

Top 5 Business And Human Rights Concerns For Companies To Monitor

Law360, New York (March 7, 2017, 10:49 AM EST) -- Businesses are being bombarded with information about their global human rights and other nonfinancial responsibilities, and are under growing pressure to publicize their efforts in that regard.

Below we outline five key developments that business should be actively monitoring in a rapidly evolving landscape.

1. "Hard" Legal Obligations

Governmental efforts to force transparency are intended to incentivize large businesses with resources and market influence to address current practice and to take steps to eliminate any adverse impacts on human rights. Increasing legislation on supply chain transparency and corporate accountability has gained significant momentum, with:

- French "corporate duty of vigilance" law. On Feb. 21, 2017, the French Parliament adopted a corporate duty of vigilance law applying to France's largest companies (capturing around 100 companies). The law imposes an obligation on parent companies to draft "vigilance plans" and take steps to prevent adverse human rights and environmental impacts arising from the activity of their own company, companies they "control" (applying a broad test) and certain subcontractors and suppliers. Noncompliance with the new rules could lead to civil liability and financial sanctions of up to €30 million.
- Implementation of the U.K. Modern Slavery Act 2015, which requires certain larger organizations (wherever incorporated) supplying goods or services and carrying on business in the U.K. to publish a slavery and human trafficking statement ("MSA statement") each year, describing steps taken (if any) during the previous year to ensure that slavery and human trafficking are not occurring in its global supply chain.
- At a regional level, the deadline for EU member state implementation of the Non-Financial Reporting Directive (2014/05/EU) passed in December 2016. Member states are required to oblige "public interest" companies with more than 500 employees to disclose information about



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policies and practices relating to social and employee matters and respect for human rights and diversity, among other matters.

Legal developments in the field are spreading rapidly across Europe and are on the horizon in the following countries (at least):

- Netherlands: the Child Labour Due Diligence Bill will — if passed — require companies to identify instances of child labor within their supply chains and to develop plans to combat those practices.
- Switzerland: the Responsible Business Initiative is pushing for amendments to the Swiss constitution (to be put to popular vote in 2018) which would compel Swiss companies to conduct human rights due diligence on all of their business activities abroad, with possible civil sanctions for noncompliance.

Whether corporate vigilance will be legislated further at a European level is uncertain. The European Parliament voted in favor of a (non-legally binding) resolution in October 2016, calling on EU member states and the EU Commission to adopt regulations on corporate liability for serious human rights abuses in global supply chains. In particular, the resolution:

- called on members states to implement mandatory human rights due diligence;
- recognized that nonbinding private sector initiatives are insufficient and sought binding and enforceable rules, sanctions, and an independent monitoring mechanism; and
- encouraged reflection on whether member states courts should have jurisdiction to hear claims against non-EU defendant companies if such companies were linked to the EU.

At a sector-specific level, the EU Council and Parliament are seeking to adopt a Conflict Minerals Regulation before the summer of 2017, which will require European companies to ensure that their trade of minerals from conflict-affected areas is not linked with human rights abuses.

In addition, stock exchanges in around 45 countries now require or encourage corporate sustainability disclosures — with Singapore the latest to implement "comply or explain" rules in July 2016.

2. Voluntary Standards

The following international guidelines and their supporting databases are designed to aid companies in identifying human rights issues in their global supply chains and effectively reporting on these issues in a way that meets minimum legal thresholds.

- UN Guiding Principles: an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. The accompanying Reporting Framework provides guidance on meeting information thresholds when reporting and identifying salient human rights issues in a global supply chain.

- OECD Guidelines for Multinational Enterprises: make recommendations on responsible business conduct, including in relation to labor and human rights issues and risk-based due diligence of supply chains. Participating countries are also obliged to set up "national contact points" (NCPs) tasked with providing a conciliation platform to resolve issues arising from allegations of non-observance by companies.
- GRI Standards: the Global Reporting Initiative launched its new GRI Standards (replacing the earlier G4 Standards) in October 2016, designed to represent best practice for reporting on a range of topics, including social impacts. The organization maintains an online platform to solicit direct feedback from stakeholders.

The Global Reporting Initiative's Sustainability and Reporting 2025 project anticipates a continued rise in voluntary digital reporting and even the possibility of "real-time" reporting to allow stakeholders to make better informed decisions regarding the human rights challenges facing their businesses.

3. Litigation Against Parent Companies

There is a growing trend of claimants bringing claims against locally registered companies, particularly in Europe and North America in respect of offenses alleged against their foreign subsidiaries and contractors. Though, to date, such claims have been unsuccessful, businesses should not turn a blind eye for the following reasons:

- Are court doors being widened for claimants? In June 2016, the English High Court awarded damages to six Lithuanian workers for modern slavery taking place on U.K. soil. However, in recent years, claims have been brought against companies for human rights violations before national courts in the U.K., Germany, Canada and various states in the U.S. (among others) for alleged violations abroad. The volume of claims being brought is undeniably significant and global litigation trends should be closely monitored. In Canada, for example, the Supreme Court of British Columbia recently rejected a Canadian company's motion to dismiss a lawsuit alleging its complicity in the use of forced labor by its local state-run subcontractors at an Eritrean mine. It is the first time that a Canadian court has recognized that a company may be tried for violations of customary international law such as slavery, forced labor and torture. A key consideration of the court was that there was a real risk that the claimants might not be provided with justice in Eritrea. In the wake of this decision, similar claims have been filed in other Canadian provinces.
- "Soft law" enforcement mechanism. The OECD framework is increasingly being used to lodge public complaints against companies with respect to alleged human rights violations. In recent years, claims have been brought before "national contact points" in the U.K., Australia, France, Germany and Switzerland, among others. Although NCPs do not generally have the power to impose binding sanctions on companies, risks to companies include reputational risks, credit-score risks when it comes to borrowing from financial institutions and the risk that such proceedings will be used by claimants as a fact-finding tool in parallel with other legal proceedings.
- "Prevention is better than cure." Taking early action to prevent allegations in the first place, is recommended. Regardless of the outcome of attempts to litigate, a review of the global landscape reveals that once proceedings are commenced against a multinational, large out-of-

court settlements (frequently in the range of \$20-25 million) are not uncommon, particularly in the interests of minimizing reputational damage and legal costs.

4. Your Own Supply Chain

Businesses face significant challenges when trying to implement meaningful human rights programs across global organizations, including in mapping complex global supply chains and monitoring the operations of overseas third parties. Those operating within certain industries, such as retail, extractive, construction and manufacturing, might face more obvious exposure to harboring modern slavery or practices with adverse human rights impacts within their supply chains. However, industries that are seen to be "lower risk" are also thinking hard about the issues. For example, businesses operating within the professional and financial services industries may still engage — either directly or indirectly — lower-paid migrant workers in higher-risk support services roles such as security, cleaning, catering and call centers.

Where possible, businesses should take early preventative steps to ensure that risks within their supply chains are identified and managed. Initiatives might include:

- conducting internal audits and risk assessments of the organization's supply chains to determine which countries, industry sectors or business partnerships are at risk of harboring human rights abuses;
- training and awareness campaigns;
- updating policies, procedures and supplier contracts to include verifying suppliers' compliance programs; and
- carrying out onsite audits of high-risk suppliers, providing training to suppliers, commercially incentivizing better practices, including contractual compliance programs.

Responsibility for overseeing human rights issues should ideally be allocated to a senior member of the organization in order to demonstrate an embedded organizational commitment.

5. The Market

A "race to the top" in corporate supply chain reporting, due diligence and human rights compliance is in motion. One of the main compliance drivers within the growing international reporting framework is, of course, reputational.

Public reporting facilitates the comparison of business commitment and pressure from consumers, investors, regulators and nongovernmental organizations on businesses that are failing to identify and assess human rights risks within their supply chains or that are not actively monitoring the efficacy of their initiatives to address adverse human rights impacts.

The following are useful resources for monitoring movement in the market:

- U.K. public registry: repository of MSA statements for over 1,500 companies, the majority of which are headquartered in the U.K. or the U.S.. While legal requirements themselves do not obligate businesses to produce extensive statements or reports, current market practice strongly suggests that businesses across a variety of industries — including manufacturing, energy, technology, pharmaceutical, utilities, food and drug, consumer products, extractives and professional services — are doing more than is strictly required by the U.K. regulations. Unsurprisingly, few (if any) statements indicate that no steps have been taken, though such a statement would satisfy the requirements.
- Report of the World Business Council for Sustainable Development (WBCSD): identifies reporting trends and emerging good practice seen from 163 companies across 20 sectors and 35 countries. WBCSD discovered that 87 percent of reports contained a commitment by the organization to respect human rights. More notably, 76 percent of members confirmed that they had gone a step further and communicated their position on human rights to their suppliers, suggesting that businesses are increasingly using their purchasing power to influence the behavior of their supply chains with respect to human rights.
- Corporate Human Rights Benchmark (CHRB): a multi-stakeholder initiative which aims to rank the top 100 companies in the agricultural products, apparel and extractive industries on their human rights performance. Results of the pilot project are expected in March 2017. This is expected to further peak investor, governmental, industry association and other stakeholder interest in corporate human rights compliance.

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