

## SLAVE LABOR: HOW COMPANIES CAN MITIGATE LEGAL UNCERTAINTY

The imposition of slave labor is punished under Brazilian criminal law with up to eight years of imprisonment and a fine. However, criminal law adopts a subjective criteria in this area that leaves room for prosecutorial abuse and reputational damage, and this renders mitigating measures highly advisable.

Crime exists whenever there is submission of a person to forced labor or restriction of a worker's freedom of movement. Other related criminal conducts are the restriction of the use of means of transportation, exercising overt vigilance in the workplace or taking possession of one's documents or personal belongings with the aim of holding a person in the workplace.

Surprisingly enough, though, criminal conduct also exists in case of imposition of a negative labor environment, such as exhausting working hours or degrading conditions. This extension poses subtler problems due to its subjective nature and thus potential of impacting even business enterprises conducted in good faith.

Although some courts have decided that the crime requires a restriction on the freedom of the worker's movement, the Brazilian Superior Court of Justice has repeatedly held that punishment should apply regardless of this in case of negative working conditions, since the restriction on freedom is only one of the ways of committing the crime.

The problems that arise from that interpretation relate to the difficulty in differentiating the crime from violations of labor rights, punished by Brazilian criminal law with less severe sanctions.

The Superior Court of Justice has to some extent decreased the uncertainty by holding that only intense and persistent violations of labor rights could give rise to the slave labor crime, but this assessment is made on a case-by-case basis.

The courts have adopted some conditions to define a conduct as slave labor, such as the absence of hygiene conditions for the performance of the job,

the setting of remuneration well below the current minimum wage, the imposition of a workday exceeding ten hours, the absence of supply of protection equipment and the lack of training in the use of dangerous materials.

As a way to inhibit slave labor, Brazilian law enforcement bodies tend to press charges against executives of companies indirectly benefited by slave labor even when there is no evidence of their knowledge of – or involvement with – the criminal activities.

This occurs, for example, in case of outsourcing activities that are subcontracted to workers laboring under degrading conditions, especially when the outsourced persons work on an exclusive basis to the outsourcing business.

Federal Regional Court recently decided that the existence of a single beneficiary of the business activities indicated, at least, willful blindness on the part of the manager. As a result, the manager of the outsourcing company was convicted to more than five years' imprisonment.

This risk can be mitigated by the adoption of measures such as the periodic inspection of outsourced companies, the insertion of clauses that prohibit the unauthorized subcontracting of services and the payment of prices that are compatible with the products sold.

In a recent well known case involving the suppliers of a fashion company accused of slave labor in Brazil, the Federal Court of São Paulo held that the company's executives were not to be convicted because the company adopted reasonable measures to avoid the unauthorized subcontracting of services and established a culture of prior verification of the productive capacity of its suppliers.

When criminal prosecution started, the Federal Prosecution Office emphasized that the lack of such measures would demonstrate that the

company accepted the risk of taking services from workers laboring under degrading conditions. Such criteria were however not set as binding rules, so there is no assurance that even if compliance measures are taken criminal liability will be kept at bay.

Additionally, in case the price paid by the outsourcing to the outsourced company is uncommonly low, this may also indicate that the outsourcer did benefit from the cheap labor conditions, whereas the payment of market values by the outsourcer would be an additional evidence that it acted in good faith.

Another mitigating and highly advisable measure would be to have in place a carefully drafted outsourcing agreement providing for audits of the supplier in the outsourced company, and to actually carry out the audits. The agreement should also foresee clear prohibitions regarding long working terms and unhealthy conditions in the work environment.

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