

Sweatshops, Slavery and GCs

Stephanie Forshee, Corporate Counsel

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Roberta Karp will never forget the call. It was 1994 and someone from then-Sen. Howard Metzenbaum's office was on the other end.

"They said, 'There's going to be a hearing on the Senate floor about child labor, and they're showing your sweater. You may want to have someone there,'" recalls Karp, the former general counsel of Liz Claiborne Inc.

She remembers a 15-year-old girl had plans to testify about making the Liz Claiborne sweater two years before, at the age of 13. "We were truly shocked," Karp says. "Really? There are children making our sweaters? We were a sophisticated global company. We were appalled."

Karp was one of the early in-house pioneers tasked with trying to eliminate child labor from her company's operations. She recalls being chased by camera crews from "Inside Edition" demanding to know what was going to be done.

That's when Karp, along with other executives at her former company, stepped up and decided to take on this child labor battle. Karp co-chaired the White House Apparel Industry Partnership, a task force formed by President Bill Clinton dedicated to improving working conditions among the industry.

The group of retailers and manufacturers formed after several brands were singled out for sweatshops found among their operations in the 1990s. In 1993, then Secretary of Labor Robert Reich began an initiative to end forced labor. In 1995, a factory in El Monte, California, was busted for holding 70 Thai immigrants against their will



and forcing them to sew garments. The following year a Department of Labor investigation revealed that Kathie Lee Gifford's clothing line was being made in sweatshops.

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Various conferences and roundtables on how to fight abuse were held during this time period.

To address the issue at Liz Claiborne, one of the first things Karp did was visit a factory. She flew to Honduras and El Salvador to become as ingrained in the process as she could.

Now, more than two decades later, more top lawyers are stepping into business-focused roles and tackling sustainability and corporate social responsibility efforts. They're finding that they must rely more on ethics than the law if they want to avoid a phone call such as the one Karp received.

TOUGH, BUMPY ROAD

When asked what their company is doing to combat poor working conditions, GCs in the retail industry usually say their company has implemented a code of conduct and hired auditors to check in on the factories. These guidelines are sure to appear on the company's website and its annual report to investors. But in-house lawyers are increasingly finding it will take more than a code of conduct to minimize risks and protect their company's reputations.

Many consumers, especially millennials, are demanding to know how their clothes are sourced. And a new crop of nonprofits are exposing questionable labor practices. So, one way or another, retailers will be held accountable.

That's why companies such as Patagonia Inc. try to go above and beyond to ensure transparency for consumers, says assistant GC Greg Curtis, based in Ventura, California. "It's not enough to be transparent," he says. "You need to stand for something and you need to show 'this is what I stand for.'"

Patagonia has always been known for its environmental and social responsibility, and lately it has become more focused on improving conditions for workers overseas. "You can't cherry-pick it. You're either going to stand for treating workers fairly or you're not," Curtis says. "When we've found something bad in our supply chain, then we talk about fixing those issues. It makes your relationship with consumers and what you stand for stronger."

Patagonia boasts on its website that it makes great strides to fight child labor, listing ways it is combating the effort.

"We firmly believe that by being in business we can influence change and show what can be done to ensure wage equity throughout the value chain," Patagonia states on its website. "We don't have it all figured out. It will be a tough, bumpy road and there are a lot of unknowns, but we are excited to take the next big step forward."

The issue of child labor is bigger than any single company. According to the International Labour Organization, 21 million men, women and children around the world are victims of forced labor (26 percent are children). The illegal profits generated by forced labor are an estimated \$150 billion annually.

Even Patagonia doesn't claim to be perfect. Only a few years ago the company identified harsh working conditions in its own supply chain. In 2011, human trafficking was discovered in its factories, a quarter of which were in Taiwan. That was when the company went from auditing only tier one suppliers to adding tier two suppliers into the mix, where the latest wave of illegal activity has been reported within the supply chain. In other words, retailers have to audit more than the factories that are assembling the clothes. There are factories that make buttons, zippers and other ancillary products that will ultimately go into the product.

This subcontracting system has been at the forefront of retailers' list of priorities since the infamous Rana Plaza incident in April 2013 when 1,130 garment factory workers died and another 2,500 were injured after a building collapsed. The disaster left many retailers exposed, especially those that claimed to have not even known they were employing workers in the space.

"I think the Rana case makes pretty clear the system was not working," says Reid Maki, director of the National Consumers League's Child Labor Coalition. "The claims on [retailers'] websites that 'we care about our workers and we're protecting them' were not true. They needed to step up their game."

Following the Rana Plaza disaster, families of the victims filed a lawsuit in Delaware in 2015 against J.C. Penney Co., The Children's Place and Wal-Mart Stores Inc. The plaintiffs allege that the retailers knew that the building had cracks in the floors and failed to take action. In May 2016, the suit was dismissed on the grounds that the plaintiffs failed to file the claim within the Bangladeshi one-year statute of limitations. The judge also noted the companies were not liable for duty of care.

"Defendants could not be reasonably expected to take precautions against a building collapse when deciding to source garments from factories in Bangladesh," wrote Delaware Judge Mary Johnston in the ruling.

"Generally an owner or general contractor does not have a duty to protect an independent contractor's employees from the hazards of completing the project.' ... Defendants neither voluntarily undertook any safety responsibilities, nor controlled the work being done in Rana Plaza in any fashion."

This case indicated a grim reality: In-house lawyers won't owe overseas workers anything based on legal

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obligations. Instead, they will be called on, more than ever, to act as the moral compass of their companies. Ayesha Barenblat formerly worked for the Better Work Project, a partner of the International Labour Organization, which chaired a workers' compensation fund for Rana Plaza victims and their families. She claims that despite little progress in the courtroom, many big-name retailers contributed to the fund. "Many gave money anonymously so there would not be legal precedent that if something happens in the future, they would have to pay for it," she says.

As a result of the Rana Plaza incident, H&M has arguably become one of the most scrutinized retailers, which reportedly signed on to improve worker conditions in Bangladesh but three years later was found to have accomplished little to make sure its factories comply with safety standards, according to audits by the Clean Clothes Campaign. Along with Forever 21 Inc., the apparel brand is the poster child, of sorts, for fast fashion, which became popular in the early 2000s. These brands are known for switching out inventory every few weeks, days even, to keep up with consumer appetites for the next trendy look—at deep discounts. To keep pace with customers, retailers are inevitably putting more pressure than ever on their suppliers to produce inventory at a fast pace.

"Fast fashion puts a huge emphasis on speed to market and low costs," says McMillan Doolittle partner and retail analyst Neil Stern. "This is where the conflicts come into play." (H&M declined to comment for this article.)

Nonprofits such as Remake, founded in 2015 in San Francisco by Barenblat, formerly of the Better Work Project, are entering the market in hopes of educating consumers. The nonprofit is currently beta testing an app, to be released in March, which aims to help inform consumers about how their clothes are made. With the app, shoppers can essentially search by a product at the store and do their own research about whether they think it is an ethical buy.

"Clothing is getting cheaper to produce but if you can buy a pair of pants for less than a cup of Starbucks coffee, you've got a problem," says Barenblat. "People can see the workers are not getting fair wages."

INTEGRITY OF **PROCESS**

In terms of compliance, wages are one of the priorities that must be top of the mind for retail attorneys, says Patagonia's Curtis. He admits it's still a "work in progress" for Patagonia but the company has made "huge efforts" in recent years.

Curtis and other in-house attorneys advise looking at not only minimum wage for workers, but beyond that, providing them with the living wage for that region. The

company, like many others, is working with the Fair Labor Association to determine fair wages for each region.

Additionally, auditing the factories is probably the most obvious solution retailers have found to help with improving working conditions. But these reports are often confidential and not usually released to the public in their entirety, leaving room for spectators to question the level of accountability.

McMillan Doolittle's Stern says, in principle, the auditing process is designed to work. "In practice, it depends on the frequency of inspection, the quality of the inspectors and the true integrity of the process," he says.



Jane Randel and Roberta Karp, Karp Randel co-founders and former colleagues at Liz Claiborne.

He points to such brands as Columbia and Gap as leaders in the industry who have made ethical sourcing a priority. But no company's practices are foolproof; sometimes it's out of their control. Jane Randel, who worked with Karp at Liz Claiborne and now works with her in the consultancy firm Karp Randel, says, "Anyone who tells you that they have no issues in their factories is lying to you."

Some in-house lawyers believe hiring independent auditors is really the best proven solution. Tony Sarabia, former GC of Guess Inc. from 1984 to 1993, advises in-house lawyers today to not rely on the production department to take care of this problem. "Their job is to make clothes in the most efficient way, so there's almost a conflict of interest there. Have some auditing system that is independent of your production chain of command."

Sarabia led Guess' legal department when he says the company was first starting to send manufacturing jobs overseas. Because it was a somewhat new function, he took on much of the oversight responsibilities. "When we started in the late '80s we were one of the only ones I was aware of, then as publicity spread, many legal departments were involved [with supply chain issues and factory oversight]."

He admits there has "absolutely been a ton of progress" since then, with retailers becoming more involved with

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their supply chains. Frankly, much of it has to do with public relations, he says. "Companies don't want that bad publicity," he says.

Not every brand is so cautious, though, of course. John Clark serves as the chief security officer of Rizk Compliance, which assists companies with their auditing processes. The company does everything from watching the ships that come in with shipments of garments or textiles to monitoring the factories sewing on tags for an individual piece of clothing.

While the larger companies are taking advantage of the ability to oversee conditions, he finds it surprising how many smaller retailers skimp on auditing to save money. "When you go into a manufacturing plant, there can be three or four brands going down the production lines side by side. So many times, I've been asked, 'X Big Box Retailer' also uses this facility. Why should we be concerned?' I ask, 'Is X going to be your legal counsel? Make sure you reach out to them and make sure they're going to protect you legally and from a reputation management standpoint.'"

LONG-TERM ENGAGEMENT

Randy Rankin has been in the business of auditing and consulting for large retailers for two decades. He says about 20 percent of the people he deals with regularly either report to or are tightly linked to the legal department. He says the biggest conundrum he sees for lawyers is for those who have a legal function and find corruption within their supply chains.

He notes that unlike in the U.S., many other countries have a statutory maximum workweek, which he describes as a standard that most factories can't realistically comply with. Rankin says counsel should actively participate in the dialogue to answer: "How do we develop a strategy that we can logically expect our partners to meet?"

"Lawyers have a hard time with people breaking the law, which makes sense," Rankin acknowledges, but when one finds child labor or nonpayment of wages, he believes "it requires long-term engagement and long-term solutions."

Abercrombie & Fitch Co.'s GC Bob Bostrom largely agrees with that approach. The retailer has an escalation process in place for its suppliers, depending on the severity of

the violations. First, Bostrom says remedial steps are imposed. If it's not resolved, the company goes to the next escalation step, and ultimately a vendor could be terminated. "Most larger apparel retailers have made very good efforts to be responsive to labor conditions and the sourcing of product," Bostrom says. "It's become a very important big part of doing business. Not only is it a compliance matter but because it's the right thing."

Aeropostale Inc. is a company that took a slightly different approach. Ed Slezak was the retailer's first GC from 2004 to 2013 and built its compliance procedures for its factories. He personally visited factories at least once a year, whether it was Hong Kong or Bangladesh. He says Aeropostale had a "zero tolerance policy" if it found things such as child labor, unsafe working conditions or fire hazards. "The vendor would be immediately pulled out," he says. "But then you've got factories that are everything from a C to an A+. That's when you have to educate the factories on what's important to your company and why it's important they rise to the company's policies and standards."

GOOD-FAITH EFFORT

Poor working conditions for factory workers isn't unique to places overseas. It's happening domestically too. Last November, the U.S. Department of Labor issued a report, which called out several brands for labor violations found in Southern California. Eighty-five percent of the audited companies in Los Angeles were found to be in violation of wage laws, with workers reporting income as low as \$4 per hour. Among the companies the workers were assembling clothing for were T.J. Maxx, Forever 21, Ross and Charlotte Russe, mostly brands associated with "fast fashion."

To say the least, it's hard to determine which brands really are ethically sourced. But when they're not, consumers are sure to take notice and vote with their wallets.

This is something predicted by Karp, even when she was interviewed by Corporate Counsel in 1997. "This is not all done just because we're moralistic," she said at the time in the cover story about Liz Claiborne's crisis. "It's also the smart thing to do. We're an organization that sells apparel. We want to clothe everyone. That's our goal. I have to have a business sensitivity and goals, or what's the point?"

Unfortunately, child labor may never be completely eradicated, Karp says today, although she still thinks retailers should fight for human rights for their workers.

"We had a good-faith effort," she says. "We never stated this is bulletproof. We said we are doing things to minimize this."