

BSCI POSITION ON PRISON LABOUR IN CHINA

Published December 2013

The Situation

Many penal systems across the world allow the possibility of prison labour under certain conditions. However, in China prisoners are often forced to work in conditions that contravene international labour or human rights standards.

In China, the labour reform system (called the “laogaidui”) consists of three categories: Labour reform of convicted prisoners (“laogai”), re-education through labour (“laojiao”), and forced job placement (“jiuye”). While laogai refers to prisoners who have been through the judicial system, lao jiao has been controversial in that it refers to labour imposed on individuals detained without judicial conviction. Although recently, the Communist Party of China decided to abolish the latter practice, it will not be formally abolished until the top legislature amends the laws.

Meanwhile, this has become a lucrative practice in China, forming a profitable and essential part of China’s GNP and economic health. China thus has a vested interest in maintaining this system. Although these practices are promoted at trade fairs in China, buyers should still question them; these practices represent a systemic risk for companies operating in or sourcing goods from China. Failure to uphold the core international labour standards developed by the ILO – such as the forced labour and abolishment of forced labour convention (see end of document) – can expose companies to various bad practices which are explained in this document.

BSCI Principles

The revised BSCI Code of Conduct reads as follows:

No bonded labour: Business partners shall not engage in any form of servitude, forced, bonded, indentured, trafficked or non-voluntary labour.

There are three major indicators that indicate whether a prisoner’s labour is forced, thus violating human rights:

1. **Lack of consent:** The work is not performed voluntarily
2. **Lack of fair remuneration:** There is no legal minimum wage paid.
3. **Lack of fair practices:** Payments are not timely, in legal tender or in full.

The most familiar and accurate notion of prison labour is that which provides a form of occupation for convicts. Such labour is not *per se* a human rights violation, if it fulfils certain conditions, such as being voluntary, or offering a certain level of remuneration. Therefore, the auditor needs to investigate further to assess whether prison labour aims at re-education and rehabilitation of convicts into society or if it represents forced prisoner labour. In any case, in accordance with ILO conventions on the matter (see end of document) BSCI recommends that participants do not engage with producers that use prison labour for reasons which are outlined here.

Potential Risks of Using Prison Labour

BSCI recommends that its participants do not engage with producers using prison labour due to the clear potential risks of deviating from the BSCI Code of Conduct. These are as follows:

1. The prison labourer's rights are not covered under Chinese labour contract law and labour law but under the prison's law and criminal law. Full labour rights are not properly protected.
2. The laws of the local prison and criminal law that govern prison labour include explicit terms indicating that legal minimum wages do not apply in prison labour but are subject to the discretion/decision of the individual prison's management.
3. Due to the prison's rules and regulations, it is impossible for auditors to carry out a full BSCI audit in any of the prison's work sites. Even in case of occasional visits where auditors can conduct partial audits, there is no way to have BSCI participants and the prison enterprises working according to BSCI's development approach or to carry out proper corrective actions where necessary.
4. There should be reasonable overtime pay for overtime work (average weekly working hours not exceeding 48 hours), but prisons are not necessarily required to comply with the rate stated in the Labour Law¹.

Summary

Within the Chinese labour reform system:

- Re-education through labour will be abolished.
- Forced job placement is forbidden by law but does occur in commercial enterprises. This does not comply with the BSCI Code of Conduct.

¹ According to the judicial interpretation by The Supreme People's Court of the People's Republic of China on Provisions of the Ministry of Justice with Regard to the Working Hours of Prisoners, Article No 8: If a prison's production unit requests prisoners to work overtime, compensation leave should be arranged, otherwise a certain amount of overtime pay should be provided according to the length of the overtime working hours. Article No 9 states that: Prison labourers are not entitled to be paid annual leave under the national annual paid leave system.

- The use of labour within the concept of convicted labour reform should be avoided. Although the Chinese government allows commercial parties to outsource to prisons, including orders from overseas buyers, there is an extremely high risk of violating the ILO's standards, and the BSCI Code of Conduct.

BSCI recommends its participants to decline to use such production sites.

In essence, BSCI participants should not use prison labour in China. This might change in the future if Chinese laws evolve to offer protection to prison labourers at the same level as labourers working outside prison, with regard to decent working conditions.

BSCI Refers to ILO Conventions 29 and 105

ILO Core Conventions are a key foundation of the BSCI's principles. With regard to Laogai, Conventions 29 and 105 are relevant:

C29 - Forced Labour Convention, 1930

This Convention requires the suppression of forced or compulsory labour in all its forms. Forced labour is 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.' The ILO Committee of Experts has held that this definition is sufficiently wide to cover debt-bondage. For the purposes of this Convention, the term 'forced labour' does not include obligations such as military service or other normal civic obligations. Also excluded is work exacted as a consequence of a criminal conviction.

Thus, ILO Convention 29 exempts labour when exacted as a result of a conviction in a court of law but only as the work or service executed lives up to a number of conditions. The Convention expressly prohibits prisoners being hired to or placed at the disposal of private entities. However, prisoners in publicly administered prisons are increasingly working for private enterprises (training schemes, producing goods or services destined for a private entity or working outside the prison facilities as part of a pre-release scheme) and secondly, sometimes the prison administration itself has been contracted to private firms. These practices can only be exempted from the Convention's prohibition if the prisoners concerned offer themselves voluntarily, without being subjected to pressure or the menace of any penalty. However, taking into account the captive circumstances of prisoners, the necessary safeguards need to exist to ensure that the prisoners offer themselves voluntarily without the menace of a penalty.

The most reliable indicator for the voluntariness of labour is that the work is performed under conditions which approximate a free labour relationship (wage levels, social security, occupational health and safety).

C105 - Abolition of Forced Labour Convention, 1957

This Convention prohibits the use of any form of forced or compulsory labour - including work following a criminal conviction - as a means of:

- Political coercion or education, or punishment for the expression of political or ideological views
- Workforce mobilisation for the purposes of economic development

- Labour discipline
- Punishment for participation in strikes, or
- Racial, social, national or religious discrimination.

China has not ratified the core ILO Conventions on forced labour. Forced labour is prohibited in China, however, it does occur in commercial enterprises.

BSCI will urge the Chinese government to ratify ILO Conventions No. 29, on Forced Labour, and No. 105, the Abolition of Forced Labour Convention.