

A Win-Win-Win For Int'l Workers, Cos. And Consumers

Law360, New York (August 19, 2013, 12:30 PM ET) -- As companies continue to employ labor overseas, company management must be aware of international standards for labor and human rights. The role of corporations in international labor trends has come to the forefront of academic, corporate and social discussions since the April 2013 garment factory tragedy in Bangladesh.

While some international standards have been established to guide corporations, companies are still expected to take leading roles in developing their responsibility and commitment to human rights.

Tragedy in Bangladesh and Varied Corporate Responses

On April 24, 2013, the collapse of an eight-story garment factory in Bangladesh killed at least 1,100 garment workers.[1] It was considered the deadliest disaster in the history of the garment industry.[2] The building owner illegally constructed floors that were ill-equipped to support heavy machinery, causing the walls to crack and eventually collapse. The factory employed several thousand workers.[3]

Much of the blame has been attributed to the Bangladeshi government, which, evidently, laxly enforced the national building code.[4] International attention has now come to focus, however, on multinational corporations and how they can mitigate the risk of this type of tragedy from recurring.

Some corporations, including Sweden-based H&M, have signed a legally binding agreement with the Bangladeshi government, known as the accord on fire and building safety in Bangladesh,[5] to fund fire and building safety in garment factories.[6] the accord would establish an independent inspector to oversee factories with the authority to shut down unsafe facilities and require improvements, financed in part by companies that signed the agreement.[7]

Some corporations have been more hesitant to sign the accord. Companies, such as Gap, have released statements indicating their intent to develop their own programs and systems for safety and enhancement of working conditions in garment factories.[8]

Company-based procedures are typically known as corporate social responsibility (CSR) programs. The Bangladesh tragedy and subsequent efforts of corporations to develop safety programs for workers in

other countries have sparked discussion on what are the international standards for safety programs and what corporations can do to ensure the proper protection and safety checks for garment workers.

What Are the International Standards?

The International Labour Organization (ILO) has established labor conventions for multinational enterprises as a resource in understanding expectations when employing workers in the global market. The ILO uses the tripartite declaration of principles,[9] also known as the multinational enterprises declaration, as a benchmark of principles for corporate social policies.

Regarding safety and health, the MNE declaration states that companies should “maintain the highest standards of safety and health, in conformity with national requirements, bearing in mind their relevant experience within the enterprise as a whole, including any knowledge of special hazards.”[10] In other words, corporations are required to be familiar with domestic safety regulations and implement safety precautions using not only the national regulations but also their own expertise regarding their products and possible risks.

The MNE declaration confirms that multinational corporations “should be expected to play a leading role in the examination of causes of industrial safety and health hazards and in the application of resulting improvements within the enterprise as a whole.”[11] Thus, the ILO declaration leaves to company discretion the responsibility for designing an appropriate program, specifying only that companies have the duty of taking “a leading role.”

Despite providing only general guidance, the ILO has provided a “helpdesk” web page [12] as a reference for various international labor standards, including occupational safety and health, security of employment and child labor. The ILO helpdesk page provides fact sheets and links to principles developed from the MNE declaration.

What Should Companies Do?

Companies wanting to establish more safety checks for workers in other countries are again left to decide whether to sign agreements such as the accord or to draft their own CSR policies. Commentators have suggested that one of the reasons that U.S. companies should be more hesitant to sign agreements like the accord, compared to their European counterparts, is that the possibility of actionable liability is higher in the United States under the Alien Tort Statute.[13]

The statute provides that “the district court shall have original jurisdiction of any civil action for a tort only, committed in violation of the law of nations or any treaty of the United States.”[14] Some companies fear that this statute would open the floodgates to litigation if workers in other countries are allowed to use the statute to bring tort liability suits against companies in the United States.

The U.S. Supreme Court’s unanimous decision in *Kiobel v. Royal Dutch Petroleum*,[15] on April 17, 2013, however, weakened the Alien Tort Statute substantially. The Supreme Court held that a presumption

against extraterritoriality applies to claims under the Alien Tort Statute and that nothing in the statute rebuts that presumption. Therefore, many potential claims would be dismissed for lack of standing.

Although international claim are now less likely to be filed under the Alien Tort Statute, a company may still prefer to design a CSR program as an alternative to signing international agreements such as the accord in Bangladesh. In fact, according to The Journal of Economic Literature, no research to assess the comparative outcomes of private and public regulation has ever been undertaken.[16]

Thus, an effective and well-managed CSR program can be a win-win-win for international workers, companies and consumers.

Implementing an Effective CSR Program

Through a CSR program, a company is able to monitor developments more closely and limit unpredictable factors of cost, management and ultimate liability. As The Economist states, “Though CSR tends to be seen as a moral matter, it comes down to the hard practicalities of companies’ reputations and risk registers.”[17]

After the Bangladesh tragedy and the resulting consumer attention to corporate practices, companies must create proactive CSR programs; thus, they cannot rely solely on issuing a CSR statement to avoid brand tarnishment. As George Tsogas, a management professor at the City University of London, explains, to show true commitment to CSR worker safety policies, companies need to have “effective means for implementation and monitoring, and some procedure for verifying that implementation is taking place.”[18]

Harvard Professor John Ruggie’s Program

An insightful resource for modeling effective CSR programs is a UN Human Rights Council report (HRC report) by Harvard Professor John Ruggie.[19] Ruggie designed guiding principles on ways corporations can showcase their commitment to international human rights while doing business in other countries.

According to the HRC report, business enterprises have the responsibility to “avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur.”[20]

Also, corporations must “seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships if they have not contributed to those impacts.”[21]

To fulfill these objectives, Ruggie has developed three essential components for a success CSR program:

- Corporate policy commitment to respect human rights

- Human-rights due diligence process to identify, prevent, mitigate and account for how a company addresses its impacts on human rights
- Process to enable the remediation of any adverse human rights impacts the company may have caused or to which it contributed[22]

Professor Ruggie's CSR Program: Three Essential Components

Policy Commitment

The policy commitment should establish the company's human rights expectations of personnel, business partners and other relevant parties.[23] The policy should also be reflected in the company's operations and procedures to embed the commitment throughout the business structure.[24]

Ruggie recommends policy approval at the highest level of the business enterprise and public availability to further showcase the company's true investment in human rights.[25]

Human-Rights Due Diligence

The human-rights due diligence process should include:

- Assessing actual and potential human rights due impacts
- Integrating and acting on the findings
- Tracking responses
- Communicating how impacts are addressed[26]

Even though a due diligence mechanism will not absolve a corporation of all potential liability, due diligence is an effective tool in avoiding many potential infringements and in showing the company's commitment to human rights.

Ruggie explains, "Conducting appropriate human-rights due diligence should help business enterprises address the risk of legal claims against them by showing that they took every reasonable step to avoid involvement with an alleged human rights abuse." [27]

Remediation

Typically, governmental organizations or procedures provide redress instruments; companies, however, can also provide various forms of remedies. Corporate remedies can include apologies, restitution, rehabilitation, financial or nonfinancial compensation and prevention of harm through injunctions or guarantee of nonrepetition.[28]

Operational-level grievance mechanisms can provide a good venue for those potentially affected by business activities, as long as the process meets certain core criteria.[29] Nonjudicial grievance mechanisms must be legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning.[30]

Concluding Recommendations

Looking to the future, corporations can use Ruggie's guidelines to advance their commitment to international safety standards while at the same time managing the possibility of risk and other factors. Companies have to design their CSR programs with not only a policy statement but also effective mechanisms to implement safety checks.

Consumers and the global community are looking to multinational corporations to take a leading role in preventing future garment factory tragedies. As H&M spokesperson Anna Eriksson stated, "Today's economy is global, and it is not a question of if a company like H&M should be present in developing countries. It is a question of how we do it."

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[2] Id.

[3] Id.

[4] ¶ Disaster at Rana Plaza, The Economist (May 4, 2013), <http://www.economist.com/news/leaders/21577067-gruesome-accident-should-make-all-bosses-think-harder-about-what-behaving-responsibly/print>.

[5] ¶ Accord on Fire and Building Safety in Bangladesh, May 13, 2013, available at <http://www.uniglobalunion.org/Apps/UNINews.nsf/vwLkpById/EC90FA91A0DB11C0C1257B6B0028A4D>

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[6] Jonathan Fahey & Anne D'innocenzio, Retailers Face Tough Decisions After Bangladesh Factory Collapse, Huffington Post (May 12, 2013), http://huffingtonpost.com/2013/05/12/retailers-bangladesh-factory_n_3262515.html?

[7] Julhas Alam & Farid Hossain, Bangladesh Collapse Search Over; Death Toll 1,127, Yahoo News (May 13, 2013), <http://www.news.yahoo.com/bangladesh-collapse-search-over-death-toll-1-127-122554495.html>.

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[9] International Labour Organization, Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (2006), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

[10] Id. at 7.

[11] Id.

[12] ILO Helpdesk for Business on International Labour Standards, International Labour Organization, <http://www.ilo.org/empent/areas/business-helpdesk/lang--en/index.htm>.

[13] 28 U.S.C. § 1350 (2013).

[14] Id.

[15] *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. Apr. 17, 2013).

[16] Nancy Folbre, Redeeming Bangladesh, N.Y. Times (May 20, 2013), <http://economix.blogs.nytimes.com/2013/05/20/redeeming-bangladesh/?pagewanted=print>.

[17] Disaster at Rana Plaza, *supra* note 4.

[18] George Tsogas, International Labour Regulation: What Have We Really Learnt So far? 83 *Erudit* (2009), <http://www.erudit.org/revue/ri/2009/v64/n1/029539ar.pdf>.

[19] Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, A/HRC/17/31 (Mar. 21, 2011).

[20] Id. at 14.

[21] Id.

[22] Id. at 15.

[23] Id.

[24] Id.

[25] Id.

[26] Id. at 16.

[27] Id. at 17.

[28] Id. at 22.

[29] Id. at 29.

[30] Id. at 26.

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