

# Groundbreaking New Executive Order Requires Federal Government Contractors To Join the Global Fight Against Human Trafficking

By [T. Markus Funk](#)

Just as businesses were coming to grips with the [California Transparency in Supply Chains Act](#)'s attempt to legislatively motivate them to join the transnational fight against human trafficking, a new federal law has appeared on the horizon rendering the California Act's efforts positively modest. On September 25, 2012, President Obama signed a groundbreaking Executive Order designed to strengthen protections against trafficking in persons in federal contracting. Among other requirements, the Executive Order requires federal contractors and subcontractors to take the following actions:

**Certifications.** File formal annual certifications confirming that neither they nor their employees engaged in any trafficking-related activities, and, if violations were identified, that they took appropriate remedial and referral action.

**Prevention.** Take steps to ensure that their employees do not engage in trafficking-related activities.

**Compliance Plans.** Develop and maintain detailed compliance plans if they have contracts exceeding \$500 million and involving services to be performed abroad.

**Self-Reporting.** Self-report any activities that are "inconsistent with" the Executive Order.

"We're making clear that American tax dollars must never, ever be used to support the trafficking of human beings," President Obama, referring to the Executive Order, said at yesterday's Clinton Global Initiative. "We will have zero tolerance. We mean what we say. We will enforce it."

## Background

More than 20 million men, women and children worldwide are victims of severe forms of trafficking in persons. Companies around the world are taking steps to eliminate the potential for trafficked labor in their operations and supply chains. The U.S. government—the world's largest single purchaser of goods and services—is now attempting to take a more active role by conscripting federal contractors and subcontractors to join the fight.

The Executive Order is intended to strengthen the efficacy of the U.S. government's long-standing "zero-tolerance policy" on trafficking in persons by directing the Federal Acquisition Regulatory (FAR) Council, in coordination with various agencies, to amend the FAR within 180 days to:

### **Prohibit All Government Contractors, Subcontractors and Their Employees From Engaging in Trafficking-Related Activities**

Highlighted prohibited activities include:

- Engaging in misleading or fraudulent recruitment practices, such as by making material misrepresentations regarding the key terms and conditions of employment (including wages and fringe benefits, the location of work, living conditions and housing).
- Charging employees recruitment fees.
- Destroying, concealing or confiscating employee identity documents, such as passports or driver's licenses.
- Failing to pay certain return transportation costs upon the end of employment outside the United States.

### **Require Larger Foreign Contracts to Include Detailed “Compliance Plans”**

For contracts involving services or supplies exceeding \$500,000 that are to be performed abroad, federal contractors and subcontractors must agree to maintain “compliance plans” that are appropriate for the nature and scope of the activities performed.

Such plans (1) “shall be provided to the contracting officer upon request,” (2) must be posted on the contractor’s or subcontractor’s website, and (3) must, “at a minimum,” include:

- Specific procedures to prevent subcontractors at any tier from engaging in trafficking in persons.
- An employee “awareness program.”
- Explicit policies aimed at ensuring that employees do not engage in trafficking-related conduct.
- Processes allowing employees to report trafficking violations without fear of retaliation.
- Recruitment and wage plans restricting the use of recruitment companies to those having “trained employees.”
- Housing plans ensuring compliance with local housing and safety standards.

### **Mandate Specific Contract Language to Aid Enforcement**

- Government contracts must now include contractor and subcontractor assurances that they will provide “full cooperation” and “reasonable access” to contract and enforcement agencies conducting audits or investigations.

### **Require Self-Reporting of Violations**

- Contracting officers must notify, as appropriate, the agency inspector general, the debarment officer or law enforcement of any trafficking-related activities that are illegal, violate regulations or are otherwise “inconsistent with” the Executive Order.

### **Annual Contractor and Subcontractor Certifications**

All government contractors and subcontractor must certify that:

- Neither the contractor nor any subcontractors have engaged in any trafficking-related activities.
- Any identified abuses resulted in appropriate remedial and/or referral actions.

According to President Obama, “[t]hese safeguards, which have been largely modeled on successful practices in the private sector, will increase stability, productivity, and certainty in federal contracting by avoiding the disruption and disarray caused by the use of trafficked labor and resulting investigative and enforcement actions.”

### **Now What?**

In light of these groundbreaking new requirements, companies need compliance advice concerning a highly-specialized area -- namely, anti-trafficking -- in which few compliance/white collar attorneys have much experience. That said, the same overseas transaction partner who pose risks under the Executive Order can be expected to similarly pose [FCPA](#), [Travel Act](#), and [UK Bribery Act](#)-related risks. Counsel experienced in anti-trafficking efforts, moreover, can also assist in preparing the required training materials and certifications, drafting compliance plans, devising due diligence and vetting procedures, and, as necessary, conducting internal audits and investigations into allegations of non-compliance.

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[T. Markus Funk](#) is a Perkins Coie Partner and Co-Chair of his firm’s [Corporate Social Responsibility and Supply Chain Compliance Practice](#) (the first such specialized practice among the AmLaw100 firms). He is also the co-author of [Child Exploitation and Trafficking: Examining the Global Challenges and U.S. Responses](#) (2012, co-authored with Chicago U.S. District Judge Virginia M. Kendall), and represents Joel Esquenazi in the [federal appeal](#) of his conviction and longest-ever FCPA sentence. Markus also currently serves on the ABA’s Presidential Anti-Trafficking Task Force and Co-Chairs the ABA’s Corporate Social Responsibility and Forced Labor Task Force. From 2000-2010, Markus was a federal prosecutor in Chicago; from 2004-06, he lived in Pristina, Kosovo, where he led USDOJ and State Department efforts to combat trafficking in Kosovo and the region.

This article is an adaptation of his September 27, 2012, [Client Update](#).