

Issues and Comments on the Designated Supplier Program (DSP) Proposal

FLA constituents have raised a number of issues related to the DSP and asked that the FLA comment on them. This document presents some of the issues raised and some brief comments by the FLA.

1. Are there antitrust concerns?

- A. Will the universities prevail if there is an antitrust challenge?
 - a. Is the opinion based on a mistaken assumption?
 - b. Why is there no Business Review Letter?
 - c. Does imposition of a wage other than one that is legally mandated increase risk?
- B. If the opinion doesn't prevail what are the implications for school licensing programs?

Comments

The assumption underlying the antitrust legal advice memo is that products of licensors are not competitive, meaning that a buyer who seeks to buy a product with a particular university logo will not buy a product with another university's logo no matter what the price difference. This may not be a realistic assumption given the intense competition in the apparel market and the many different outlets that sell logoed products. Arguing that products of licensors are non-competitive may be a position that universities and licensees are not comfortable taking because of its implications in other antitrust disputes.

The WRC has not obtained a Business Review Letter from the Department of Justice (DOJ) for the Designated Suppliers Program. When the FLA was being formed, many of the member companies and universities took great comfort from the DOJ's Business Review Letter. While a favorable Business Review Letter is not a guarantee against all antitrust lawsuits, it does indicate that the DOJ does not have a current intention to exercise its enforcement discretion and challenge a proposed set of activities. A Business Review Letter can also be used to respond to threats of private litigation.

There are certain areas that tend to increase antitrust concerns at the DOJ. One of these is arrangements involving wages, particularly if the arrangements entail not merely payment of minimum, legally mandated wages, but rather some other wage level, such as a living wage.

Should the DSP go forward and litigation result in a finding of antitrust violation, this could have serious implications for universities and for their licensing programs, particularly because of the treble damages associated with antitrust violations.

2. What will be the impact in countries where there are legal or structural reasons that would prevent factories from becoming designated?

- A. Are all factories in China and Vietnam ruled out of the program?
- B. Will requirements such as the prohibition against trade unions in certain sectors (e.g., Bangladesh's export processing zones) lead to the same outcome?
- C. How is abandoning these factories any different from cutting and running?
- D. Do the proponents of the proposal have any analysis of the level of displacement associated with the proposal and how to deal with such displacement?

Comments

The proposal requires that in order to be designated, a factory's employees must be represented by a legitimate, representative labor union or other representative employee body. In countries like China and Vietnam, workers are not permitted to form labor unions of their own choosing. Factories in these countries therefore might not be designated under the DSP. In countries like Bangladesh, where unions are permitted, workers in export processing zones – where garment producers are likely to be located – do not have such right. Following the same logic, factories in export processing zones in Bangladesh might not be designated. Bangladesh has over 2 million workers employed in apparel production and apparel exports represent over 70% of the country's total exports. As the MFA Forum has indicated, there are no readily available jobs in Bangladesh for workers who may lose their jobs in the apparel industry.

As a result of the program, licensees are likely to end working relationships with many factories and leave workers without jobs. This would seem to be contrary to the WRC's long-held view that companies should stay with troubled factories and improve matters rather than "cut and run."

In most countries of the world, there is no unemployment insurance program to assist workers through a period of unemployment.

3. Does having an NGO in Washington be the final arbiter over decisions made by workers in a factory violate ILO principles regarding freedom of association?

- A. What criteria would be used?
- B. What will happen in locales where unions are allowed but collective bargaining is not?
- C. Does any single organization have the capacity to make these types of judgments in thousands of factories?
- D. What if there are conflicting views?

Comments

The ILO Freedom of Association Convention states that “workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.” Freedom of association does not mean there has to be a union—only that the workers shall have the right to form a union if they so choose. The DSP goes farther, requiring that unions or some other representative body exist in a factory in order to be designated.

Under the DSP, the WRC will be the arbiter of whether or not a union is “legitimate.” It is not clear how the WRC will do this and what criteria it would use. By entering into this arena, the WRC would delve into a tricky area as ILO jurisprudence indicates that only workers themselves have the right to form unions and choose their leaders, and interference from the outside – such as by indicating or suggesting what might be “legitimate” representation – is not allowed. Moreover, it is not clear how the WRC will make the determination of whether temporary contract labor arrangements “have the effect of hindering the exercise of [organizational] rights,” or whether some classes of contract workers -- such as canteen workers, medical personnel, security guards – might be permitted.

The proposal suggests that in addition to having a union or other representative employee body, the factory must negotiate in good faith a collective bargaining agreement with the union or employee body. Many factories that have unions do not meet the more stringent requirements in local law to have the power to negotiate a CBA. This requirement seems to set a very high bar and whittle down even more the number of factories that could meet the test.

If there are conflicting views among organizations regarding whether or not a union is “legitimate,” how will the WRC make a determination?

4. Is the proposed path to achieving a living wage the best?

- A. Does any single organization have the capacity to calculate and verify the payment of a living wage in dozens of countries with thousands of factories?
- B. Will a regulatory regime be sustainable unless it is tempered by market realities?
- C. If the living wage as proposed is only a temporary alternative to wage levels achieved through collective bargaining, why not focus efforts on achieving democratically-elected worker organizations with the ability to negotiate?

Comments

The determination of living wages is complicated both definitionally and in practice. This requirement would pose a huge work load on the staff of the WRC. The two

illustrations in the WRC website – for Indonesia and El Salvador – do not reassure us that calculating a living wage is a straightforward procedure.

- The proposal suggests that living wages would be calculated monthly for every location where a factory is located. This is potentially a huge list of countries/areas, probably over 100 countries and many regions within each country.
- The proposal suggests that prices would be collected monthly in each location—this suggests that the WRC would be doing the equivalent of the work that the Bureau of Labor Statistics does in the United States to calculate the U.S. Consumer Price Index around the world.
- Commodities have different prices – even for commodities that appear to be homogeneous (like rice) the price will vary depending on quality, size of purchase, type of store where it is sold, etc.
- The basket of commodities to be priced probably varies across regions.

There are myriad technical and data problems in calculating the living wage even for one factory. To do it adequately and defensibly on a “worksite-by-worksite” basis and on a monthly basis – as contemplated by the WRC proposal – would require a veritable army of staff. We are not aware of the WRC’s experience in calculating living wages.

The DSP approach of a living wage calculated by the WRC fundamentally disempowers workers and the labor relations process. We should be creating incentives and undertaking capacity building to encourage worker representation and collective bargaining to allow workers and employers to arrive at a wage level that reflects the domestic situation.

National wage fixing machinery is usually tripartite and allows representation by all interested parties. That improves the chances of them arriving at a realistic level. The WRC as the arbiter of living wages would have none of the legitimizing features of a national mechanism mandated by law or established through collective bargaining.

5. Is the proposed supply-chain model economically viable?

- A. Are there enough factories to provide the product differentiation needed to sustain licensing revenues?
- B. Since the entire collegiate-licensing business is a small fraction of the apparel industry, will the higher-quality factories, with many customers beside licensees, simply opt out of manufacturing for licensees imposing these requirements?

Comments

There has been very limited or no engagement to date of the licensee community in the development of the DSP. Licensees would be in the best position to be able to determine how the proposal would affect their activities in terms of identifying sufficient factories to serve all of their needs. To our knowledge, the WRC has not carried out this analysis.

We are aware of a list consisting of 62 factories, 10 where the WRC knows that progress has been made with regard to freedom of association because there is a recognized trade union and another 52 where the WRC has knowledge that there is a trade union. The distribution of these factories is heavily tilted toward Africa. Thus 35 of the factories (56%) are in Africa (14 in Swaziland, 13 in South Africa, 8 in Kenya), 10 in South East Asia (4 each in Thailand and Indonesia, 2 in the Philippines), 6 in the United States (nearly 10%), 5 in East Asia (5 in Cambodia, none in China or Vietnam), 5 in Latin America (2 in the Dominican Republic, and one each in Mexico, El Salvador, and Haiti), and 1 in South Asia (1 in Sri Lanka, none in India, Pakistan, or Bangladesh).

An open question is whether, when faced with the DSP, some of the licensees for whom collegiate products are not central, will decide to terminate licensed production and will move into other forms of production, to the financial detriment of universities.

6. Who is going to pay for the cost increase, and how large will it be?

Comments

The DSP is quite candid in stating that consumers will pay for the cost increase.

The WRC document titled “The Impact of Substantial Labor Cost Increases on Apparel Retail Prices” states that the impact of increasing wages to living wage levels would result in “relatively small increases in retail prices.” However, the legal opinion by Baker for the WRC states that the DSP would result in price increases paid by licensee factories on the order of 10-12%. This may be the “relatively small increase in prices” that the WRC refers to in its paper.

We are not aware of analysis that would show how an increase in the price of logoed goods of 10-12%, while presumably prices of other competitive products remain the same, would affect sales of logoed goods.