

Legal Brief Underlying Better Work's Compliance Assessment Tool: Forced Labour

INTRODUCTION

The Better Work Compliance Assessment Tool (CAT) is used by Enterprise Advisors in all Better Work country programmes to assess enterprise compliance with international core labour standards, as well as national labour law. This brief provides an explanation of the legal standards underlying the questions in the Better Work CAT on Forced Labour. It is intended to serve as an annotation to the Better Work CAT, and is organized according to the structure of that document (by compliance point and question). As issues arise in applying the CAT, additional clarification of the standards will be incorporated.

ILO Conventions, Recommendations and supervisory body documents referred to in this brief

- ILO Convention 29 (C.29): Forced Labour Convention, 1930
- ILO Convention 105 (C.105): Abolition of Forced Labour Convention, 1957
- ILO Convention 181 (C.181): Private Employment Agencies Convention, 1997
- United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956
- Report of the Committee of Experts on the Application of Conventions and Recommendations, Forced Labour Convention (C.29) (2011) (“CEACR Report, C.29 (2011)”) (with reference to specific observations)
- Report of the Committee of Experts on the Application of Conventions and Recommendations, Forced Labour Convention (C.105)
- ILO General Survey, Fundamental Conventions, 2012 (General Survey 2012)
- ILO General Survey, Forced Labour, 2007 (General Survey 2007)
- ILO Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, The Cost of Coercion (2009) (“Cost of Coercion”)
- ILO Special Action Programme to Combat Forced Labour, Combating Forced Labour: A Handbook for Employers & Business (“SAP Employers’ Handbook”)
- ILO Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement (2005) (“ILO Guidance for Legislation”)
- International Trade Union Confederation Guide: How to Combat Forced Labour and Trafficking, Best Practices Manual for Trade Unions (2009)



- United States Department of State, Annual Trafficking in Persons Report, 10th ed. (June 2010 report)

FORCED LABOUR

Forced labour is work exacted under the menace of penalty and for which the person has not offered him/herself voluntarily.¹ Forced labour violates the basic human right to work in freedom and freely choose one's work.

Two basic elements must be present for work to be considered "forced labour":² 1) the worker is not performing the work voluntarily (there is a lack of consent); and 2) the worker is working under threat of penalty.³ Although the lack of consent and coercion are distinct elements under Convention 29, they may overlap. If workers agree to work under threat of penalty, they have not offered themselves voluntarily.⁴

Consent refers to workers' initial agreement to perform the work, as well as their freedom to leave the employment at any time (taking into account reasonable notice requirements). Workers must freely consent to accept the work and they must be free to leave the job and the workplace at all times.⁵ If workers are deceived or fraudulently induced to take on the work, their consent is not considered valid.⁶

Deciding whether work is performed voluntarily often involves looking at pressures that make it difficult for workers to choose not to work, for example, physical confinement in the workplace, psychological compulsion (e.g., threats), deception or false promises about types and terms of work, non-payment of wages, or withholding of workers' identity documents.⁷

In the context of the CAT, the threat of penalty involves coercion on the part of the employer to control, manipulate, deceive and/or override the worker's will.⁸ For vulnerable workers, a relatively small amount of coercion may lead to forced labour.⁹ For example,

¹ C.29, Art. 2.

² The *work* element distinguishes forced *labour* from compulsory education. General Survey 2012, paras. 268, 269.

³ C.29, Art. 2; Cost of Coercion, para. 24. Employers' Handbook, Part 1, page 8.

⁴ General Survey 2012, para. 271; General Survey 2007, para. 38.

⁵ General Survey 2012, para. 271; SAP Employers' Handbook, Part 1, page 8.

⁶ General Survey 2012, para. 271; Cost of Coercion, para. 25.

⁷ SAP Employers' Handbook, Part 1, page 9 (listing examples of ways in which workers can involuntarily enter employment, as well as examples of ways in which they might be prevented from leaving it without penalty).

⁸ More broadly, the coercion can arise from the action of third parties.

workers who are migrants, pregnant or from ethnic minorities often are vulnerable and therefore may be more susceptible to forced labour.¹⁰

Examples of penalties that could be imposed or threatened include: beatings, torture or sexual assault;¹¹ • restrictions on freedom of movement, e.g., prohibiting workers from leaving the workplace or living accommodation;¹² • financial penalties, e.g., burdening workers with unmanageable debt or delaying wage payments to keep workers on the job;¹³ • threatening to report workers to the authorities (police, immigration, etc.);¹⁴ • deportation, for example in the case of migrants in irregular situations;¹⁵ • denying workers access to their personal documents;¹⁶ • termination or exclusion from future employment;¹⁷ • exclusion from community and social life;¹⁸ • refusal of food, shelter or other necessities;¹⁹ • transfer to worse working conditions;²⁰ and • removal of rights or privileges.²¹

Compliance Point: Coercion

1. Free exit from the workplace, dorms and industrial park

While workers may have required hours and they may not be able to come and go as they wish without reason, they should not be confined or detained in the workplace,

⁹ SAP Employers' Handbook, Part 1, page 16. Abuse of a position of vulnerability is a form of psychological coercion that can be used to induce consent. General Survey, paras. 76, 79; ILO Guidance for Legislation, page 22 (under the Palermo Protocol, a position of vulnerability is "any situation in which the person involved has no real and acceptable alternative to submit to the abuse").

¹⁰ General Survey 2012, paras. 294, 295; SAP Employers' Handbook, Part 1, page 16.

¹¹ General Survey 2012, para. 270; SAP Employer's Handbook, Part 4, page 6; ILO Guidance for Legislation, page 20.

¹² SAP Employer's Handbook, Part 4, pages 11-12; ILO Guidance for Legislation, page 20.

¹³ General Survey 2012, para. 294; SAP Employer's Handbook, Part 4, pages 7-9; ILO Guidance for Legislation, page 20.

¹⁴ SAP Employer's Handbook, Part 4, pages 13-14; ILO Guide for Legislation, page 21.

¹⁵ SAP Employer's Handbook, Part 4, pages 13-14.

¹⁶ General Survey 2012, paras. 270, 295; SAP Employer's Handbook, Part 4, pages 13-14; ILO Guidance for Legislation, page 21.

¹⁷ SAP Employer's Handbook, Part 1, page 9, and Part 4, pages 9-10.

¹⁸ General Survey 2012, para. 270; SAP Employer's Handbook, Part 1, page 9.

¹⁹ SAP Employer's Handbook, Part 1, page 9.

²⁰ SAP Employer's Handbook, Part 1, page 9.

²¹ General Survey 2012, para. 270; Cost of Coercion, para. 104; SAP Employers' Handbook, Part 1, page 9.

either during or outside of working hours.²² The employer should not lock the doors to the workplace or dorms to prevent workers from leaving, use penalties to enforce a curfew, or hire security guards to restrict workers' movement.

In evaluating whether restrictions on movement amount to forced labour, relevant factors to consider include, (i) whether management has put strong controls in place to restrict workers' movement, such as locked dormitories, an enforced curfew (e.g., management approval required in order to leave), security guards, or other coercive measures; (ii) the extent to which workers' freedom is restricted, including whether workers can leave the dorms and industrial park after they finish work (including overtime), and on their days off; and (iii) the vulnerability of the workers, including for example, whether they have no real choice but to live in dorms due to lack of choice or feasible alternatives.

Furthermore, if the employer is preventing workers from leaving the workplace, dorms or industrial park in order to extract the maximum amount of labour from the workers, this indicates forced labour.²³

2. Violence or the threat of violence

Violence or the threat of violence may be used by an employer as a “menace of penalty.”²⁴ Threats that lead to forced labour differ from abuse or harassment in that the employer uses the threats in order to coerce workers to work. In some cases, one individual may be used as an example to intimidate the whole workforce.²⁵

3. Delaying or withholding wage payments

Delayed or withheld wage payments can be an indicator of forced labour when employers delay or withhold the payments in order to coerce workers to work. For example, employers may delay wage payments in order to coerce workers to stay on the job, or they may exact unpaid work by withholding workers' wages prior to terminating them.²⁶

4. Forced labour to discipline workers or punish them for participation in a strike

²² SAP Employer's Handbook, Part 4, pages 11, 12.

²³ ILO Guidance for Legislation, page 20.

²⁴ General Survey 2012, para. 270; Cost of Coercion, para. 24 (the menace of penalty in its most extreme form involves physical violence or restraint, or even death threats addressed to the victim or relatives); ILO Guidance for Legislation, page 20.

²⁵ SAP Employer's Handbook, Part 4, page 6 (threats or violence should not be used to intimidate individual workers or the workforce as a whole).

²⁶ Cost of Coercion, para. 80; ILO Guidance for Legislation, page 20; SAP Employer's Handbook, Part 4, pages 7, 8.

Under Convention 105, forced labour may not be used to discipline workers, or to punish workers for participating in a strike.²⁷ Workers may not be subject to forced labour to ensure that they perform their work, nor can they be disciplined using forced labour as a penalty.²⁸ The prohibition on the use of forced labour to punish workers for participating in a strike does not cover punishment for acts of violence, assault or destruction of property.²⁹ Sanctions for such breaches of public order, as determined by judicial processes, may be criminally penalized, including through the use of forced labour.³⁰ However, no sanctions involving compulsory labour, including for example compulsory prison labour, should be imposed on workers for having organized or participated in a peaceful strike.³¹

5. Workers' access to their personal documents (such as birth certificates, passports, work permits and ID cards)

Ordinarily, workers should keep their personal documents themselves. The employer's retention of a worker's identity documents can amount to a "menace of penalty" under Convention 29.³² However, in some cases, it may be acceptable for employers to hold onto workers' documents, for example, if necessary to ensure that the documents are secure. In this situation, workers should freely consent to have their documents held, and they should be allowed to access them at their discretion.³³

Forced labour would be indicated if workers do not have access to their documents, and they feel they cannot leave their job without risking the loss of the documents.³⁴ If workers have consented to have their documents held, and they confirm that their access is adequate, the fact that the employer is holding the documents would not indicate forced labour.

²⁷ C.105, Art. 1(c, d).

²⁸ General Survey 2012, para. 309.

²⁹ General Survey 2012, para. 313.

³⁰ General Survey 2012, para. 313.

³¹ General Survey 2012, para. 314; SAP Employer's Handbook, Part 4, page 9.

³² General Survey 2012, paras. 270, 295; Cost of Coercion, para. 24.

³³ SAP Employer's Handbook, Part 2, page 19, and Part 1, at page 5 (workers should be free to access personal documents stored by the employer at any time upon request). ILO forced labour experts with the Special Action Programme to End Forced Labour have clarified that while ideally, workers should have access to their documents 24 hours per day, 7 days per week, a lesser level of access is acceptable if workers indicate that they have adequate access. The fact that access is not possible while the worker's official documents are being renewed is not an indicator of forced labour, unless it can be shown that the employer is colluding with the authorities in an effort to force workers to remain on the job.

³⁴ SAP Employer's Handbook, Part 2, page 19.

6. Threats such as deportation, cancellation of visas or reporting to the authorities

Workers can be made very vulnerable when their work visa is linked to a particular employer.³⁵ Employers may threaten workers with deportation or other penalties associated with their migrant status to make them work beyond their contract or to force them to stay on the job.³⁶ Migrant workers in irregular situations are not necessarily forced labourers, but they may be if the employer exploits the worker's irregular status to withhold wages or require work beyond the scope of the contract (such as sexual favours or overtime beyond legal limits).³⁷ Employers can manipulate workers' fear not only of deportation, but of torture and mistreatment by the authorities, especially if workers have had bad experiences with law enforcement in their home countries.³⁸

7. Work beyond the expiration of workers' fixed duration contracts

Workers on fixed duration contracts should not be required to work beyond the expiration of their contracts without their consent.³⁹ Migrant workers whose work permits are tied to a particular employer may be particularly vulnerable to this practice.

8. Freedom to terminate employment with reasonable notice

Even where workers initially agreed to their employment, they must remain free to leave the job.⁴⁰ Workers on unlimited duration contracts as well as workers on fixed duration contracts should be free to resign with reasonable notice.⁴¹ Workers who resign before the end of a fixed duration contract may be subject to reasonable penalties for early termination in conformance with national law, but they should not be required to continue working for a significant period of time beyond the reasonable

³⁵ An extreme example of this is the visa sponsorship or “Kafala” system, under which the employer is responsible for the worker’s visa and legal status. General Survey, para. 295; Cost of Coercion, para. 100.

³⁶ SAP Employer’s Handbook, Part 1, page 9, Box 1; Cost of Coercion, para. 24 (denunciation to authorities and deportation can be used as means of psychological coercion to keep workers in forced labour).

³⁷ General Survey 2012, para. 295 (the vulnerability of migrants in irregular situations exposes them to exploitation).

³⁸ Cost of Coercion, para. 24.

³⁹ SAP Employer’s Handbook, Part 3, page 2; SAP Employer’s Handbook, Part 4, page 5.

⁴⁰ General Survey 2012, para. 271.

⁴¹ SAP Employer’s Handbook, Part 3, page 2 (workers on unlimited duration contracts should be able to terminate their employment upon reasonable notice in accordance with legal requirements, without penalty).

notice period.⁴² If workers are not free to leave their employment upon reasonable notice, this may indicate forced labour.⁴³

9. Other coercive tactics

Other possible indicators of forced labour could include employers giving workers drugs to induce addiction or dependence, using psychological or spiritual manipulation (such as witchcraft), or other physical means to control workers and force them to work.⁴⁴ Such tactics impact workers' ability to give free and informed consent to work.

Compliance Point: Bonded Labour

Bonded labour arises when workers are forced to work in order to repay a debt, and their work is not reasonably valued and applied against the debt, or the duration and nature of the work demanded as repayment are not sufficiently limited and defined.⁴⁵ Debt is the root cause of bonded labour.⁴⁶

1. Indebtedness due to non-cash benefits

Non-cash benefits (such as food and housing) should not cause workers to become so indebted to the employer that they cannot freely leave the job.⁴⁷ In-kind benefits should make up only part of a worker's remuneration to ensure that the worker is not deprived of cash, and they should be in line with national law and collective agreements. They should not be used to make the worker dependent on the employer.⁴⁸

2. Debts for recruitment fees owed to the employer or a third party

In some cases, workers may not be free to leave their jobs due to a debt for recruitment fees owed to their employer or a third party.⁴⁹ Forced labour can arise when migrant

⁴² SAP Employer's Handbook, Part 4, page 5 (workers have the right to enter into and leave employment freely, without the threat of penalty, taking into account their legal rights and responsibilities).

⁴³ General Survey 2012, paras. 271, 290 (laws that restrict the right to terminate employment upon reasonable notice turn a contractual relationship based on the will of the parties into one that runs counter to Convention 29).

⁴⁴ SAP Employer's Handbook, Part 1, page 9, Box 1 (threats of supernatural retaliation can be used as means to keep workers in forced labour).

⁴⁵ United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, Art. 1.

⁴⁶ General Survey 2012, para. 294.

⁴⁷ SAP Employer's Handbook, Part 3, page 3.

⁴⁸ SAP Employer's Handbook, Part 3, page 3.

⁴⁹ See generally, Cost of Coercion, paras. 102-133.

workers take on significant debts in order to obtain employment, and they are not free to change employers in the destination country.⁵⁰

Debt coupled with a lack of freedom to leave the employment may indicate forced labour when an employer uses the debt to coerce workers into staying on the job or agreeing to certain (unfavourable) terms and conditions (e.g., by referring to the debt while threatening workers). Forced labour also may be indicated when an employer manipulates the debt to make it more difficult for workers to repay it. Abusive practices such as charging excessive recruitment fees, deceptive wage deductions, and charging excessively high interest rates should not be used to bind workers to employment.⁵¹ The manipulation of debt can trap workers, particularly vulnerable workers, in forced labour situations.⁵²

The ILO recommends that employers, not workers, should pay recruitment fees. Private employment agencies should not charge directly or indirectly, in whole or in part, any fees or costs to workers.⁵³ If workers take on substantial debts in order to cover recruitment fees, including debts to friends, family or other third parties, they may find that they cannot leave their employment, even when the working conditions turn out to be exploitive.⁵⁴ In some cases, their ability to pay off the debt is diminished through contract substitution. For example, migrant workers may agree to certain terms and conditions of employment in their home countries, but then be employed under different terms and conditions in the destination country. When coupled with debts for recruitment fees, these workers are vulnerable to forced labour.⁵⁵

Unfortunately, there is “insufficient consensus” as to what is acceptable with regard to fee charging, sponsorship systems and restrictions on the rights of migrant workers to change their employer.⁵⁶ To protect workers from becoming subject to forced labour, the employer should: (i) use only registered and licensed private employment agencies (if licensing is available);⁵⁷ (ii) ensure that workers receive adequate protection regarding

⁵⁰ SAP Employer’s Handbook, Part 1, page 15.

⁵¹ SAP Employer’s Handbook, Part 4, page 7.

⁵² General Survey 2012, para. 294.

⁵³ C181, Art. 7; Cost of Coercion, para. 107.

⁵⁴ ITUC Guide: How to Combat Forced Labour and Trafficking, at page 13.

⁵⁵ Cost of Coercion, paras. 104, 105, 115, 116; US Department of State, Trafficking in Persons Report, 10th ed. (June 2010), page 41.

⁵⁶ Cost of Coercion, para. 235.

⁵⁷ C.181, Art. 3(2) (recommending licensing or certification systems for private employment agencies).

wages and other working conditions; and (iii) ensure that workers do not bear recruitment fees or costs.⁵⁸

3. Other debt to the employer

Forced labour also can arise from debts unrelated to recruitment fees that are owed to the employer. For example, workers may incur debt to the employer through salary advances or other loans, or through inherited debt. The debt may be manipulated through deceit or fraudulent bookkeeping.⁵⁹ Advances and loans made by the employer to workers, interest charges, and any deductions made from wages to repay the debt should not exceed legal limits, and workers should be fully informed of the conditions underlying loans and advances.⁶⁰

Compliance Point: Forced Labour and Overtime

Coercion is an indicator of forced labour regardless of whether it occurs during regular hours or overtime. Subjecting workers to the coercive tactics discussed above indicates forced labour, even if the tactics are used solely to force workers to work overtime. In a limited set of circumstances, forced labour also can arise when workers are forced to work overtime through economic coercion.⁶¹

1. Paying below minimum wage during normal working hours

If an employer exploits workers' vulnerability by paying below minimum wage during normal working hours, and if workers are so vulnerable that they have no real choice but to work overtime, this may indicate forced labour.⁶² Forced labour also may be indicated if workers have to work beyond normal working hours in order to meet production targets.⁶³ The Committee of Experts has stated that, "in cases in which work ... is imposed by exploiting the worker's vulnerability, under the menace of a penalty, dismissal or payment of wages below the minimum level, such exploitation ceases to be

⁵⁸ SAP Employer's Handbook, Part 3, page 6.

⁵⁹ Cost of Coercion, para. 40.

⁶⁰ General Survey 2012, para. 294; SAP Employer's Handbook, Part 1, page 14, and Part 3, at page 3.

⁶¹ General Survey 2012, para. 292.

⁶² General Survey 2012, para. 292 ("although workers may in theory be able to refuse to work beyond normal working hours, their vulnerability means that in practice they may have no choice and are obliged to do so in order to earn the minimum wage or keep their jobs, or both"). Cost of Coercion, para. 35.

⁶³ General Survey 2012, para. 292 ("where remuneration is based on productivity targets, workers may be obliged to work beyond normal working hours, as only in so doing can they earn the minimum wage"); SAP Employer's Handbook, Part 4, page 10.

merely a matter of poor conditions of employment and becomes one of imposing work under the menace of a penalty, which calls for protection by the Convention.”⁶⁴

Non-compliance with minimum wage requirements or high production targets does not indicate forced labour in all cases. If workers can freely choose not to work overtime and there is no coercion on the part of the employer, this would not indicate forced labour.

2. Forced overtime beyond legal limits through threats of dismissal or other action that would reduce future income

Forced overtime also would be considered forced labour if (i) the number of overtime hours worked exceeds legal limits; (ii) workers have not freely agreed to work the excessive overtime; and (iii) there is economic compulsion, such as threats to fire workers or never offer them overtime again if they don't work the excessive overtime.⁶⁵

The workers' vulnerability should be considered in determining whether they freely agreed to work the excessive overtime.⁶⁶

Compliance Point: Prison Labour

Convention 29 excludes from its scope compulsory labour that is exacted from a person convicted in a court of law when the work is carried out under the supervision and control of a public authority, and the person is not performing the work for private enterprises.⁶⁷ In addition, the Committee of Experts has made clear that the Convention does allow for prisoners to work for private enterprises, if they have freely consented to perform the work without being subject to menace of penalty and the conditions of work approximate those of a free labour relationship.⁶⁸

1. Prisoner labourers freely consent to work

In order for prisoners to work for private enterprises, they must give free, formal and informed consent to perform the work.⁶⁹ Since the consent is given in the context of a lack of freedom, it should be in writing.⁷⁰

⁶⁴ General Survey 2012, para. 292.

⁶⁵ SAP Employer's Handbook, Part 2, pages 19, 20, and Part 4, page 10.

⁶⁶ General Survey, para. 292.

⁶⁷ C.29, Art. 2(2)(c).

⁶⁸ General Survey 2012, paras. 278, 279. Privatized prison labour is discussed at length in the 2007 General Survey at paras. 98-122.

⁶⁹ CEACR Report, C.29 (2011), Cameroon at pages 222-23, Hungary at pages 230; General Survey 2012, paras. 278, 279, 291.

⁷⁰ General Survey 2012, para. 279.

2. Prison labourers receive comparable treatment to non-prison workers

The most reliable indicator of free consent in the context of privatized prison labour is whether the working conditions approximate a free labour relationship.⁷¹ In order to fall outside the scope of Convention 29, conditions of work such as wages, working hours, social security, and safety and health measures should be comparable for prisoners and non-prison workers.⁷²

3. Prison labour is carried out under the supervision and control of a public authority

Supervision and control by the public authority is required to ensure that the conditions of work remain within acceptable limits.⁷³ The level of supervision and control must amount to more than just periodic inspections of the workplace by the public authority. Government labour inspectors should exercise effective, systematic and regular supervision and control in order to conform to Convention 29.⁷⁴

⁷¹ General Survey 2012, para. 279.

⁷² CEACR Report, C.29 (2011), Cameroon.

⁷³ General Survey 2007, para. 112.

⁷⁴ General Survey 2007, para. 112.