavy transnational organized crime involvement
- Taints products we use every day

need. Having a city seek to forge a path similar to the one blazed by President Obama's Executive Order of 2012 (concerning federal contractors' use of trafficking/forced/child labor) represents a keen awareness of the significant risk, as well as an immediate plan of action to protect its citizenry from that risk.

The Mayor's plan is fairly straight-forward: Houston is betting on its considerable purchasing power—not to mention moral leadership—to ensure that city contractors put robust compliance programs in place and take those additional steps necessary to drive out the tragically widespread use of modern day slavery in supply chains, both in the U.S. and abroad. Those who dare to risk noncompliance with the order will be barred from obtaining valuable city contracts; worse, they may be subjected to potential state or federal criminal prosecution and potential import bans.

This effort, in short, represents a further beachhead in the expanding battle to remove the ugly taint of trafficking from the supply chains for products and services that we all consume on a daily basis. In the past, these laudable efforts were left to the state and national levels of government. But to have a city seek to protect its citizens (as well as the most vulnerable citizens of the world) in the wake of recovering from natural disaster represents a first in that it, on a local government level, recognizes that these violations often also occur at a local level.

## Houston's Executive Order—A Deeper Dive

Houston's five-page Executive Order sets the stage for the City's procurement apparatus to put together specific supply chain requirements focused on trafficking.

The Executive Order begins by noting that the City spends hundreds of millions of public funds dollars on goods and services. (And, naturally, these numbers will continue to spike with the need to rebuild thousands of structures destroyed by Hurricane Harvey.)

Next, the Order observes that the City's decisions can benefit and protect workers around the world, and states that "public safety and morals" are served by stopping funding of human rights violations and (less defined) "social and environmental" harm. The overall purpose of the Executive Order, tracking President Obama's declaration almost verbatim, is to ensure that "taxpayer dollars do not contribute to trafficking in persons." In its role as a market participant, the City seeks to aspirationally "assure the integrity of the procurement process is not undermined by substandard labor

practices or purchase of services provided or goods made under exploitative or unsustainable conditions."

## The Executive Order's Slate of Purposes

Like most Executive Orders, this one is also not short on laudable objectives:

- *Raise awareness* about human trafficking and what corporate citizens can do to assist in the fight against human trafficking;
- *Encourage contractors* to follow employee recruitment and labor practices that do not violate human trafficking laws;
- *Urge contractors* to engage subcontractors with employee recruitment and labor practices that do not violate human trafficking laws;
- *Educate the public* that human trafficking is a violation of state and federal law;
- *Affirm that the City* will not conduct business with entities that have knowledge of, or further, human trafficking; and
- *Declare the City* will use its best efforts to conduct business with enterprises that take steps to safeguard against human trafficking.

## The Executive Order's Scope

The Executive Order explicitly applies to *all* service contracts and purchases of goods or services, whether by contract, purchase order, purchasing cards (P-

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Judge Virginia M. Kendall was appointed by President Barack Obama in 2006 to the U.S. District Court for the Northern District of Illinois. She currently serves on the Seventh Circuit's Civil Jury Instruction Committee and has sat by designation with the Seventh, Ninth, and Federal Circuit Courts of Appeal. Prior to her appointment, she worked for more than 10 years as an Assistant U.S. Attorney in Chicago. Kendall lectures extensively both domestically and internationally in the areas of public corruption, corporate supply chain compliance, ethics, and human rights, especially in relation to human trafficking and crimes against women and children.

Funk and Kendall, who worked together as Chicago federal prosecutors, co-authored *Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses* (First edition 2010; second, updated edition 2017), and served as co-chairs of the ABA Section of Litigation Special Committee on Human Trafficking (2008 – 2010). Funk also co-authored *The ABA Compliance Officer Deskbook* (American Bar Association, 2017).

cards), or spot purchases. (That said, and as outlined below, the exceptions the Executive Order provides in the form of waivers threaten to potentially swallow the stated—and broad—scope.)

## The Executive Order's Definitions

Turning to the definitions the Executive Order employs, it reaches back to the federal Trafficking Victims Protection Act of 2000, codified at 22 U.S.C. §§ 7101-7114 (TVPA), as amended. The TVPA provides detailed definitions for standard terms, such as “abuse of legal process,” “coercion,” “commercial sex act,” “debt bondage,” “involuntary servitude,” “severe forms of trafficking in persons,” and “sex trafficking.” (Contrary to the Executive Order’s claim, however, “contractor” and “fair trade” are, in fact, not defined by the TVPA—though the Executive Order provides its own definitions). Most notably among these definitions, the TVPA’s definition for “Severe Form of Trafficking in Persons” includes using “fraud” to obtain the labor of another for the purpose of, among other things, involuntary servitude.

Not coincidentally, including the fraud-in-labor-procurement language is now even more essential. It, after all, is well-documented that contractors flood the market subsequent to natural disasters when the usual market players are supplemented by numerous “entrepreneurs” who view the demise of the victims as merely an opportunity to make a quick buck without scrutiny. When those in governance want to show that their communities are recovering, even though market participants cannot perform the necessary services due to the sheer volume of need, these opportunists can easily prey upon the vulnerable. Here, the Order not only recognizes this practice, but it tracks best practices by including *all types* of exploitation.

## The Executive Order's Means Of Achieving Its Purpose

The Executive Order’s stated objective, touched on above, is that City (or, more accurately, *taxpayer*) funds will not be used to “promote human trafficking in any manner.” But in so doing the City repeatedly uses the broader, and more undefined, term “fair trade.” In order to achieve this worthy objective, the Executive Order directs the Mayor’s Office to “make best efforts” to:

- *Build awareness* of, and adherence to, this policy through information dissemination and incorporation into relevant City employee trainings;

- *Encourage development of internal City procedures* to facilitate the purchase of “certified fair trade products” (this, notably, goes far beyond just avoiding products made with trafficked labor);

- *Develop City employee fair trade procurement resources*, including lists of approved products, contractors, bid specification language, and best practices;

- *Work with commodity providers, service providers and other contractors to include certified fair trade products* on all relevant market basket lists, discount lists and contract when feasible, allowed by law and fiscally prudent;

- *Work with contractors to develop automatic or streamlined data collection*, for evaluating the effectiveness of this Executive Order;

- *Facilitate communication* with City departments about fair trade procurement best practices;

- *Encourage compliance with the Executive Order* by City contractors.

## Next Steps . . . Moving From Aspiration to Reality

The Executive Order provides action-items to various City departments slated for completion by Nov. 18, 2017:

- **Chief Procurement Officer & Departments with Delegated Authority** must make “best efforts” to:

- o *Incorporate the requirements of the Executive Order into all formal competitive procurements* issued after the effective date of the Executive Order and resulting contracts for which contract negotiations begin after the effective date of the Executive Order using the language approved by the Legal Department;

- o *Add to the currently published Terms and Conditions for Purchase Orders* (<http://purchasing.houstontx.gov>) the language approved by the Legal Department that requires the contractor to comply with the Executive Order.

- **City Departments** must make “best efforts” to:

- o Ensure that City Department staff that administers or manages contracts are aware of the Executive Order.

- o Incorporate the requirements of the Executive Order contracts for which contract negotiations begin after the effective date of the Executive Order by using the language approved by the Legal Department;

- o Encourage contractors that perform work for a department to comply with the Executive Order.

- o Select contractors that can comply with the Executive Order, unless the below-described waiver is available.

- o Ensure that all contracts and purchase orders include or reference language approved by the Legal Department that requires the contractor to comply with the Executive Order and all applicable program requirements in all contracts for the purchase.

*Note:* All City Departments must notify the City’s Chief Procurement Officer and Special Advisor to the Mayor on Human Trafficking of any information received by a City department regarding any “potential violations” of this Executive Order.

- **Contractors**, for their part, must also *immediately* make “best efforts” to comply with the Executive Order with respect to all contracts that were entered after the effective date of the Executive Order.

*Note:* The onus is on contractors to self-report any *potential* issues (though the Executive Order conspicuously omits the requirement of “immediate” notification, giving contractors some leeway to investigate—or to do nothing). Contractors are *required* to notify the City’s Chief Procurement Officer, City Attorney, and the Director of “any information” concerning “possible human trafficking or violations of this Executive Order” discovered in the performance of providing services or goods to the City.

While the precise contract language (“Terms and Conditions for Purchase Orders”) is still being hammered out by the City’s Legal Department and the City’s Chief Procurement Officer (and departments with delegated authority), it is almost a foregone conclusion

that the remedies for failure to comply are likely to include the following:

- Loss of contract/intelligibility for future contracts/debarment (the Executive Order provides that contractors found to have “engaged in or promoted” human trafficking—“directly or indirectly”—“may be” subject to suspension or termination of the relationship with the City *if* no “remedial action is taken in a manner acceptable to the City”—more on this below);

- False statement/falsification liability; and

- Civil and/or criminal false claims liability (obtaining City funds through fraud/false representations).

This is a non-exhaustive list of potential government remedies. Contractors must also consider the risk of class actions, advocacy group pressures, and consumer boycotts if they are revealed to have used trafficked labor in the manufacture of their products or when providing their services. In fact, these latter risks often are far more devastating (and immediate) than any enforcement actions by the authorities.

## **A View From the Trenches: Areas Worthy of a Second Look**

### **‘Fair Trade’ Objectives An Unnecessary Distraction**

There is one area in which the Executive Order seems to deviate rather markedly from the more focused objective of fighting trafficking in its supply chains. On a number of occasions the Executive Order veers into discussions of enforcing broader “fair trade” goals.

According to the Executive Order’s definition section, for example, “[f]air trade’s principles” include, among other things, “sustainable soil and water use practices and funds for community development, as well as prohibitions on . . . many harmful pesticides and fertilizers.” It appears to your authors that the drafters viewed “fair trade” as an umbrella term encompassing human trafficking and other forms of forced labor. Although that may be true, in general terms at least, by introducing far-afield efforts to encourage sustainable soil and water use practices, fund community development, and prohibit harmful pesticides, the Executive Order risks losing focus and conflating various “social/environmental” efforts with the immediate need to curb exploitation—particularly in a post-disaster environment.

Eliminating trafficked labor from supply chains is a task that is already truly momentous. Adding these largely unrelated efforts to ensure diverse “social goods” to the mix may, from our perspective, be mistake. Just monitoring compliance with the anti-trafficking provisions is itself a herculean task (if done correctly); determining whether a City contractor is following (entirely undefined) sustainable soil practices thousands of miles away is an unnecessary distraction. Should the City in the future consider redrafting efforts, it may want to take another look at whether keeping these “add-on” efforts aimed at achieving social impact is sensible.

### **‘Waiver’ Provisions Exceptionally Broad**

According to the Executive Order, the Special Advisor to the Mayor on Human Trafficking will consider re-

quests for waivers from Executive Order’s requirements. These waiver requests can come from “any City department that submits a written request for waiver and offers documented support showing special circumstances that would justify a waiver.” So far so good. But the factors that “may be considered special circumstances” are so broad as to almost be all-encompassing (or, rather, are ones that almost any reasonably crafty contractor can try to claim; the waivers threaten to swallow the Order) include:

- *Adverse Impact*—Compliance with this Executive Order would cause an “unreasonably adverse impact” on the City’s ability to obtain goods or services, “unduly interfere” with a department’s contracting needs, or is likely to cause an “unreasonably adverse financial impact” on the City;

- *Bulk Purchasing*—Purchases made using a cooperative purchasing program or pursuant to an interlocal agreement;

- *Essential*—No other qualified responsive bidders comply with the requirements of this Executive Order (!) *and* the contract is for a service or project that is essential to the City or public;

- *Sole Source*—Purchase of goods or services is available only from a single source *and* the contract is for a service or project that is essential to the City or public;

- *Emergency*—The contract is a response to an emergency that endangers public health or safety;

- *General*—Other matters where the Special Advisor to the Mayor on Human Trafficking “deems it to be in the City’s best interest;” and

- *Additional Catch-All*—“Nothing in this policy shall be construed as requiring a department or contractor to procure fair trade products that do not perform adequately for their intended use, exclude adequate competition, or are not available at a reasonable price within a reasonable time.”

### **Debarment Only After Remediation Opportunity-and No Permanent Debarment Option**

The Executive Order provides City contractors with what appears to be a major loophole. Specifically, the Executive Order provides that “Contractors that have been found to have engaged or promoted-directly or indirectly-human trafficking *may be* subject to suspension or termination of the relationship with the City *if* no remedial action is taken in a manner acceptable to the City.” The clear language of the Executive Order, then, provides all contractors an opportunity to try to remediate the identified problem. Only *after* such remediation efforts are found to be lacking can the contractor be terminated.

This might have been a simple drafting oversight. But the City may want to more explicitly give itself the option of terminating a contractor if and when it finds that the conduct is of a nature or magnitude precluding any remediation efforts (such as when, for example, the contractor is formally charged with or convicted of engaging in, or supporting, human trafficking). The City should also consider whether *permanent* debarment for particularly egregious conduct should be one of its remedies (as written, the Executive Order apparently does not contemplate this possibility).

## No Requirement of Cooperation With the City in Any Investigations

Unlike the federal anti-trafficking in government contracts provisions, moreover, the Houston Executive Order contains no requirement that a contractor cooperate in any City investigation of potential violations of the Executive Order (whether the information was developed by the contractor or by a third party). While this requirement of cooperation under the Federal Acquisition Regulations struck many as fairly heavy-handed, a good argument can be made that companies seeking City/government contracts and receiving tax payer resources should be obligated to cooperate with any good faith City investigation (after all, today most company employees and executives in their employment contracts agree to cooperate with internal investigations into potential misconduct; what makes City contractors so different?). When corruption remains pervasive in perpetuating trafficking, these cooperative requirements are essential to breaking that well-documented link.

## Uncertainty About How Far Down the Supply Chain The Executive Order Reaches

As the City drafts its anti-trafficking contract provisions, it should avoid the mistake made in the Federal Acquisition Regulations by not defining “supply chain” or “contractor.” Otherwise there will be a lack of clarity as to how far down the supply chain a contractor will be expected to ensure compliance (and, yes, it is easy to say “all the way down”—but with most Fortune 100 manufacturers, for example, having over 5,000 direct suppliers, ensuring compliance many layers down becomes a virtually impossible exercise). Even some qualifying language such as “ensure compliance by those contractors and sub-contractors over which [the City Contractor] can exercise some reasonable amount of control. . . .”

## Anti-Trafficking Program Best Practices: An Overview

There are some tried and tested basic guidelines for contractors just getting started (or fine-tuning) existing policies:

A. *Introduce and Enforce Meaningful Policies* (or add policy language) focused on identifying and eliminating risks emanating from the various forms of coerced/forced labor within a business’s supply chains. Among other places, such internally consistent policies or policy language should be included in:

- Codes of Conduct;
- Annual Compliance Certifications;
- Standard Contract Language;
- Due Diligence Questionnaires; and
- Supplier Statements of Conformity.

B. *Adopt Standard Contract Language* for key areas such as:

- Indemnification;
- Audit rights;
- Requirement of full cooperation in the case of any internal investigation or review;

- Requirement of immediate notification in the case of actual or potential non-performance/problems;

- Right to, as needed, contact the relevant authorities in the case of violation; and

- Consent to follow company-developed action plan in case of any instances of noncompliance.

C. *Design a Risk-Based Labor Verification/Audit Program* to evaluate and address risks of coerced and child labor in the company’s supply chains, including:

- Designing features tailored to reduce, control, and eliminate those risks;

- Identifying the greatest risks existing within the supply chain;

- Deciding whether to employ independent third parties to conduct these verifications/audits;

- Considering including in the verification process consultations with independent unions, workers’ associations, or workers within the workplace; and

- Ensuring that supplier audits evaluate supplier compliance with company standards for eliminating coerced and child labor issues.

D. *Require Appropriate Certifications.* Suppliers in the supply chain should certify that, in addition to the above, materials incorporated into products comply with (1) the company’s code of conduct, and (2) the laws against coerced and child labor in the country or countries in which they are doing business. Key substantive provisions should include representations and warranties that a supplier:

- **Complies** with all applicable national and international laws and regulations, as well as the company’s code of conduct, including prohibition and eradication of coerced and child labor in its facilities, and that it requires its suppliers, including labor brokers and agencies, to do the same.

- **Treats** its workers with dignity and respect, provides them with a safe work environment, and ensures that the work environment is in compliance with applicable environmental, labor, and employment laws, and your code of conduct.

- **Refrains** from corrupt practices, and does not engage in human rights violations.

- **Certifies** that it has not, and will not, directly or indirectly, engage in certain activities connected to coerced and child labor. These activities should be expressly detailed in the certification.

E. *Design a Risk-Based Labor Verification/Audit Program* to evaluate and address risks of coerced and child labor in the company’s supply chains, including:

- **Identify** the greatest risks existing within the supply chain;

- **Design** measures tailored to reduce, control, and eliminate those risks;

- **Decide** whether to employ independent third parties to conduct these verifications/audits;

- **Consider** folding into the verification process consultations with independent unions, workers’ associations, or workers within the workplace;

- **Ensure** that audits of suppliers evaluate supplier compliance with company standards for eliminating coerced and child labor.

F. *Develop and Publicize Internal Accountability Standards*, including those related to supply chain management and procurement systems, and procedures for employees and contractors regarding coerced and child labor. Make sure you have procedures in place for employees and contractors who fail to meet these standards.

G. *Assess Supply Chain Management and Procurement Systems of Suppliers* in the companies' supply chains to verify whether those suppliers have appropriate systems to identify risks of coerced and child labor within their own supply chains.

H. *Train Employees and Business Partners*, particularly those with direct responsibility for supply chain management, on the company's expectations as they relate to coerced and child labor, particularly with respect to mitigating risks within the supply chains of products.

I. *Guarantee that Remediation is Provided* for those who have been identified as victims of coerced or child labor.

## All Eyes on Houston!

By enlisting—or, depending on one's perspective, conscripting—City contractors into the fight against human trafficking, child labor, and other forced or coerced labor practices, laws like the Houston Executive Order introduce a wholly new compliance reality requiring accountability and supply chain compliance. Today's companies—especially those that interface with, or rely on, overseas markets as part of their supply chains (and, these days, those are *most companies*)—must understand and prevent the myriad problems flowing from such labor issues. The costs for paying insufficient attention to these issues, after all, can wreck companies, destroy brands, and land wrongdoers in prison. Efforts such as those undertaken by the City of Houston deserve close observation. Houston's approach could lead the way to a new compliance reality that in very real terms comes to the aid of those victims abused in the US, China, India, Mexico, Pakistan, and elsewhere in service of making the every-day products used by billions of people around the globe. So if imitation is in fact the sincerest form of flattery, Houston should prepare to be flattered.