

# ADVISER

## THE MODERN SLAVERY ACT 2015 – INCREASING EXPOSURES FOR DIRECTORS AND OFFICERS

### OVERVIEW

The Modern Slavery Act 2015 received royal assent on 26 March 2015 and consolidates existing legislation concerning slavery, servitude, and human trafficking offences. The Act introduces new measures that the UK Government claims will strengthen successful prosecution against offenders while offering enhanced protections for victims.

Two new civil orders<sup>1</sup> will become available to the courts to help prevent modern slavery and establish an independent anti-slavery commissioner, whose role includes encouraging good practice in the prevention, detection, investigation, and prosecution of slavery and human trafficking offences.

Importantly, the Act also introduces a new reporting requirement for businesses in relation to transparency in the supply chain.

### WHO MUST COMPLY WITH THE NEW REPORTING REQUIREMENTS?

The new reporting obligation as provided in section 54 of the Act applies to a commercial organisation that:

- Supplies goods or services; and
- Has a total global turnover of GBP36 million or more; and
- Carries on a business, or part of a business, in any part of the United Kingdom.

Given the above, this part of the Act appears to have extra territorial effect and will require non-UK incorporated businesses that meet the above criteria (who may only have marginal UK turnover) to report on modern slavery in their supply chain.

### WHAT MUST BE REPORTED?

The commercial organisation must prepare a slavery and human trafficking statement for each financial year ending on or after 31 March 2016. The statement should detail the steps the organisation has taken to ensure that slavery or human trafficking is not taking place in its supply chains or business. The statement may include information about:

- The organisation's structure and its supply chain.
- Policies in relation to slavery and human trafficking.
- Due diligence processes in relation to slavery and human trafficking in its business and supply chains.
- A focus on exposed areas susceptible to slavery and human trafficking.
- Training available to staff on slavery and human trafficking.

The slavery and human trafficking statement must be published on the organisation's website and include a link to this statement in a prominent place on that website's homepage. If the organisation has no website, a copy of the statement must be available within 30 days to anyone who makes a written request for one.

### IMPLICATIONS – SLAVERY UNDER THE SPOTLIGHT

The slavery and human trafficking statement must be approved by the board of directors and signed by a director (with similar ownership and accountability applying to partnerships). Interestingly, this raises a question with regards to personal liability that may be incurred by the signatory as a result of perceived negligence or duty of care when signing off on such statements where they are found to be inaccurate.

<sup>1</sup> Slavery and trafficking prevention orders (part 2, s14-s22) and slavery and trafficking risk orders (part 2, s23-s22).

The introduction of increased reporting requirements for large corporations will put into focus the measures boards are taking on ensuring ethical processes and procedures are implemented, conversely highlighting those businesses that are falling behind in their duties.

The natural consequence of these changes is the likely increase in allegations of slavery and human trafficking offences, which previously may not have come to light had changes not been enacted.

## PROTECTING THE BOARD AND SENIOR MANAGEMENT UNDER INCREASED SCRUTINY – DIRECTORS AND OFFICERS LIABILITY (D&O) INSURANCE

With the maximum sentence available for modern slavery and human trafficking offences<sup>2</sup> increasing from 14 years to life imprisonment, it is vital that a company's D&O policy is sufficiently robust. Firstly, to cover middle management for criminal prosecutions arising from offences under the Act, along with civil claims alleging unlawful imprisonment, intimidation, assault, and trespass to the person or similar acts. Cases such as that brought against DJ Houghton Catching Services Limited<sup>3</sup> highlight how company directors may be implicated in proceedings, and the Act will only strengthen the tools available to prosecutors to bring perpetrators of wrongdoing to justice.

Secondly, while it is perceived to be unlikely that criminal offences defined in the Act will be brought against board directors of large organisations, allegations may be brought for breach of codified duty under existing legislation.

An allegation may include failing to act with reasonable care, skill, and diligence when signing off on a transparency statement or failing to promote the success of the company if middle management are found guilty of abuses which result in damage to the company.

Specific policy areas to consider are:

- Are wrongful act triggers sufficiently broad to respond to the wide array of allegations encompassed within the Act or outside that relate to modern slavery and human trafficking offenses?
- Does the claim definition adequately respond to employment practices violations, civil proceedings, and criminal proceedings?
- Does the policy cover the cost of bail bond premiums, given that alleged breaches may result in a criminal trial?
- How broad is the bodily injury exclusion within the policy and are there adequate carvebacks to protect a director where the loss is non-indemnifiable?
- Is there adequate coverage in relation to derivative investigation costs where shareholders demand the board bring civil proceedings against a director, possibly following reputational damage or a drop in share price as a result of modern slavery failings?
- Is the investigations coverage robust enough to cover you for representation during an internal investigation prior to the company's pre report to an investigative body or enforcement agency, such as the National Crime Agency or the Gangmasters Licencing Authority?

- Is there a "final adjudication" provision for the criminal or fraudulent conduct exclusion, so that the exclusion can only be triggered once there is a final non-appealable finding of liability by a court of law? The exclusion should be fully severable so that, if one director is found liable, their actions will not invalidate cover for the other innocent directors.

## SUMMARY

The Modern Slavery Act 2015 significantly increases the focus on large organisations by mandating disclosure on the steps they are taking to prevent modern slavery. It is hoped that this increased transparency will galvanise those organisations that have not previously considered these issues to become more pro-active and implement ethical business practices. The legislation now makes modern slavery a board issue which must be seriously considered and, where organisations or individuals fall short, new powers and sentencing can result in severe consequences for those held accountable.

## CONTACT

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<sup>2</sup> Modern Slavery Act 2015, ss 1 and 2.

<sup>3</sup> Leigh Day. "British company sued in landmark modern slavery case," available at <https://www.leighday.co.uk/News/2015/August-2015/British-company-sued-in-landmark-modern-slavery-ca>, accessed 22 April 2016.

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