MODERN SLAVERY ACT: HOW TO COMPLY WITH THE ‘CORPORATE PROVISION'

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Labor, Employment and Workplace Safety Alert

By: Paul Callegari

INTRODUCTION

On 29 October 2015, the 'corporate provision', section 54, of the Modern Slavery Act (the “**Act**”), came into force. All businesses in the UK with a global turnover of £36 million will now be required to publish an annual slavery and human trafficking statement. The stated purpose of the section is to encourage all businesses to develop an appropriate and effective response to modern slavery. The Home Secretary has championed the Act as a ground-breaking 'transparency measure' to tackle the growing worldwide evil of human trafficking and exploitation and as a weapon to stop “callous and brutal individuals who are prepared to abuse men, women and children” for gain.

This 'corporate provision' is part of a wider legislative compliance framework and is consistent with the language of the Bribery Act in its extra-territorial reach. It encourages businesses to implement a proportionate and ethical approach by increasing transparency. The motivation to comply with the legislation is primarily reputational. Businesses which fail to put in place measures to combat slavery and human trafficking will be less attractive to investors. The Act is designed to encourage businesses to have responsibility for ensuring that workers are not exploited, that they are safe and that relevant employment, safety and human rights laws are adhered to. To coincide with the provision coming into force the Government has published a detailed, forty page “Practical Guide” (the “**Guidance**”). This alert sets out the key, technical, elements of the corporate provision and the Guidance and outlines the steps that businesses should take to comply.

WHAT SHOULD COMPANIES DO?

The Guidance makes it plain that the purpose of the legislation is to promote ethical business practices and policies that protect workers from being abused and exploited in their own organisation and global supply chains. The Government expects businesses to put in place appropriate due diligence and reporting to improve risk identification as part of their drive to develop a credible and accurate slavery and human trafficking statement each year. The tone and language of the Act and Guidance (echoing the Bribery Act) advocates a common sense approach to due diligence. The Act firmly places the onus on business to be pro-active and forward-looking. Although failure to comply with the provision can only result in an injunction to do so, businesses should be alive to the severe reputational risk and adverse investment publicity of not producing a suitable statement which adequately addresses how the business is combatting the risks of modern day slavery.

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THE REQUIREMENT

The Act provides that any commercial organisation with a global turnover of £36 million or more must prepare a slavery and human trafficking statement for each financial year which concludes on or after 31 March 2016. Businesses with a year-end of 31 March 2016 will be the first required to produce a statement.

Below we will set out the technical aspects of the provision and what to consider in producing a statement.

COMMERCIAL ORGANISATION

A “commercial organisation” is defined as any body corporate or partnership that carries on a business, or part of a business, in the UK. As with the Bribery Act 2010, the Act is extra-territorial and businesses need not be incorporated or formed in the UK for the Act to apply to them. Provided it falls within the definition, any organisation in any part of a group structure will be required to comply with the provision and produce a statement. However, where a parent and one or more subsidiaries in the same group are required to produce a statement, the parent may produce one statement that subsidiaries can use.

CARRY ON BUSINESS

The Guidance provides that whether a body or business can be said to be “carrying on business” should be determined using a “common sense approach.” The organisation will be caught if it has the relevant turnover and “engages in commercial activities” in the UK. It is unlikely that organisations without a demonstrable business presence in the UK will be caught and having a subsidiary in the UK will not, in itself, mean that a parent is carrying on business in the UK.

THE STATEMENT

The statement is expected to be “clear, detailed and informative” and to improve and evolve year on year. The statement may take one of two formats. It may set out the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place in any part of its supply chains or business. Or the statement may simply state that the organisation has taken no such steps. The measure is intended to bring about increased transparency in businesses and to “create a level playing field between those businesses … which act responsibly and that need to change their policies and procedures.”

DEFINITION OF SLAVERY AND HUMAN TRAFFICKING

The Guidance adopts the definition of slavery set out in the 1926 Slavery Convention. Slavery is defined as “the status or condition of a person over whom all or any of the powers attaching to the right of ownership are exercised”. The key element is “the behaviour on the part of the offender as if he / she did own the person, which deprives the person of their freedom”. The definition of human trafficking requires that “a person arranges or facilitates the travel of another person with a view to that person being exploited”.

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The Guidance accepts that identifying potential victims of modern slavery will sometimes be difficult, but emphasises the responsibility that businesses have to “ensure that workers are not being exploited, that they are safe and that relevant employment (include wage and work hour), health and safety and human rights laws and international standards are adhered to, including freedom of movement and communications”.

SUPPLY CHAIN

“Supply chain” is understood to have its everyday meaning. The Guidance explains that the reference in the Act to ensuring that the supply chain is free of slavery and human trafficking should not be taken to mean that the organisation in question must guarantee that the supply chain is slavery free, simply that the organisation sets out all the actions it has taken in relation to each part of the supply chain.

This means that if a foreign subsidiary is part of the parent company's supply chain or own business, the parent company's statement should cover any actions taken in relation to that subsidiary to prevent modern slavery.

STATEMENT CONTENT

The statement should be succinct and written in simple language. The Act specifies six areas of information that a business may include in its slavery and human trafficking statement. These are not compulsory:

- *Organisation structure, business and supply chains*

To produce an effective statement, businesses will need to have a comprehensive understanding of their own supply chains and structure.

- *Policies in relation to slavery and human trafficking*

This may simply explain how current policies and practices, programmes and management systems already work in the business to prevent slavery. Any relevant policies should be supported by the board of directors and senior management and effectively communicated. The Guidance sets out some sample questions that the business should consider when drawing up an appropriate anti- slavery policy. For example, an organisation may put in place a specific policy to require the business only to use specified employment agencies.

- *Due diligence processes in relation to slavery and human trafficking in its business and supply chains*

Due diligence is not a requirement of the Act. However, due diligence around modern slavery is likely to be part of a wider framework of the business' due diligence around ethical trade, corporate and social responsibility and human rights. Due diligence should be proportionate to the risk and level of influence a business may have, and informed by other risk assessments that have been conducted. Businesses are encouraged to undertake 'on the ground' due diligence to investigate working conditions with support from independent third parties.

- *The parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps that it has taken to assess and manage that risk*

Businesses are encouraged to adopt risk assessments, policies and procedures that are proportionate to their size and profile. The risks will vary according to the countries of operation, the sector, types of transaction and

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supplier relationships. It is a critical part of an effective approach to tackling slavery that a business researches and identifies risks in order to remedy them.

- *Effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against key performance indicators (KPIs)*

The Guidance emphasises that the business should consider whether their performance incentives, such as buying the lowest cost products, may influence or create an increased risk of slavery. Businesses may consider that it is appropriate to set out information on their existing KPIs and whether they have considered the risks these bring and whether the business has introduced any additional KPIs to ensure the performance of anti-slavery actions undertaken.

- *The training about slavery and human trafficking that is available to its staff*

The Guidance confirms that training is regarded as a critical part of any business' response to its obligations to combat slavery. Organisations should think about where training should be targeted to have the most effect. Well trained and informed employees, who are aware of what actions the business is taking to root out slavery and human trafficking, will be in a better position to raise red flags.

APPROVAL AND PUBLICATION

The statement must be approved by the board of directors (if a body corporate) or equivalent management and signed by a director (or equivalent). The statement must be published on the organisation's website, if it has one, and there must be a prominent link to it on the website's home page. Where an organisation does not have a website, it must provide a copy of the statement within 30 days to anyone who requests one in writing.

KEY CONTACTS



PAUL CALLEGARI
PRACTICE GROUP COORDINATOR - LABOR, EMPLOYMENT, AND WORKPLACE SAFETY AND MANAGING PARTNER, LONDON OFFICE

LONDON
+44.20.7360.8194
PAUL.CALLEGARI@KLGATES.COM

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