QUESTIONS AND ANSWERS (Q&A)

1. Which criteria have been used in Brazil to characterize the existence of "labor conditions similar to slavery"? Do other countries use the same criteria?

As a general rule, most countries have used the objective definition linked to forced labor with established concept, which is in the Convention 29 of the International Labor Organization (ILO), ratified by Brazil. (See: HTTP://www.oitbrasil.org.br)

However, in Brazil, article 149 of the Brazilian Penal Code adds other items in addition to mentioning forced labour (ILO Convention 29). Therefore, in Brazil, exhaustive workdays, degrading working conditions and restriction of freedom due to a debt to the employer or responsible agent also characterize crime of “reducing someone to a condition analogous to that of a slave”.

2. Is the recognition of the existence of workforce in conditions analogous to slavery done in an objective way?

Partly it is possible to obtain objectivity in this recognition, because forced labor has a legal definition: restriction of freedom due to a debt to the employer or responsible agent and document retention as a way to retain the employee are assumptions that are direct evidence and are linked to the restriction of freedom.
However, exhaustive workdays and degrading working conditions cannot be identified simply and objectively, at the discretion of interpretation of who supervises or identifies problems, or those who apply the law.

The majority case law interprets the Article 149 of the Brazilian Penal Code as requiring a cumulative assessment, because degrading condition without restriction of freedom includes other illicit and cannot be characterized as condition analogous to that of slavery.

Another view considers that only the practice of conduct described is sufficient to characterize the crime without the need of restriction of freedom. For this current, the degrading condition is sufficient without restriction of freedom, to conclude that there is a condition analogous to slavery.

3. How to establish the existence of forced labor, exhausting workdays and degrading working condition?

The situations described in the Article 149 of the Criminal Code - exhausting workdays, degrading working conditions - cannot be identified in a simple and objective way, but depend on valuation and interpretation from others.

In other words, the current legislation assigns the characterization of the crime in question under the subjective criterion of the one who receives, whether the judge in the trial of the case, whether the oversight when making assessments, which, again, causes great legal uncertainty for companies who can not predict exactly what and which behaviors will feature work in conditions analogous to slavery and operate only with evidence, especially in the subjectivity of degrading working conditions and exhausting journey.

4. Who is qualified for judging the existence or not of the crime under the Article 149 of the Criminal Code?

The judiciary - Federal Court – has the competence for judging the existence or not of the crime under the Article 149 of the Criminal Code because it is a crime against the organization of work.

5. At what point can be stated that there was an actual occurrence of crime?

It can be said that there was the actual occurrence of the crime only after the final and unappeasable decision of a criminal sentence, to be not infringed the constitutional principle of presumption of innocence (Article 5 ° LVII of the Federal Constitution).

6. How is the determination made of the crime of conditions analogous to slavery at the administrative level?

Decree No. 1153 of 13/10/2003 of the Ministry of Labor and Employment sets the procedures to be followed by labor inspectors during their auditing towards the identification and release of workers subjected to forced labor and a condition analogous to slave, for granting the benefit of unemployment insurance.

The auditor shall provide an application form of unemployment insurance (RSDTR) to the rescued employee.

It is noteworthy that the Department of Labor Inspection (SIT in Portuguese), through its Mobile Inspection Group (GEFM in Portuguese) and the Regional Superintendents of Labor (SRTs in Portuguese), prioritize auditing inspections to identify and release workers submitted to conditions analogous to slavery.

For proof, the labor auditor, in addition to typical auditing procedures shall draw up detailed report of Fiscal Action (RAT), which will be forwarded to the head of the inspection when the auditing initiative is from the Regional Superintendent offices to be immediately sent to the Labor Inspection Department (GMT) in Brasilia, and when auditing is done by the Special Mobile Inspection Group, the report will be forwarded by the coordinator to the Department of Labor Inspection.

7. What are the reasons that have led the auditors to "release" workers?

Most of the releases occur because of precariousness of job conditions in companies providing services, usually related to housing or accommodation, in addition to the occasional violations of Regulatory Standard 31, which rules the issues of health and occupational safety in the field.

8. Are the actions of the auditors limited to the workers involved?

On several occasions, inspectors question other workers who are not involved in the possible assessment, if they want to also be released.

This procedure has been causing substantial and unnecessary costs for companies, while it artificially inflates the number of "releases."

9. How can a company defend itself administratively?

The company must prepare, within 10 days of receipt of notice of violation, an administrative appeal to the Regional Superintendent of Labor in the state where the violation occurred. If the company does not have success, the next step is an administrative appeal to Brasilia. In the case the company succeeds in its defense, will the public agency will make an "ex-officio" appeal, and the decision may be altered in Brasilia.

In this context, only with the dismissal and closing of the violation assessments the problem is resolved.

10. What happens if the company is not successful?

After the publication of the decision of the administrative appeal in the Federal Register, the Department of Labor Inspection will give an order requesting the inclusion of the company in the "dirty list" of slave labor, according to Ministerial Decree No. 2 of 03.31.2015.

11. What happens if the company pays the fine and do not present an appeal?

Automatically after the information from the Regional Labor Superintendence of the State to the Department of Labor Inspection in Brasilia, the company will be included in the "dirty list" of slave labor.

12. What is the purpose of the Inter-Ministerial Ordinance No. 2 of 03.31.2015, of the MTE?

The purpose of the Ordinance is to create, within the MTE, a record of employers who have kept workers in conditions analogous to slavery.

13. When is the infringer's name included in the registry?

After the final administrative decision related to the assessment notice of violation issued during the inspection, which identified workers subjected to conditions analogous to slavery. Therefore, the inclusion can take place before a judicial decision.

14. When is the registry updated?

The update is twice a year: June 30 and December 31 of each year.

15. How and when can the company exit the registry?

The labor inspection monitors the company for two years after the inclusion in the registry to verify the regularity of working conditions. After this period, if there is no recurrence, the removal of the names of the registry should occur, provided that the related fines are paid and any labor and social security debts are settled.

16. Is it possible to verify the subjective nature of decisions made by the auditors?

Initially, it must be emphasized that the MTE auditor has functional autonomy, which means he/she have incontestable legitimacy to interpret any legal provision, giving the employer the right of defense in the administrative and judicial spheres. This, in itself, creates a condition in which the subjectivity prevails; there is no standard possible in decisions made during the inspections by different auditors in different locations.

17. How can the actions of the Ministry of Labor related to Ordinance 540 be interpreted?

The Article 2 of Decree 540 of the MTE provides that "The inclusion of the infringer's name in the registry will occur after final administrative decision on assessment notice issued due to action where it was identified workers in a condition analogous to that of a slave".

However the only existing legal provision in the Brazilian law is the one in Article 149 of the Criminal Code which characterize the crime of reducing someone to a condition analogous to that of a slave.

The judicial branch - the Federal Court – is who has jurisdiction to establish the presence or absence of the kind referred to in Article 149 of the Criminal Code because it is a crime against the organization of work, and NEVER the labor auditing unit, who can not establish the existence of work in conditions analogous to slavery, much less take appropriate punitive measures before the final judgment of criminal custodial sentence.

Not only the violation of the constitutional guarantee of the presumption of innocence, the inclusion of the employer on the list violates the constitutional guarantee of principle of due legal process, adversarial principle and the right to a full defense, as it "skips" all

these steps, since the MTE "condemns" the company of the crime of reducing its workers to conditions analogous to slavery without decision process in the criminal sphere.

18. Do the interpretation of Article 149 of the penal code and the actions of the Ministry of Labor and Employment bring legal certainty to the employer?

The legal uncertainty for employers is clear:

a) The characterization of the conditions analogous to slavery in the Criminal Code with use of the term "degrading working conditions," with a subjectivity which could harm the innocent and help the guilty in the criminal sphere, makes clear the need to amend the Criminal Code so that it has a clear and objective text, that provides the right framing when crime actually occurs;

b) At the administrative level there is the need to respect the constitutional principles of the presumption of innocence, principle of due legal process, adversarial principle and the right to a full defense;

c) The need for a clearer, more transparent and objective procedure by the MTE, endorsed in the law, where the independence of administrative and criminal law is respected, to avoid damage to the society, the employer and the workers themselves, with irreparable harm for that employer who, in one way or another, is likely to be entered in the "dirty list" or is already there, without the right to due process, in particular without its final judgment of custodial criminal sentence;

d) The need for amendment/revocation of the Inter-ministerial Ordinance No. 2 of 31/03/2015/MTE guided by logical and reasonable principles that can also bring certainty related to the capital/labor ratio, for example, its inclusion in the list only and exclusively after final judgment of custodial criminal sentence.