FERMA

The Federation of European Risk Management Associations brings together 22 risk management associations in 21 European countries, representing 4,800 risk managers active in a wide range of organisations. FERMA provides the means of co-ordinating risk management and optimising the impact of these associations outside their national boundaries on a European level.

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INTERNATIONAL SOS FOUNDATION

Established in 2011, the International SOS Foundation – Ambassadors for duty of care – has the goal of improving the safety, security, health and welfare of people working abroad or on remote assignments through the study, understanding and mitigation of potential risks. The escalation of globalisation has enabled more individuals to work across borders and in unfamiliar environments; exposure to risks which can impact personal health, security and safety increases along with travel.

The foundation is a registered charity and was started with a grant from International SOS. It is a fully independent, non-profit organisation.

www.internationalsosfoundation.org

This paper can be viewed online at http://learn.internationalsosfoundation.org/FERMA-Paper-2017

The present paper is complementary to the legal review of Travel Risk Management 2015: European Trends – Understanding Health, Safety and Security risk management for work-related international travel and assignments paper.
DUTY OF CARE OWED BY EUROPEAN ORGANISATIONS TO THEIR MOBILE WORKERS

Europe Legal Review, October 2017
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Introduction

It is increasingly common for organisations to expand to new markets across the globe – even in the most remote areas. As international activity increases, so too does the number of business travellers and expats. These mobile workers and their family members often find themselves in surroundings they are unfamiliar with. Accordingly, they may be faced with greater risks and threats to their health, safety and wellbeing.

Furthermore, the recent events in London, Barcelona, Paris and Brussels demonstrate that risk can be also closer to home than we think. Respecting the duty of care agenda, and accounting for employees and their wellbeing is essential. According to a survey, 46% of European organisations say that health and safety incidents had an impact on their business continuity in 2016.1

The health and wellbeing of international assignees and business travellers is the responsibility of the employers. It is their duty of care.

There is a need to have clear organisational policies and strategies in place that are aimed at reducing any risks and promoting the health of the employees abroad.

Where an employee is to be sent abroad, the employer must consider not only ethical implications, but also the legal aspects of such an assignment.

The regulations in this paper are relevant for the situation whereby an employer with headquarter in Europe assigns an employee based in Europe to work in another country for a fixed period. The paper provides a general overview of the legal framework from 14 European countries outlining the employer’s duties toward its employees in the field of safety, health and security in these situations.


Laurent Fourier, Executive Director of the International SOS Foundation
DUTY OF CARE OBLIGATIONS OF EUROPEAN EMPLOYERS FROM...

I. SUMMARY
Duty of care for Belgian organisations means looking into contractual arrangements in terms of job content, working conditions and work organization and taking care of the wellbeing of workers wherever they are performing their job. This is a responsibility that is not only legally embedded, but also constitutes a moral obligation towards collaborators.

II. OVERVIEW LEGAL REQUIREMENTS
From a legal perspective, compliance for companies operating in several countries is much more complex than for domestic organisations. Because international companies operate in different countries, they must adhere to a myriad of national laws. In addition, they must comply with supranational regulations (for example, European Union directives and International Labour Organisation conventions) after they are transposed into national law. They may need to deal with the issues of the extraterritorial scope of legislation and rules pertaining to jurisdiction and choice of law.

CONTRACTUAL ARRANGEMENTS
When international business travellers or assignees work in Belgium, Belgian law is applicable independently of the magnitude or duration of work. When Belgians are sent to other European Union (EU) countries, the choice of law (Belgian or other) depends on the specific laws of each EU country involved. The general principle is that the parties can choose the law applicable to the employment contract. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

1. Such a choice can be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.
2. Furthermore, the parties can decide to select the law applicable to the whole of the employment contract or to only a part of such a contract (provided that such a partial application does not prejudice the consistency of the contract).
3. The parties may also at any time agree to subject the employment contract to a law other than that which previously governed it.

However, the choice of a country law made by the contractual parties can not deprive the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable in the absence of such a choice, it is to say:
- The law of the country in which or, falling that, from which the employee habitually carries out his work in performance of the contract. Or
- Falling that, by the law of the country in which the place of business through which he was engaged is situated.
- Unless it appears from the circumstances as a whole that the employment contract is more closely connected with another country, in which case the contract shall be governed by the law of that other country.

In other words, the aforementioned rules apply if they are more favorable to the employee than the law chosen by the parties in the employment contract.

WELLBEING OF THE WORKERS
No company can ignore prevention. It is a legal obligation. In Belgium, the ‘Welzijnswet’ (the Act of 4 August 1996 on well-being of workers in the performance of their work) stipulates that every employer should take the necessary measures to promote the well-being of the workers at work. The Act is applicable to workplaces in a broad sense that is any place where work is done, regardless whether it is inside or outside an establishment or country.

This ‘Welzijnswet’ presents the national framework for the management of employee well-being at work. It includes all factors related to the conditions under which work is done including safety at work, protection of the health of the worker, psychosocial aspects of work, including stress, violence and harassment, ergonomics, work hygiene and embellishment of the workplace environment.

The Act and the decrees in execution of the Act (Codex on well-being at work) further detail the basic principle. Every employer must have a policy regarding the well-being of the workers at work based on the general prevention principles (avoid risks, combat or limit the risks at source taking technical progress into account, give collective protective measures priority over individual protective measures, ensure information and training of workers).
This prevention policy has to be structural and systematic and should be embedded in the whole management of the organisation. The performance of a risk assessment and the consequent choice of preventive measures is the basis of the policy. The Act allows for some room to implement the policy. It should be seen as an opportunity rather than an obligation to set up a prevention policy that aligns with the company culture.

Summarising, one can say that in order to be aligned with the various legal provisions, an employer is generally duty-bound to implement, as far as reasonably practicable, the following measures to ensure the safety and health of its employees at work:

- Taking preventive measures based upon a risk assessment taking into account the general prevention principles;
- Providing safe work equipment (bringing into service, maintenance, inspection);
- Instituting procedures to deal with workplace emergencies;
- First aid;
- Measures that must be taken if there is serious and imminent danger;
- Information, consultation and participation of workers;
- Adequate instruction and training of workers;
- Enlist competent internal or external services or persons.

WORK ACCIDENTS
In Belgium, the Arboddsongaëllenwer (work accidents act) of 1971 imposes specific responsibilities on employers. A work accident is defined as a sudden unplanned and uncontrolled event happening to a worker in the course of work and resulting in personal injury. In the course of work includes the way to and back from the workplace. Accidents occurring during a work mission abroad are also covered. Every employer needs to have an occupational accident insurance for his workers. Each work accident has to be reported to the occupational accident insurer in order to compensate the victim. Another legal obligation is to register and examine accidents to be able to take appropriate corrective action to avoid similar accidents in the future. For specific work situations, such as working at heights, in confined spaces, asbestos removal, etc special preventive measures must be taken by the employer. The control of major-accident hazards (for instance in the chemical industry) is subject to special regulation.

III. LIABILITY/REDRESS
Expatriates or business travellers to and from specific countries are likely to seek redress for harm under the Western laws where the corporate operates – even if the host nations have not created duty of care legislation. With increased globalisation, employee mobility is expanding to include converse migration of workers from less to more developed countries. The employees range from low skilled workers (such as janitors, service workers, maids, maritime workers, taxi drivers, etc.) to skilled engineers. While the home countries of the employees may not have well developed duty of care cultures and legislation, employers are being held liable to the highest duty of care levels in the home or the host countries, and courts tend to favour over-greater protections for workers.

IV. PREVENTION
Safe and healthy working conditions are essential to the production of quality products and services. Being successful in business implies taking calculated risks. Prevention is the most rational way to protect from risk of accident and disease. Prevention allows eliminating or reducing uncertainty to a certain extent. There is no absolute guaranty, but by assessing risks and taking appropriate preventive action, companies can improve their productivity and ensure continuity. This is equally valid for the situation of workers travelling or residing abroad for work.

VBO-FEB, 2017
Kris de Meester – Manager Health & Safety Affairs
www.vbo-fab.be
If an employee suffers an industrial injury while on assignment abroad, there are examples in Danish case law where in some cases the employee may claim damages under the Danish Liability for Damages Act from the Danish employer. In the assessment of the Danish employer’s liability in such cases, the Danish courts have established on a few occasions that the Danish Working Environment Act is not directly applicable outside of Denmark, but the principles which follow from the Danish Working Environment Act may be applied in order to assess whether the Danish employer is liable. The crucial factor here is whether having regard to all of the circumstances involved, the case has the strongest ties to Denmark.

In a High Court judgment from 2010, for example, the High Court held that a travelling field engineer who was injured while working in China was entitled to damages from his Danish employer. The employment contract had been concluded in Denmark where the parties were based, the main work address of the field engineer was in Denmark, the work in China was carried out separately from the local employees and all necessary communication took place directly between the field engineer and the office in Denmark. On that basis, the High Court held that the ties to Denmark were such as to make the employer subject to the duty to act reasonably and the duty of care imposed on employers under the general rules of Danish law in connection with industrial injuries—which, among other things, build on the principles mentioned in the Danish Working Environment Act. However, the High Court also said that it was evident that the provisions of the Danish Working Environment Act were not directly applicable in China, and in the assessment of liability weight was also given to the fact that, in case of assignments abroad, employers have no or only limited influence on the organisation of the workplace and no or only limited opportunity to supervise the work.

Therefore, in light of Danish case law, it cannot be ruled out that a Danish employer who suffers an injury at work while on an assignment abroad would be entitled to damages from the Danish employer and that, in their assessment of liability, the Danish courts would also consider the principles of the Danish Working Environment Act. Consequently, Danish employers which assign their employees to work abroad should ensure that the employee is not exposed to unreasonable risk and danger while working abroad.

If the employee is about to be assigned to an unstable region or an accident-prone area, the employee’s precautionary measures should be increased and the following may be considered:

- Assess the health status of the employee before the assignment and the risks of illness or injury during the travel and stay abroad (within the limitations of the Danish Health Information Act).
- Provide information and training on what to do in the event of sickness or an accident.

It is important to note that employees also have certain obligations under the Danish Working Environment Act. Among other things, the employees must comply with the health and safety regulations and instructions which apply to the employer in general and their own work in particular. If an employee becomes aware of any errors or deficiencies which may affect health or safety and cannot be remedied by themselves, they must inform the employer.

An employee’s failure to meet the obligations under the Danish Working Environment Act does not generally lead to any direct sanction under the Act. However, it may reduce the employer’s liability to pay damages under the Danish Liability for Damages Act if the employee is contributorily negligent.

The Danish Industrial Injury Insurance Act

As described above, if an employee suffers an injury at work, the employee will be entitled to compensation under the Danish Industrial Injury Insurance Act if the injury qualifies as an industrial injury or an occupational disease. Even though an employee has been assigned to work abroad for a specified period of time, the employee may—if certain conditions are met—continue to be covered by the Danish Industrial Injury Insurance Act. This may be the case in the following three scenarios:

- If assigned to work in another EEA/EAA member state or in Switzerland, the employee will continue to be covered by the Danish Industrial Injury Insurance Act if the duration of the assignment is anticipated not to exceed 24 months and the employee is not assigned abroad to replace another person whose assignment has expired or is expiring.
- If assigned to work in a country which has concluded an agreement with Denmark on industrial injury insurance, the employee will be covered by Danish law in this regard for the period and on the terms and conditions set out in such agreement.
- If assigned to work in an EEA country which has no agreement with Denmark in the field of industrial injury insurance, the employee will still be covered by Danish law in this regard for up to 12 months of the employee’s stay in the other country if the assigning employer is based in Denmark and the assigned employee is based in Denmark at the time of assignment. In addition, there are a number of other conditions which must also be met. If assigned by the Danish State or an organisation performing services or work on behalf of the Danish state, the employee will still be covered by Danish law without any limitation in time.

The above only describes the general conditions which must be met in order for the employee to remain covered by Danish law in this regard. It is always recommendable to seek legal advice in each individual case.

Notwithstanding that the employer has taken out an industrial injury insurance and pays contributions to the Danish Labour Market Occupational Diseases Fund, this is not sufficient to fully discharge the duty of care. The employer is still obligated to make sure that the work is performed in a safe and healthy working environment. Otherwise, the employer risks being met with a claim for damages under the Danish Liability for Damages Act.

The Danish Liability for Damages Act

An employee’s failure to meet the obligations under the Danish Liability for Damages Act if the employee is contributorily negligent.

In that connection, Danish employers should note that the regulatory and legal landscape in Denmark is different from the rest of Europe. Danish employers should ensure that all types of assignment abroad are covered by Danish law in this regard.

When a foreign employer assigns an employee to work in Denmark for a fixed period of time, the Danish Posting of Workers Act will apply. Under the Act, such foreign employees will be covered by the Danish Working Environment Act while performing work in Denmark as well as by several other rules and regulations, including the Danish Act on Equal Treatment of Men and Women, the Danish Equal Pay Act, the Danish Anti-Discrimination Act and the Danish Act on Implementation of Parts of the Working Time Directive. Furthermore, foreign employers assigning employees to work in Denmark in connection with provision of services must register with the Register of Foreign Service Providers (RUT), which is maintained by the Danish Working Environment Authority.

When an employee is assigned to work in another EEA/EAA member state, the Posted Workers Directive (96/71/EC) will usually apply. Under the Posted Workers Directive, Danish employers must comply with health, safety and hygiene standards that are at least as favourable to the employee as those of the country where the employee is carrying out the work. Consequently, Danish employers assigned to work in another EEA/EAA member state will—as a minimum—be covered by local health and safety law.

When a foreign employer assigns an employee to work in Denmark for a fixed period of time, the Danish Posting of Workers Act will apply. Under the Act, such foreign employees will be covered by the Danish Working Environment Act while performing work in Denmark as well as by several other rules and regulations, including the Danish Act on Equal Treatment of Men and Women, the Danish Equal Pay Act, the Danish Anti-Discrimination Act and the Danish Act on Implementation of Parts of the Working Time Directive. Furthermore, foreign employers assigning employees to work in Denmark in connection with provision of services must register with the Register of Foreign Service Providers (RUT), which is maintained by the Danish Working Environment Authority.

It is important to check local health and safety law before assigning any employees to work in that specific country and in order to make sure that the standards or working conditions of that country are acceptable so as to avoid the risk of claims for damages under the Danish Liability for Damages Act. Assuming that regulation will be more or less the same in the home country simply is not sufficient. A lot of countries operate with very different laws and take a very different approach to enforcement. Many legal issues may come into play and will require proper preparation and well-drafted paper work. Detailed advice should therefore be taken.

VI. CONCLUSION

Danish employers should understand the risk involved in assigning employees to work in a foreign country, and ensure that all types of risks have been considered and appropriate measures put in place—whether in the form of training, medical support and screening, insurance, security or the like. In that connection, Danish employers should note that the regulatory and legal landscape may vary from country to country, and also be aware that there is a risk that they may become liable to pay damages if they fail to secure acceptable working conditions in the foreign country in question.
I. INTRODUCTION

In the current marketplace, global travel is becoming the norm, with more employers than ever before sending their employees abroad. The graduates who form part of the millennial generation are keen to work outside their home country, suggesting that there will be even more demand from employees for international postings going forward. However, the risks involved in posting employees abroad are also on the rise.

Recent world events have shown the increased risks associated with global travel from aviation disasters to an increased risk of terrorism activity, from natural disasters to pandemics such as the Ebola outbreak in West Africa in 2014 and the MERS outbreak in South Korea earlier this year, suggesting that there is an inherent risk involved in sending employees to work in other jurisdictions. Every 15 seconds, a worker dies from a workplace accident, an estimate which does not address the legal rights of British nationals (or nationals of any other country) who are employed by local employers in countries other than England and Wales.

II. THE DUTY OF CARE AND ITS ORIGINS

Under the Health and Safety at Work Act 1974, employers owe a statutory duty to ensure the health, safety and welfare of every employee.

There is also a term of mutual trust and confidence implied in every employment relationship. As a result of this term, employers have a duty to provide their employees with, among other things, a working environment that is suitable for the performance of their duties.

Additionally, employers have a common law duty to take reasonable care for their employees. This duty has arisen through the UK case law system and is this common law duty of care that is perhaps most frequently cited by employees when things go wrong when they are working abroad.

The common law duty of care has formed the basis of two high-profile cases brought in the UK courts against the employers of two British men who were fatally injured while working abroad. Palfrey was informed by his employer that he did not need to be concerned about the risk of malaria in West Africa, as he would be working on an oil rig offshore, where there was no risk of being bitten by a mosquito. As such, Palfrey was infected with malaria.

In an employment relationship, it is generally accepted that the first element – a proximate relationship between the parties – is present. As such, in the case of a dispute, a court would usually be looking at whether any injury, disease or death of the employee was foreseeable and whether there was a causal link between the employer’s actions (or lack thereof) and the damage or injury sustained by the employee.

Foreseeability

A foreseeable risk is a risk that a reasonable person should be able to identify. Foreseeability is assessed by reference to all of the circumstances of the case, so what is reasonably foreseeable in one case may not be foreseeable in another.

For example, there would be a foreseeable risk involved in standing next to a tall metallic object in an open space during a lightning storm. Add an umbrella to the equation, and the foreseeability of the risk increases. However, there may be no foreseeable risk in standing in exactly the same position with multiple umbrellas on a bright, sunny day.

Causation

For causation to be established, there must be a link between the action or inaction of the employer and the harm that the employee suffers. The causation principle is often referred to as the “but for” test. For example, if there was an unmarked hole in a walkway which an employer chose not to cordon off or sign post, and an employee was subsequently injured by falling into the hole, there would likely be a causal link between the employee’s failure to sign post the hole and the employee’s injury. Applying the “but for” test for but for the employer’s failure to make the area safe, the employee would not have fallen into the hole and would not, therefore, have been injured. As such, a causal link would likely be established between the failure on the part of the employer and the employee’s injury.

The Duty of Care

Where a common law duty of care exists, employers must take reasonable precautions to protect their employees from any foreseeable risk of injury, disease or death. From a practical perspective, this means that employers owe a duty to their employees to:

• provide safe systems of work;
• take care in selecting proper and competent fellow workers and supervisors;
• provide proper machinery and materials; and
• provide and maintain a safe system of work.

Third party premises

Importantly, these duties don’t only exist while an employee is working at his or her usual place of work. It has long been established that employers who send their staff to work at the premises of others cannot relinquish all responsibility for their safety simply because the employee has left his primary place of work.

Rather, employers must continue to safeguard employees who are working overseas, at a third party premises or at remote locations. An employer must ensure that the employees they may access while working offshore are satisfied, especially if the employees are working from locations where the local safety standards and working practices may not comply with the accepted standards in England and Wales.

Travel

An area that is often overlooked when employees are working abroad is travel, either to or from work on a day-to-day basis or to and from the UK. Generally, when an employee is working from his or her usual place of work, the employer will not have responsibility for the employee’s travel to and from work. The employee will be expected to make his or her own travel arrangements. However, where an employee is working abroad, the duty of care may include a duty to ensure the employee’s safety while in transit.

In the case of Palfrey v Ark Offshore Limited, an employee contracts a fatal malaria infection while travelling to West Africa to work on an oil rig. Mr Palfrey was informed by his employer that he did not need to be concerned about the risk of malaria in West Africa, as he would be working on an oil rig offshore, where there was no risk of being bitten by a mosquito. As such, it was”
Mr. Dufey took no anti-malarial medication before or during his trip. When Mr. Dufey was bitten by a mosquito during an overnight stay on an island en route to the oil rig, he contracted malaria, which proved to be fatal.

In this case, the High Court found that there was a clear failure on the part of Mr. Dufey’s employer to take reasonable care to ensure the safety of Mr. Dufey in the course of his employment, which included travel to and from the oil rig.

In another successful case, an employee brought a claim against his employer when he suffered a slipped disc due to an inadequate minibus that was supplied by his employer to transport him to the third party premises where he was working while abroad. The Court of Appeal found that the employer had caused the employee to travel in conditions that were so extreme that there was a foreseeable risk of any person of an ordinary level of physical robustness succumbing to an injury. These cases show that, when sending employees abroad, it is not just the place of work that needs to be considered, but also the employee’s ability to access the place of work safely.

III. CASE EXAMPLES

The common law duty of care was propelled into the media spotlight following the High Court’s rulings in Cassley v (1) GMP Securities Europe LLP; and (2) Sundance Resources Limited and Dusek & Ors v Stormharbour Securities LLP in 2015. Both cases involved fatal aviation accidents, resulting in the death of British men who had been working abroad at the time of the accidents. In both cases, the employing entities were found to have breached their duties of care towards their employees.

**DUSEK & ORS V STORMHARBOUR SECURITIES LLP**

The Dusek case arose as a result of a helicopter crash in the Peruvian Andes, which caused the death of Mr. Dusek. The flight in question had been scheduled to take Mr. Dusek, who was working for Stormharbour at the time, to visit the site of a hydroelectricity complex that was being built in south-east Peru. However, the helicopter came into difficulties on the way to the site and crashed into a mountain in the Andes mountain range, killing all passengers and crew on board the flight. Mr. Dusek’s family brought a claim against Stormharbour in the High Court, in which it was alleged that, among other things, Stormharbour had failed in its duty as an employer to provide Mr. Dusek with a safe place of work.

When the case was heard, Justice Hamblen found that the incident was essentially an accident waiting to happen. Hamblen considered that:

- it was clear that the flight was a dangerous, high risk one;
- Stormharbour would also have known that Cusco, which was the departure point of the flight, is at a high altitude, making helicopter travel more dangerous.

In delivering judgment, Justice Hamblen stated that any reasonable and responsible employer would have realised that if their employee was to take a helicopter flight from high altitude, across the Andes mountains, to a particularly undeveloped and inaccessible area, there was a real risk of death and the proposed flight raised obvious and foreseeable safety risks.

“...they had fulfilled their duty of care by taking steps involving little time and no cost.”

Against this backdrop, and taking into account the inherent level of risk involved with an travel in the Andes, it was found that Stormharbour should have made at least some inquiry into the safety of the trip and carried out some form of risk assessment. However, it did not.

Justice Hamblen found that if Stormharbour had taken either of these steps, which would have involved little time and little cost, Mr. Dusek would never have boarded the plane as he would not have died. Breach of duty and causation were therefore both satisfied and the company was unable to defend the claim.

CASSLEY V (1) GMP SECURITIES EUROPE LLP, AND (2) SUNDANCE RESOURCES LIMITED

In Cassley v GMP’s employer, GMP was also found to have breached its duty of care to Mr. Cassley when he was killed in an aeroplane crash in the Republic of Congo. The plane that Mr. Cassley was travelling on as part of a site visit to a mine came into difficulties and crashed into the hillsides in a remote area of the Congolese jungle. All passengers and crew died in the collision.

When the case was heard, the Honourable Justice Coulson confirmed that, in addition to all of the general duties of care that Mr. Cassley would have been covered by in the usual course of his employment, GMP owed Mr. Cassley a duty of care in respect of his working at remote third party premises (in this case, the mine) and a duty of care in relation to travel to and from those premises (in this case, the flight).

“...they took no steps at all to satisfy their duty of care.”

When delivering judgment, he concluded that GMP took no steps at all to satisfy their duty of care. Justice Coulson confirmed that GMP’s failures in this case, as listed by Justice Coulson, were numerous.

Firstly, GMP was found to have undertaken no enquiries of any sort about the proposed trip and to have taken no steps to satisfy themselves that the trip was safe, something they had agreed to do in their own policies and procedures. Secondly, GMP failed to ensure that risks would be either avoided or reduced to an acceptable level. Thirdly, they failed to show any leadership or effective action in respect of health and safety. Fourthly, they failed to conduct risk assessments. Fifthly, they failed to subject contractors to selection processes requiring them to prove their safety standards and, ultimately, they failed to put Mr. Cassley’s health and safety at the top of their list of priorities, something that they should have done in the circumstances.

On any reading of the judgment, it is clear that Justice Coulson took a very dim view of the lack of steps taken by GMP to discharge their obligations towards Mr. Cassley.

They failed to show any leadership or effective action in respect of health and safety.

However, a critical difference between Mr. Cassley’s case and Mr. Dusek’s case was that in Cassley, there was no causal link between the failings of GMP and the fatalities. Justice Coulson found that even if GMP had complied with its duties and undertaken additional enquiries, the accident would still have occurred. As such, the claim against GMP was unsuccessful.

In both cases, the employers were refused permission to appeal against the judgements.

This shows the importance of the principle of causation in English law. Even if an employer is in breach of its duties, there must be a causal link between the breach and the injury to the employee for a claim to succeed. However, both cases provide an important reminder to employers of the duty of care that is owed to employees.

LESSONS LEARNED FROM CASSELY

GMP was heavily criticised in the judgment in Cassley for effectively failing to do in their own policies and procedures adequate procedures in place to safeguard their employees can learn lessons from the case, especially in relation to the following points:

**Policies must be implemented effectively**

It is not enough to have health and safety policies in place; businesses must take steps to make sure these policies are actively enforced. During the trial, it became apparent that GMP had put policies and standards of conduct into place, but had failed to ensure these were implemented efficiently. This is a lesson to all employers to make sure that managers understand the aims and objectives of the policies that they have in place and take a holistic view when using the policies on a day-to-day basis. It is not enough to carry out a box ticking exercise against a checklist, real thought must be given to whether the objectives and requirements of the policies that are in place are being satisfied in practice.

**Carry out risk assessments**

Employers should carry out risk assessments in order to properly understand the relative health, safety and security risks that will apply to employees while they are abroad. These need to be tailored to the specific circumstances of the business trip or international assignment, adopting a one size fits all approach will not be enough. As part of the risk assessment process, worldwide risks should be taken into account, such as a heightened risk of natural disaster, terrorist activity or disease. Local factors must also be considered, for example, a lack of medical infrastructure, adequate transport or accommodation in the area the employee is staying or a localised risk of
It is increasingly common for companies to expand into new markets across the globe — even in the most remote areas. As international activity increases, so does the number of business travellers and expatriates. Finnish companies are increasingly going international, too. As a result, the employees of these internationally expanding companies often find themselves in surroundings they are unfamiliar with. Accordingly, they may be faced with greater risks and threats to their health, safety and wellbeing. This brings along new challenges for the employers with international operations when it comes to occupational health and safety, among other things.

Where an employee working regularly in Finland is to be sent to work abroad either on a business trip or on an assignment, the employer must consider not only different practical and even ethical implications, but also various legal aspects relating to the employee’s health and safety at work.

I. FINNISH LEGAL FRAMEWORK

Finnish legislation sets numerous requirements for employers regarding health and safety at work. The most fundamental of the set of regulations is the Occupational Health and Safety Act (738/2002, as amended) (OHSA) (in Fin: työturvallisuuslaki). The OHSA sets forth, among other things, the general duty of the employer to ensure its employees’ health and safety at work. In addition to the OHSA, numerous provisions on occupational health and safety are included in other acts and lower level sets of regulations given on, among others, construction work, chemical and biological factors at work and safety of machinery, to name just a few.

The OHSA as well as other occupational health and safety regulations must be applied with respect to employees, i.e. individuals who, based on a contract, perform work tasks under regulations must be applied with respect to ‘employees’, i.e. of regulations given on, among others, construction work, chemical work. In addition to the OHSA, numerous provisions on occupational health and safety apply in Finland.

Accordingly, the Finnish occupational health and safety authority (Rome I)

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Accordingly, the Finnish occupational health and safety authority

Agency workers are the employe

As mentioned above, the most fundamental occupational health and safety regulation in Finland is the OHSA. The objective of the OHSA is to improve working environments and working conditions in order to ensure and maintain the working capacity of employees, prevent occupational accidents and diseases as well as eliminate other hazards to the employees from work and working environments.

II. OCCUPATIONAL HEALTH AND SAFETY OBLIGATIONS UNDER THE OHSA

As mentioned above, the most fundamental occupational health and safety regulation in Finland is the OHSA. The objective of the OHSA is to improve working environments and working conditions in order to ensure and maintain the working capacity of employees, prevent occupational accidents and diseases as well as eliminate other hazards to the employees from work and working environments. The OHSA protects the employees’ physical health, but also includes an express provision on harassment, or bullying, under which the employer must use available means to take measures to remedy the situation in case it becomes aware of harassment.

During the past years, employees in Finland have become increasingly aware of the employer’s obligations relating to psychological wellbeing at work. All the more often, occupational health and safety crime charges are also pressed based on the alleged breach by the employer to act upon having become aware of bullying or suspected bullying. Thus, when it comes to international working situations, it is important for the employers to acknowledge that their obligations relate also to this aspect of wellbeing at work.
Under the OHSA, the employer has a general obligation to take care of the occupational health and safety of its employees. In addition to the general duty of care, the employer has, among others, the following obligations:

- It shall have a written policy for action on occupational health and safety in order to promote safety and health and to maintain the employees’ working capacity.
- It shall, taking the nature of the work and activities into account, systematically and adequately analyze and identify the hazards and risk factors caused by the work and working environment, and, if the hazards and risk factors cannot be eliminated, assess their consequences to the employees’ health and safety (so-called assessment of risks and hazards). Said obligation is an active employer’s duty to take action, i.e. the employer is required to take concrete measures in order to fulfill the obligation. This includes, among other things, that the analysis and assessment are actively revised and kept up-to-date.
- It shall give its employees necessary information on the hazards and risk factors of the workplace and ensure, among other things, that the employees receive an adequate orientation to the work and working conditions as well as instructions and guidance in order to eliminate the hazards and risks of the work (so-called training and guidance of employees).
- In case it notices that an employee is exposed to workloads in a manner which endangers his health, it shall, by available means take measures to analyze the workload factors and to avoid or reduce the risk.

In addition to the aforementioned, the OHSA includes various provisions on, among other things, work ergonomics, safety devices, cleanliness, physical and biological factors at work and display screen equipment. Although these provisions provide for specific obligations for the employer, they also give guidance as to what kind of matters should be paid attention to when, for example, carrying out the assessment of risks and hazards.

The OHSA sets forth obligations mainly for employers. However, it is good to note that employees also have certain obligations under the OHSA. Most importantly, under the OHSA the employees shall take care of their own and the other employees’ health and safety by available means and in accordance with their knowledge, experience and skills. The employees shall also without delay inform the employer of any such faults and defects they have discovered, for example, in the working conditions or working methods, machinery or other work equipment which may cause risks to the employees’ safety or health.

Although an employee’s breach of his obligations under the OHSA does not in general lead to any direct sanctions or reduce the employer’s liability under the occupational health and safety law, the OHSA does not in general lead to any direct sanctions or reduce the employer’s liability under the occupational health and safety law.

III. EMPLOYER’S OCCUPATIONAL HEALTH AND SAFETY OBLIGATIONS UNDER FINNISH LAW WHEN SENDING EMPLOYEES ABROAD FOR WORK

The OHSA does not contain express provisions on the employer’s obligations when sending employees abroad for work. However, the employer is, under its general duty of care, required to take care of the health and safety of its employees also when they perform their work tasks abroad.

It is taken into account that, as the employer may not have a presence abroad, practical reasons prevent it from attending to its occupational health and safety duties in the same way they could be attended to should the work be performed in Finland. Under an express provision of the OHSA, unusual and unforeseeable circumstances which are beyond the employer’s control are taken into consideration as factors restricting the scope of the employer’s duty to exercise care.

When it comes to the employer sending its employees to work abroad, the assessment of risks and hazards as well as the training and guidance of employees get particular importance over some of the other obligations which require the employer’s presence at the workplace. In addition to having a general policy for action in order to promote safety and health in place, the employer should also prepare particular instructions for working abroad. Those instructions could be included in the general policy for action, but due to various details relating to international working situations, a separate policy is a recommended alternative.

In order to minimize the occupational health and safety hazards to its employees, the employer should analyze the risks relating to working abroad as carefully as possible. Depending on the circumstances, it may be advisable to carry out the analysis with the help of an expert who has knowledge and experience on the conditions in the country of destination. Various matters starting from political and other social risks and particular health risks to infrastructure, travelling and communication possibilities as well as the employees’ returning back home should be taken into account. In addition to the general risks, the risks associated with the individual employee in question (such as the employee’s health) should also be assessed (individual risk assessment).

It is highly advisable to have the assessment of risks and hazards drafted in writing, as that is the only way the employer can prove the assessment has factually been carried out. The risk assessment should also duly be kept up to date and amended if a change in any of the circumstances relating to working abroad gives a reason to assess the risks differently than before.

A proper risk assessment helps the employer to carry out its duty to instruct and train the employees on health and safety matters. Based on the risk assessment, the employer may also issue its written instructions or policy on working abroad.

The policy on working abroad could constitute, for example, the following items:

- A general description of the occupational health and safety risks when working abroad and the occupational health and safety risks specific to different countries of destination.
- Information on safety precautions before the trip and during the trip, such as for example:
  - Finding out additional information on the destination from different resources:
    - Travel documents;
    - Medical examinations;
    - Cultural and religious aspects;
    - Clothing;  
  - Money and currency;
- Communications and keeping in touch with the employer;
- Traffic and travelling safely;
- Drink and food;
- Hygiene and medicine;
- Instructions on how to act in case of sickness or accident;
- Information on how the employer supports the employee’s return back home (longer assignments).

The content of the policy can, naturally, be adjusted depending on, for example, the destination where the employees may work. Since it is the employees themselves who are often the best source of information about potential health and safety risks relating to working abroad, when the business trip or assignment is already taking place, it is also advisable that the policy on working abroad emphasizes the employees’ obligations deriving from the OHSA.

In addition to reminding the employees of their obligation to take care of their own health and safety and that of the other employees, they should be reminded of their obligation to inform the employer without delay of any such factors in the working conditions or otherwise at the workplace which may cause health or safety risks. This is one way the employer can demonstrate that it has attempted to carry out the assessment of risks and hazards as carefully as possible.
It is also advisable to emphasize that the employee’s general duty of loyalty towards the employer requires that the employee duly adheres to the employer’s instructions regarding working abroad and other possible instructions at all times.

The policy on working abroad should be handled in cooperation with the employee(s)/their representatives under the Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (4/2006, as amended) (in Finnish työsuojelun valvonnasta ja työpaikan työsuojeluyhteistoiminnasta) Even if the employees have elected an occupational health and safety representative who is often the employee’s interlocutor in cooperation relating to health and safety matters, it could be advisable to handle the policy together with all employees in any case particularly in smaller workplaces.

In case the employee(s) are to be sent abroad for work for the first time, it would also be advisable for the employer to arrange specific safety training for the employee(s). Such training would be particularly important in relation to longer assignments or for employees who go on business trips repeatedly, especially if the business trips are to countries in which the health and safety situation differs significantly from that in Finland. The safety training could constitute the employer going through the policy on working abroad with the relevant employees and a dialogue around questions the employees might have on health and safety matters. Finally, it is imperative that the policy on working abroad and any amendments thereto are made available to the employees. The policy may be posted, for example, on the company’s intranet or made available by other means deemed appropriate and effective.

IV. EMPLOYER’S OCCUPATIONAL HEALTH AND SAFETY OBLIGATIONS UNDER THE LAW OF THE OVERSEAS COUNTRY

In addition to ensuring compliance with the Finnish legislation, it should be taken into account that the legislation in the country of destination may also set requirements regarding occupational health and safety. This may be the case particularly in situations where the employee is sent overseas for a longer period than a short business trip, i.e. typically for a temporary assignment in another country or other business abroad.

Although in Europe the legal framework of the European Union sets certain similar requirements for different Member States, even European jurisdictions may operate under very different laws. Naturally, outside Europe the differences can be and typically are even greater. Also, the approach to enforcement in different countries may differ from that in Finland significantly. Therefore, in order to gain an understanding of the obligations, but also potential risks involved in case an occupational health and safety risk materializes, it is advisable for the employer to seek local legal advice before sending personnel to work in a given territory.

V. LIABILITY FOR THE BREACH OF OCCUPATIONAL HEALTH AND SAFETY OBLIGATIONS IN FINLAND

An employer’s breach of its occupational health and safety obligations may lead to both criminal and civil sanctions under Finnish legislation. Under the Finnish Penal Code (591/1998, as amended) (in Finnish työntekijäkapina), an employer or the employer’s representative, who intentionally or negligently, for example, violates work safety regulations, or makes possible the continuation of a situation contrary to work safety regulations by neglecting to monitor compliance with them in work that he supervises, may be sentenced to a fine or to imprisonment up to one year for a work safety offence. A criminal liability may also follow, if the employer or its representative neglects to provide for the financial, organizational or other prerequisites for safety at work.

Under the Penal Code, an employer’s representative is a statutory or other decision-making body of the employer entity, such as a managing director or the board of directors. However, an individual who on behalf of the employer directs or supervises the work can also be considered the employer’s representative. The liability for the work safety offence is allocated to the person/-s into whose sphere of responsability the act or negligence belongs.

In the case of an employer sending its employees to work abroad, it is particularly the breach of those of the provisions of the OHSA that have been addressed above that may lead to the employer or its representative facing charges for a work safety offence. In other words, should the employer intentionally or out of negligence fail to carry out the risk assessment, to inform and instruct the employees about the risks relating to work abroad and/or the means as to how to best avoid the risks or how to act, in case the risk materializes, or to take action upon having become aware of a materialized risk, the employer or its representative could face a criminal sanction.

Taking into account that various obligations relating to occupational health and safety in international working situations may fall upon different persons and levels in the organization, the criminal liability may also spread throughout the organization starting from the person/-s responsible for e.g. executing or the risk assessment up to the top management who may have, for example, neglected to ensure that there are adequate financial resources available for fulfilling the employer’s occupational health and safety obligations. In addition to individual punishments in the organization, the legal entity may be sentenced to a corporate fine if a person who is part of its statutory-organization or other management or who exercises actual decision-making authority therein has, for example, allowed the commission of the offence or if diligence necessary for the prevention of the offence has not been observed in the operations of the employer entity. A corporate fine may be imposed, even if the offender cannot be identified or is otherwise not punished.

THE SCALE FOR CORPORATE FINES RANGES FROM EUR 850 TO EUR 850,000.

The scale for corporate fines ranges from EUR 850 to EUR 850,000 depending on the nature and extent of the omission or the participation of the management and the financial standing of the corporation. In addition to criminal liability, the employer or its representative may also be held liable for damages caused to the employee.

VI. SUMMARY

The OHSA imposes a general duty of care on employers to take all reasonably practicable measures to ensure the safety and health of its employees. Although the employer’s possibilities to ensure its employees’ health and safety in their work abroad are limited, the employer cannot ignore its occupational health and safety obligations deriving from Finnish legislation in international working situations. What the actual extent of the employer’s occupational health and safety obligations is depends largely on the particular circumstances at hand in each individual case.

In addition to the obligations set forth in the Finnish legislation, the obligations set forth in the legislation of the country of destination must also be taken into account. This applies particularly in connection with longer assignments. Regardless of whether the employees are to be sent abroad on short business trips or as employees on longer assignments, the assessment of occupational health and safety risks as well as proper corporate policies and instruction/training procedures should be given particular attention and duly executed. To the extent feasible, all measures taken should also be recorded in writing in order to ensure that, if needed, the employer is able to prove that it has duly fulfilled its duty of care and other express obligations under the applicable legislation.

Although Finnish legal practice contains numerous judgments relating to employers’ breach of their occupational health and safety obligations, no precedents on work safety offences involving international aspects so far exist in Finland. However, taking into account that the essential elements of a work safety offence are easily at hand (as explained above, the ‘mere’ violation of work safety regulations out of negligence is sufficient), it is highly advisable that an employer sending its employees overseas for work pays careful attention to its statutory obligations on occupational health and safety in order to avoid sanctions.

CASTRÉN & SNELLMAN, 2015

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1. Through the OHSA, Finland has implemented the European Framework Council Directive 97/87/EC on the introduction of measures to encourage improvements in the safety and health of workers at work.

2. Through the Posted Workers Act, Finland has implemented Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the Posted Workers Directive).
L'OBbligation de sécurITé des empLoyers vis-à-vis de leurs salariés en MISSION à l'étranger

PoinT sur l'aTTenDEMENT FRANçaise AplIcABLE

de manière générale, le droit français impose à tout employeur d'assurer la sécurité de ses salariés dans le cadre de leurs fonctions. cette obligation requiert de tout employeur qu'il fasse preuve d'une vigilance particulière face aux risques sanitaires, géopolitiques et terroristes, notamment à l'occasion des déplacements à l'étranger quelle qu'en soit la durée en mettant en place des mesures adaptées à la santé, la sûreté et la sécurité des salariés envoyés en mission. dans un contexte d'internationalisation accélérée, ces problématiques de sécurité ne cessent de croître avec corollairement la responsabilité juridique de l'entreprise et de ses dirigeants.

I. AU REGARD DU DROIT DU TRAVAIL

LÉGISLATION APPLICABLE
l'article L. 4121-1 du Code du travail, transposant la directive européenne n° 89/391/CEE du 12 juin 1989 relative à la sécurité et la santé des travailleurs, dispose que tout employeur doit prendre les mesures nécessaires pour assurer la sécurité et protéger la santé physique et mentale de ses salariés. Il précise que ces mesures comprennent:

- Des actions de prévention des risques professionnels et de la pénibilité au travail.
- Des actions d'information et de formation.
- La mise en place d'une organisation et de moyens adaptés.

l'employeur veille en outre à l'adaptation de ces mesures pour tenir compte de l'évolution des circonstances. Conformément à l'article L. 4121-2 du Code du travail, l'employeur doit notamment, à cette fin d'éviter les risques, évaluer les risques qui ne peuvent être évités et combattre les risques à la source.

jURISPRUDENCE

La jurisprudence française précise que l'obligation de sécurité de l'employeur est une obligation de résultat découlant du contrat de travail (Cass. soc. 11 avril 2002, n° 00-16.535). Il résulte de cette obligation de sécurité que l'employeur peut être tenu responsable de l'accident survenu à un salarié pendant sa mission. Néanmoins, la Cour de cassation vient de préciser sa position en prenant en compte l'existence d'une politique de prévention des risques psychosociaux mise en place par l'employeur. Elle a ainsi jugé que lorsque l'employeur avait pris les mesures de prévention visées par les articles rappelés ci-dessus, il remplissait son obligation d'assurer la sécurité et de protéger la santé physique et mentale de ses salariés. Il précise que ces mesures comprennent:

- Des actions de prévention des risques professionnels et de la pénibilité au travail.
- Des actions d'information et de formation.
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II. AU REGARD DU DROIT DE LA SÉCURITé SOCIALE

LÉGISLATION APPLICABLE

Les accidents survenus lors du détachement d'un salarié à l'étranger peuvent être pris en charge au titre de la législation des accidents du travail et maladies professionnelles si celui-ci demeure affilié à la sécurité sociale française. Est considéré comme accident du travail, quelle qu'en soit la cause, l'accident survenu par le fait ou à l'occasion du travail (CASS art. L. 411-1). Un tel accident a non seulement un impact sur le taux de cotisations AT/MP de l'entreprise, mais est également susceptible d'engager directement la responsabilité pénale de l'employeur en cas de faute inexcusable (« Lorsque l'accident est dû à la faute inexcusable de l'employeur ou de ceux qu'il s'est substitué dans la direction, la victime ou ses ayants droit ont droit à une indemnisation complémentaire » - CASS art. L. 452-1).

En outre, il n'établissait pas qu'il avait lui-même vérifié le respect des consignes de sécurité, telles que le changement des itinéraires et des horaires des déplacements des salariés entre l'hôtel et le lieu de travail (24 octobre 2007, n° 06/06115). Il doit néanmoins être précisé que les accidents de mission ne relèvent pas tous d'une faute inexcusable de l'employeur. Par exemple, s'agissant d'un journaliste sportif en mission en Allemagne, victime d'une crise cardiaque de retour à son hôtel, la Cour de cassation a jugé qu'il s'agissait d'un accident du travail, mais sans faute inexcusable de l'employeur (Civ. 2e, 3 avril 2014, n° 13-15.003). Ainsi, l'appréciation de la connaissance du danger à l'étranger – et donc de la responsabilité de l'employeur – prend en compte les risques liés :
DUTY OF CARE OBLIGATIONS OF EUROPEAN EMPLOYERS FROM...

I. AUSGANGSLAGE

Auf diese Weise werden Arbeitnehmer mit Risiken konfrontiert, denen sie in Deutschland nicht ausgesetzt waren. Es entspricht seit jeher der Auffassung in der juristischen Literatur und der Rechtsprechung, dass die Arbeitgeber aufgrund ihrer Fürsorgepflicht ihre im Ausland eingesetzten Arbeitnehmer besonders schützen müssen.


II. JURISPRUDENCE

De telles solutions, rendues au sujet de situations circonstancées au territoire français, sont transposables aux situations de détachement international.

IV. AU REGARD DES CONVENTIONS COLLECTIVES
Certaines conventions collectives mettent à la charge de l’employeur des obligations spécifiques, telles qu’une obligation de prise en charge d’un éventuel rachat optique, ou une obligation d’information renforcée.

LATHAM & WATKINS, 2016
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DUTY OF CARE OBLIGATIONS OF EUROPEAN EMPLOYERS FROM THE PERSPECTIVE OF MOBILE WORKERS

II. ALLGEMEINE FÜRSORGEPFlicht DES ARBITEGEBERS


III. KONKRETIERTE FÜRSORGEPFlicht DES ARBITEGEBERS BEI AUSLANDSIEINSATZEN

Unter Berücksichtigung sowohl der bisherigen als auch der augenblicklichen Rechtsprechung als auch der veröffentlichten Literatur zur Fürsorgepflicht bei Auslandseinsätzen wird im Allgemeinen zwischen der Fürsorgepflicht des Arbeitgebers in zeitlicher Hinsicht vor und nach dem Auslandsaufenthalt differenziert.

WÄHREND DES AUSLANDSFAHNTHALT


Aufgrund der vorstehend dargestellten Anforderung an die Fürsorgepflicht des Arbeitgebers bei der Entscheidung seiner Arbeitnehmer im Ausland sowie zur Förderung der Bereitschaft von Arbeitnehmern zu entsprechenden Auslandseinsätzen, empfiehlt es sich für den Arbeitgeber, Sorge für die Arbeitnehmer zu tragen, indem entsprechende Zusatzversicherungen abgeschlossen und qualifizierte, auf Auslandseinsätze spezialisierte Drittanbieter mit der Präsenz im Arbeits- und Notfallbereich der Arbeitnehmer im Ausland gezogen werden. Zudem wird die Schutzunfähigkeit von Arbeitnehmern im Ausland berücksichtigt, die nicht den Anforderungen an den Arbeitnehmer entsprechen.

DUTY OF CARE OWED BY EUROPEAN ORGANISATIONS TO THEIR MOBILE WORKERS
DUTY OF CARE OWED BY IRISH COMPANIES TO THEIR OVERSEAS EMPLOYEES:
A LEGAL PERSPECTIVE

I. INTRODUCTION
At a time of increased fluidity in business movements, the development of global markets in various established and developing industries, and the growth of the concept of “international workers”, it is critical for organisations to be aware of and understand the obligations they have in relation to their workers health and safety.

A recent report on “Modern Mobility” by PwC predicts that the number of globally mobile people over the next two years. 20% of companies surveyed plan to increase the number of employees who work overseas. 1

II. LEGAL FRAMEWORK

In Ireland, the legislation on health and safety in the workplace places very specific obligations on employers. In addition to statutory obligations, an employer owes a common law duty of care to employees by virtue of the contract of employment between the parties and the inherent relationship of “trust and confidence” between employer and employee.

III. COMMON LAW

Employers have a duty of care to their employees under common law. The modern concept of the duty of care owed by an employer to an employee was established in the case of Wilson and Clyde Coal Company Ltd v English in which it was held that an employer owes a “duty of care” to its employees which is personal to the employee and not capable of delegation. This duty includes (I) the provision of a safe place of work, (II) a safe system of work, (III) competent staff, and (IV) proper equipment.

The duty of care however is not an absolute one – an employer will discharge its duty of care to its employees if it does “what a reasonable and prudent employer would have done in the circumstances”.5

In order to give rise to liability on the part of the employer for breaching the duty of care owed to an employee, there must be causation between the employer’s actions, or omissions as the case may be, and the injury which occurred to the employee, also the injury or the risk of such injury, must be “reasonably foreseeable” by the employer taking into consideration the individual circumstances of the employee and the nature of the job (i.e. if an employee is particularly skilled/experienced, the employer may be held to a lesser standard of care for such an employee).6

In addition to ensuring compliance with the 2005 Act and the common law obligations in Ireland, it is important to note that the legislation in the country of destination for an employee being assigned outside of Ireland may also prescribe requirements regarding occupational health and safety. This may be the case particularly in circumstances where an employee is sent overseas for a longer assignment rather than a shorter business trip. Although the legal framework in the EU sets certain similar requirements for member states, the health and safety laws across member states are not uniform and can differ significantly across jurisdictions. Outside of the EU, the differences in law can be and typically are even greater. Furthermore, the approach to enforcement in different countries may differ from that in Ireland. It is therefore advisable for an employer to seek local legal advice before sending employees to work outside of Ireland.
This is compounded by the EU Posted Workers Directive (96/71/EC) (the "Directive"), which applies generally to the assignment of a worker from one member state to another member state within the EU. The Directive outlines a "core set" of terms and conditions of employment which must be guaranteed to workers posted to a member state as if they were national workers of that member state, including health and safety at work. The Directive was transposed into Irish law by s.20 of the Protection of Employees (Part Time Work Act) 2006.16

IV. LOGISTICS
THIRD PARTY PREMISES

As noted above, an employer may be held liable to an employee for injuries sustained arising from an unsafe place of work regardless of whether that place of work is under the employer’s direct control. This is particularly relevant in the context of employers requesting employees to attend locations other than their usual place of work.

In Thomas McMahon v Irish Biscuits Ltd and Power Supermarkets T/A Quinnsworth,17 the plaintiff, a sales representative with Irish Biscuits, suffered personal injuries following a fall during the course of checking the Irish Biscuits stock in a Quinnsworth supermarket. On the day of his fall, the plaintiff had asked a Quinnsworth employee to move pallets which were blocking the shelves but the employee failed to move the pallets. Mr McMahon climbed the shelves and ultimately fell, suffering back injuries. Irish Biscuits argued that in the absence of complaints, it was under no obligation to carry out risk assessments. The High Court held that the employer had a duty to ensure that the facilities provided to employees, including by its customers, did not threaten the employees’ safety. This duty was held to extend to monitoring the facilities its employees used while on its customer’s premises and ensuring that such premises provide a safe working environment.

This is an important consideration for employers sending employees to work at client/third party locations and/or on secondment. Where an employee is assigned to work outside of Ireland, the duty of care may include a duty to ensure the employee's safety while travelling to the new place of work. Therefore when sending employees abroad, it is not just the place of work that needs to be considered, but also the employee’s ability to safely reach and access the place of work.

V. REGULATION

HEALTH AND SAFETY AUTHORITY

The HSA is responsible for enforcing health and safety at work in Ireland. It provides information to employers, employees and self-employed people on workplace health and safety.

According to the HSA Annual Summary of Statistics for 2014, 56 fatal and 7431 non-fatal workplace accidents were reported to the HSA in 2014. This was an increase of 9 fatal and 833 non-fatal accidents from 2013.18

The HSA has published guidelines on the following issues to assist employers with their obligations:

- Manual Handling of Loads;
- Display Screen Equipment;
- Work at Heights;
- Safety signs at places of work;
- Protection of young persons;
- First Aid;
- Night work and shift work;
- Pregnant, post-natal and breastfeeding employees.

Whereas these guidelines are not set down in statute, they are considered best practice and regard would be given to them in any complaint hearing/proceedings involving the subject matter which is provided for in the guidelines.

Workers assigned to work outside of Ireland (with contracts governed by Irish law) and workers of other EU member states on long-term assignment to Ireland may be subject to regulation under the Irish health and safety regime and these guidelines will be relevant in such circumstances.

FURTHER INDUSTRY SPECIFIC REGULATION

Employers should be aware that additional legislative provisions may apply depending on the particular industry in which the employer operates, for example, construction, healthcare, quarrying, fishing, catering and hospitality, etc.

A full list of occupational health and safety legislation, dangerous substances legislation and associated codes of practice, can be found on the HSA website.19

In addition the HSA has issued a number of codes of practice which may be of relevance when assessing if an employer’s obligations regarding outdoor workers (HSA, Code of Practice for Working on Roads, Code of Practice for Roof Work, etc).

VI. LIABILITY AND ENFORCEMENT

Workplace accidents may expose employers to the risk of litigation and reputational damage. In serious cases, the employer may also be exposed to the risk of criminal prosecution.

Workplace accidents may expose employers to the risk of litigation and reputational damage. In serious cases, the employer may also be exposed to the risk of criminal prosecution. The HSA is responsible for enforcing health and safety and obligations, and identifying issues with health and safety compliance.

On finding an issue with health and safety compliance, HSA inspectors may serve notice(s) on the relevant organisation requiring that certain issues be remedied within a particular timeframe.

The HSA inspector may also apply to the High Court for an order prohibiting or restricting the use of a place of work.20 Courts may also impose fines or prison sentences (or both), depending on the seriousness of the offence. The HSA also has the right to publish the names and addresses of those subjected to a prohibition notice, High Court order or a penalty following a court conviction.21

Under the 2005 Act, directors and senior managers carry particular responsibilities if it can be shown that an offence committed by the organisation was attributable to neglect, connivance, consent or authority on their part.22

The duty has also been extended to others with responsibility for safety in particular workplaces, such as the project engineer on a road alignment project and the site manager on a construction site.23

Outside of the 2005 Act, an employee could take proceedings against their employer alleging they have suffered a personal injury as a result of their employment and their working conditions/ workplace hazards, etc. It is important to note that such a cause of action could be alleged in respect of working in Ireland, working overseas, or in transit, depending on the circumstances.

The obligations of employers under the 2005 Act, and indeed the common law duty of care, are not restricted in their application to Ireland. The health and safety of employees has to therefore be considered in the context of overseas travel also.

Finally a whistleblower report alleging wrongdoing on the part of an organisation based on the health and safety of an individual being, or likely to be endangered, may be considered a ‘protected disclosure’ within the meaning of the Protected Disclosures Act 2014, meaning that an individual who makes such a disclosure will have certain statutory protections in respect of their actions.

ARTHUR COX, 2017
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3. The HSA is a national statutory body established in 1999 with responsibility for ensuring that workers are protected from work-related injury and ill-health through enforcement of occupational health and safety law, promotion of accident prevention and provision of information and advice across all sectors.
8. [2003] BIR 76.
15. Section 8 of the 2005 Act.
LA NORMATIVA SPECIFICA: IL COSIDDETTO TESTO UNICO SICUREZZA E IL DECRETO LEGISLATIVO N.231 DEL 2001

La normativa specifica è per lo più contenuta nel cosiddetto Testo Unico Sicurezza, ed è volta alla prevenzione dell’infortunio attraverso l’individuazione, la gestione e la riduzione dei rischi connessi allo svolgimento dell’attività lavorativa.

Il datore di lavoro deve al riguardo mettere in pratica una serie di regole dettagliate e stringenti. Diversi sono gli obblighi, ma i principali sono:
- la valutazione dei rischi connessi allo svolgimento dell’attività lavorativa per individuare le fonti di pericolo e l’entità del danno che ne ne deriva;
- la predisposizione delle misure di sicurezza necessarie per prevenire il rischio e proteggere i lavoratori;
- l’identificazione del preposto al loro funzionamento e rispetto;
- l’attuazione delle misure così individuate, soprattutto attraverso l’informazione e la formazione dei lavoratori.

Un corretto modello di organizzazione e gestione dovrebbe quindi contenere, tra l’altro:
- a) misure di prevenzione e protezione per il rispetto di tutti gli standard tecnico-strutturali di legge relativi ad attrezzature, impianti, luoghi di lavoro, agenti chimici, fisici e biologici;
- b) forme di vigilanza sull’adempimento degli obblighi, delle procedure e delle istruzioni in materia di sicurezza;
- c) venifiche periodiche sull’applicazione e sull’efficacia delle procedure adottate;
- d) un idoneo sistema di controllo sull’attuazione del medesimo modello e sul mantenimento nel tempo delle condizioni di donità delle misure adottate;
- e) un sistema disciplinare idoneo a sanzionare il mancato rispetto delle misure indicate nel modello.

IL DATORE DI LAVORO È CHIAMATO A TUTELARE LA SICUREZZA DEI LAVORATORI, OVUNQUE ESSI OPERINO E, DUNQUE, ANCHE NEL CASO IN CUI LA PRESTAZIONE DELL’ATTIVITÀ Venga EFFETTUATA ALL’ESTERO

II. GIURISPRUDENZA

Il CASO “SOLARE ELETTRICA S.R.L.”

Un lavoratore italiano muore fulminato in Francia, dove si trovava per eseguire, nell’ambito di un subappalto, dei lavori sulla linea elettrica. L’amministratore unico della ditta di lavoro Solare s.r.l. è ritenuto colpevole di omicidio colposo e condannato a otto mesi di carcere oltre al risarcimento dei danni. Secondo il Tribunale, il datore di lavoro ha, tra l’altro, colposamente omesso:
- di formare all’avvocato di un datore di lavoro che aveva assunto un dipendente un documento di protezione individuale;
- di vigilare in ordine alla mancata fornitura di detti dispositivi da parte del committente e dell’appaltatore;
- di formare professionalmente e di informare preventivamente il lavoratore dei rischi connessi all’esecuzione dei lavori affidatigli;
- di vigilare in ordine al mancato adempimento di tali obblighi da parte del committente e dell’appaltatore;
- e di sottoporre il lavoratore alla sorveglianza sanitaria a cura di un medico regolamentare.

La Corte di Cassazione considera il datore di lavoro, nella persona dell’amministratore unico responsabile a prescindere dalla circostanza che il lavoratore fosse all’estero, in quanto “a lui incombeva l’obbligo di adempiere a tutte le misure di sicurezza e di prevenzione necessarie a prevenire infortuni o a garantire la sicurezza dei dipendenti che ad essi, in vario modo, facevano capo.”

L’INVIO DEL LAVORATORE FUORI DALL’EUROPA

Il legislatore italiano ha affrontato la questione introducendo un’ulteriore norma ad hoc, che impone al datore di lavoro di prevedere idonee misure in materia di sicurezza e tutela della salute, oltre un’assicurazione per ogni viaggio di andata e ritorno dal luogo di destinazione e per i casi di morire o di invalidità permanente.

Il datore di lavoro è in sostanza tenuto ad applicare gli stessi principi generali che regolano la materia in Italia, adattando le misure alla specifica situazione concreta, che può variare a seconda del luogo di lavoro.

Linvio di propri dipendenti in taluni paesi, dotati di una legislazione specifica in materia di sicurezza (che potrà essere comparata con quella italiana), richiede da parte del datore di lavoro un certo tipo di adeguamento. Tutt’altro tipo di intervento, invece, richiede l’invio

INTRODUZIONE ALLA LEGISLAZIONE ITALIANA SUL DUTY OF CARE

In un mondo globalizzato e caratterizzato da una sempre maggiore facilità di spostamento, anche le imprese italiane ricorrono sempre più spesso all’invio di personale all’estero. Epidodi di cronaca, anche recenti, mostrano come ogni datore di lavoro debba prestare particolare attenzione al tema della sicurezza dei dipendenti inviati in missione all’estero, specie nel caso in cui la prestazione lavorativa debba svolgersi in paesi che non presentino adeguati standard di sicurezza. Il presente contributo intende dare un inquadramento generale di tale tema, riconducibile al cosiddetto “duty of care” (sulla base delle leggi italiane in vigore al momento in cui è stato scritto).

I. QUADRO LEGISLATIVO

La norma generale e di sistema è la norma del datore di lavoro “è tenuto ad adottare nell’esercizio dell’impresa le misure che, secondo la specialità del lavoro, l’esperienza e la tecnica, sono necessarie a tutelare l’integrità fisica e la personalità morale dei prestatori di lavoro”. A questa norma i giudici italiani fanno da sempre riferimento nella loro giurisprudenza, anche nella comprensione di eventuali infortuni sul lavoro, se l’adozione di quelle misure avrebbe potuto evitarli o prevenirli.

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IL RECENTE “CASO BONATTI”
Nell’agosto del 2015, in Libia, vengono sequestrati quattro lavoratori italiani dell’impresa Bonatti, durante il loro trasferimento verso il luogo di lavoro. A seguito del sequestro due di loro perdono la vita. La Magistratura italiana, dopo questi avvenimenti, ha deciso di aprire un indagine penale a carico del manager italiano responsabile della logistica in Libia. Il reato che viene contestato, secondo quanto emerge dai principali quotidiani, è l’omicidio colposo e l’accusa parrebbe vertere sul fatto che il manager non abbia adottato tutte le norme che tutelano le condizioni di sicurezza e di salute sul luogo di lavoro.  30 Le indagini del pubblico ministero sembrerebbero quindi prendere le mosse dai contenuti e dalle tutele garantite dall’art. 2087 cod. civ.

III. CONSEGUENZE
La neglielgere attuazione dei principi in materia di sicurezza sul luogo di lavoro non è dunque priva di conseguenze per il datore di lavoro italiano, sia sotto il profilo penale che civile. In estrema sintesi, per quanto riguarda l’aspetto civilistico, le conseguenze sono rappresentate dalla condanna del datore di lavoro al riscatto del danno. Per quanto riguarda l’aspetto penalistico, non solo si potrebbe essere la condanna del responsabile dell’attuazione degli obblighi di tutela, ma si potrebbe anche verificare l’irrogazione di una sanzione (anche a carattere interdittivo) in capo alla società datrice di lavoro.

BONELIERDE, 2017
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DUTY OF CARE FOR DUTCH EMPLOYERS

I. SAMENVATTING
Voor Nederlandse organisaties betekent zorgplicht kijken naar contractuele afspraken in termen van de inhoud van het werk, arbeidsvoorwaarden, werkomstandigheden en arbeidsorganisatie en zorg dragen voor het welbevinden van werknemers, waar ze hun werk ook uitoefenen. Het gaat hierbij niet alleen om een verantwoordelijkheid die juridisch verankerd is, maar ook om een morele verantwoordelijkheid ten aanzien van medewerkers.

II. OVERZICHT WETTELIJKE VERPLICHTINGEN
Vanuit juridisch oogpunt is het naleven van wettelijke verplichtingen vele complexer voor ondernemingen die in verschillende landen actief zijn dan voor organisaties die zich beperken tot de thuismarkt. Omdat internationale organisaties in verschillende landen opereren, moeten ze zich aanpassen aan een veelheid van nationale regels. Daarbovenop komen nog eens internationale regels (bijvoorbeeld EU-richtlijnen en conventies van de Internationale Arbeidsorganisatie) die worden omgezet in nationale wetgeving. Ze zullen ook rekening moeten houden met zaken als het extraterritoriaal toepassingsgebied van wetgeving en met regels op het vlak van jurisdictie en rechtskeuze.

CONTRACTUELE BEPALINGEN
Wanneer internationale zakenezigers of expats in Nederland werken, kan het Nederlands dwingend recht van toepassing zijn, ongeacht de omvang of de duur van het werk. Wanneer Nederlanders naar andere landen van de Europese Unie (EU) worden uitgestuurd bestaat veelal de wens het Nederlands arbeidsrecht te handhaven. Het algemene principe is dat de partijen kiezen welk recht van toepassing is op de arbeids-vereenkomst (Verordening (EG) nr. 593/2008 van het Europees Parlement en de Raad van 17 juni 2008 inzake het recht dat van toepassing is op verbintensities uit overeenkomsten (Rome II)).

1. Deze keuze kan op expliciete of impliciete wijze gebeuren (dit houdt in dat het voldoende duidelijk blijkt uit de bepalingen van de arbeidsvereenkomst of de omstandigheden van het geval).
2. De partijen kunnen er trouwens voor opteren om een recht te kiezen dat toepasselijk is op de hele arbeidsvereenkomst of op slechts een deel ervan (op voorwaarde dat een dergelijke gedeeltelijke toepassing geen afbreuk doet aan de coherente van de overeenkomst).
3. Ten slotte kunnen de partijen op elk ogenblik overeenkomen om de arbeidsvereenkomst te laten beheersen door een ander recht dan het recht dat de arbeidsvereenkomst ervoor beheert.

Er zijn echter beperkingen aan het principe van de keuzevrijheid. Zo kan de rechtskeuze van de partijen niet tot gevolg hebben dat de werknemer de bescherming verliest die hij geniet op grond van de dwingende bepalingen van het recht van het land dat bij gebreke van rechtskeuze hem op naam van de overeenkomst zou zijn geweest, zodat de dwingende bepalingen van:
• het recht van het land waar of, bij gebreke daarvan, van waaruit de werknemer te installeren in Nederland zijnde het recht van het land dezelfde economische band heeft met een ander land, het recht van dat andere land.
Met andere woorden, de voorafgaande dwingende bepalingen zijn in toepassing in de mate waarin zij voor de werknemer gunstiger zijn dan het recht van de partijen in hun arbeidsvereenkomst hebben gekozen.

ZORGPLICHT IN NEDERLAND
Nederland kent in haar regelgeving verschillende onderdelen voor de zorgplicht ten aanzien van werknemers die internationaal worden uitgezonden. Allereerst bevat artikel 7:655 van het Nederlandse BW de verplichting om de werknemer te informeren over een aantal zaken bij het werken in het buitenland, zoals zijn
DUTY OF CARE OBLIGATIONS OF EUROPEAN EMPLOYERS FROM…

...SOCIALE ZEKERHEIDSCATEGORIE, DE HUISHOUDESTUIN EN DE WIJZE WAAROP DE TERUGKREEGER IS GEREGEELD. BIJ DE CONTINUERING VAN DE NEDERLANDSE ARBEIDSVEREENKOMST HOORT OOK HET LOONDOEBETALINGSPERVERBINTENISCHIJN BIJ ZIEKTE GEDUREND DE EERSTE 104 WEKEN. EERST DANNA KAN EVENTUEEL SPRAKEN ZIJN VAN EEN ARBEIDSMISGEZINSFACILITEITSAANVRAGING.

Het is immers lang niet meer ongewoon dat werknemers in opdracht van hun werkgever tijdelijk of voor langere duur in een ander land werkzaamheden uitvoeren. Vaak is dat verblijf niet uitsluitend werk gerelateerd en zal een werknemer in verband met het werk ook enige privétijd in het buitenland doorbrengen. Waar de grens van werk en privé gelegd moet worden is niet altijd duidelijk. Dat is wel relevant, met name nu de werkgever aansprakelijk is voor de schade die een werknemer kan opleveren in de uitoefening van zijn buitenlandse werkzaamheden.

Uitgangspunt is dat Nederlandse arbeidsrechts onveranderd van toepassing blijft, gedurende de buitenlandse werkzaamheden. Aansprakelijkheid voor de schade die een werknemer gedurende de uitoefening van zijn werkzaamheden of mogelijk daarbuiten lijdt, dient dan ook beantwoord te worden aan de hand van de artikelen 7:658 BW (zorgverplichting werkgever/aansprakelijkheid) en 7:611 BW (goed werkeervoorwaarden).

In het algemeen bovat artikel 7:658 BW de zorgplicht van de werkgever voor de veiligheid van de werkplek van de werknemer. Daarvoor zal de werkgever die maatregelen moeten nemen die redelijkerwijs nodig zijn om te voorkomen dat de werknemer in de uitoefening van zijn functie schade lijdt. Gezien deze formulering lijkt het te gaan om een inspanningsverbintenis en niet een resultaatsverbintenis. Schiet de werkgever te kort in zijn zorgplicht, dan is hij jegens de werknemer aansprakelijk voor de schade die deze in de uitoefening van zijn werkzaamheden lijdt. De schadeplicht van de werkgever komt te vervallen indien hij aantoont dat hij zijn zorgplicht nagekomen is, of de schade het gevolg is van opzet of bewuste roekeloosheid van de werknemer. De grens van aansprakelijkheid van een werkgever volgens 7:658 BW ligt in de uitoefening van de werkzaamheden. De buitengrens daarvan zal in beginsel liggen waar nog zeggenschap over de werkplek bestaat en mogelijkheid tot het geven van aanwijzingen. De Schieding tussen werk of privé ligt daarbij overigens niet duidelijk. Denk daarbij aan schade die is opgelopen tijdens een personeelsuitje.

Mogelijkheid kan de grens verder duidelijk gemaakt worden aan de hand van de vraag of er nog voldoende band met de uitoefening van de werkzaamheden bestaat. Die speelt met name indien meerdere dagen in een ander land werkzaamheden worden uitgevoerd en een werknemer in dat land ook enige privétijd doorbrengt. De Nederlandse jurisprudentie kent daar een aantal voorbeelden van.

Behalve de specifieke bepalingen in het Nederlands burgerlijk rechtsboek is er ook een algemene bepaling, die inzake goed werkgewestigensheid, die een inkadering kan zijn voor de aansprakelijkheid van de werkgever wanneer zijn werknemers in het buitenland werken.

SPECIFIËKE ZORGPLICHTWETGEVING

Verschillende landen – meer bepaald in West-Europa, de Verenigde Staten, Canada en Australië – hebben wetgeving uitgewerkt met betrekking tot de zorgplicht van de werkgever. In andere landen bestaat dergelijke regelgeving er niet. Globaal gezien is het weinig waarschijnlijk dat opkomende markten zoals China, India en Brazilie vandaag de dag zullen nemen om stil te staan bij de zorgplicht .

In de meeste gevallen hebben die landen geen regelgeving over de zorgplicht van de werkgever opgesteld of afdwingbaar gemaakt. Bevorderlijk kunnen werkgevers actief in die landen niet op beide oren slapen.

III. AANSPRAKELIJKHEID

Expats of zakenreizigers van en naar verschillende landen zullen geneigd zijn te proberen geleden schade te verhalen krachtens de westerse wetgeving waar hun bedrijven onder vallen – zelfs wanneer de gastlanden geen wetgeving inzake zorgplicht hebben uitgewerkt. Met de toenemende mondialisering worden werknemers steeds mobiler, met inbegrip van een omgekeerde migratietoestroom van minder ontwikkelde naar meer ontwikkelde landen.

Het gaat zowel om laaggeschoolde werknemers (portiers, onderhoudspersoneel, huishuispersoneel, matrozen, taxichauffeurs, etc.) als om hoogopgeleide ingenieurs. Tervelv de zorgplichtcultuur en –wetgeving in de thuiskant en van de werknemers nog in de kinderschoenen kan staan, worden werkgevers toch geacht het hoogste zorgplichtniveau van het thuis- of gastland toe te passen. Rechtsbanken neigen ook naar een steeds hoger beschermingsniveau van werknemers.

IV. PREVENTIE

Volgeloze en gezonde arbeidsomstandigheden zijn een essentieel element bij de productie van kwaliteitsgoederen en -diensten. Bij succesvol zakendoeën hoort het nemen van rekening met de risico’s. Preventie is het meest rationele middel om zich tegen risico’s te beschermen. Preventie maakt het mogelijk onzekerheden weg te werken of te beperken, maar geeft nooit een absolute garantie. Er zullen altijd incidenten en ongevallen zijn die de risico’s in en schatten risicomaatregelen te nemen, kunnen bedrijven hun continuïteit en productiviteit verbeteren, en dat geldt ook voor de situatie van medewerkers die reizen of tijdelijk in het buitenland verblijven.

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in place when necessary. It also means that working environment issues need to be taken into account in the daily decision-making and should be assessed continuously.

The jurisdiction of the WEA is limited to Norwegian territory and the territorial waters, with certain exceptions. This means that a Norwegian employer will have no direct obligations under the WEA with regard to the work carried out by an employee abroad. However, the WEA will be applicable in the time period prior to the assignment. The WEA imposes obligations on the employer whereby the employer has to ensure that the employee has access to the relevant information and training and holds an adequate level of risk-awareness for the work to be performed. Such information and training obligations will have to be addressed by the employer prior to the assignment. Before sending the employee abroad the employer therefore should take all reasonable measures to ensure that the employee is:

Suitable to conduct the work in question (in terms of education, training, experience, etc.);

Informed about the risks and dangers involved in the assignment (both in respect of the work activities as well as the general situation in the country where the work will be performed);

Informed about how to avoid such risks and danger and how to act in case of an emergency.

As stated above, the WEA does not provide any distinct obligations for the employer with regard to employees working in other countries. However, even if the WEA as a main rule is limited to Norwegian territory and territorial waters, it is fair to assume that the obligation to secure a safe and sound working environment in the WEA to a certain extent will have some implications for the employer’s duties also in relation to work being performed in another country.

First of all, the employment contract may state that Norwegian law will apply also when work is performed in a foreign country. Secondly, Norwegian employers might feel uncomfortable completely overlooking their domestic obligations in foreign countries. Thirdly, the underlying obligation to secure a safe working environment might also be relevant in relation to a consideration of negligence under the Act relating to compensation for damages.

In light of this, a caring employer should consider a number of measures before sending an employee abroad. For instance, the following may be considered appropriate in this regard:

- Perform, and continuously keep up-to-date, adequate risk analysis of the assignment.
- Provide the employee with necessary medical support.
- Make sure that sufficient insurance coverage is put in place.
- Give due consideration to accompanying family members.

If an employee is about to be sent to an unstable region or a high-risk area, the precautionary measures should be increased. In such a case the following may be considered:

- Assess the health status of the employee before travel and the risks of likely illnesses or injuries during the travel and stay abroad;
- Provide immunization programmes for the countries to be visited in accordance with international guidelines;
- Provide information and training on what to do in the event of (i) sickness or injury, or (II) an emergency or disaster during the trip;
- Consider establishing routines for regular communication/contact with the employee;
- Consider providing guidelines for off-duty hours and activities; and
- Consider certain safety measures.

### III. LIABILITY AND SANCTIONS

Intentional or negligent breaches of the rules in the WEA may be punishable as criminal offences. Both the owner of the company, the employer or the person acting as employer can be charged for such breaches, and the penalty might be both prison time and/or statutory penalty fees. In some cases, for example where the breach has caused or could have caused serious danger for the life or health of the employee, breaches can be punishable with as much as 5 years in prison.

In addition to this, an employer may commence a civil claim against his employer under the Act relating to compensation for damages. The jurisdictional scope of this law is also limited to Norwegian territory. However, it might be given effect in the specific case. An example of this is the case referred to below.

There has been very little Norwegian case law regarding an employee’s obligations towards employees in foreign countries, but in 2015 the Oslo District Court passed judgement in a case regarding the Norwegian Refugee Council’s economic liability after one of its employees was shot and kidnapped when working for the company in Kenya.

The Norwegian Refugee Council was convicted to pay an assembly compensation of approximately 460,000 euro to the employee, a relatively high amount by Norwegian standards. The case was however particular in many ways. The Norwegian Refugee Council operates refugee camps in some of the most dangerous and unstable areas of the world. The position of the kidnapped employee was first Project Manager Emergency Coordinator and subsequently Area Programme Support Manager in the refugee camp Dadaab in Kenya from July 2011 until July 2012.

The employee was a Canadian citizen and he was hired and worked in Kenya for a Norwegian company.

The kidnapping of the employee occurred when the Secretary General of the Norwegian Refugee Council came to visit the refugee camps in Kenya. The delegation accompanying the Secretary General travelled in an unarmed convoy. Outside the refugee camp IFO II the convoy was attacked. The chauffeur in one of the cars was killed, another chauffeur was seriously wounded and four employees of the Norwegian Refugee Council were kidnapped. The employee that filed the suit was shot and injured in addition to being kidnapped and held hostage for several days before being rescued.

The safety situation in the area had become more serious from the fall of 2011, and there were incidents where humanitarian aid workers were kidnapped. The safety during the visit had been assessed by several people in charge of security for the region, and they were agreed on having an unarmed convoy. However, when the decision to travel in an unarmed convoy became known to the chief of security in Oslo he immediately sent an e-mail expressing his concerns. At this point the visit had begun, and none of the recipients received his e-mail until after the incident. One of the local chauffeurs also refused to partake in the convoy when he learned that it was to be unarmed.

This aspects, along with other factors, resulted in the Norwegian Refugee Council acknowledging that the safety measures that had been taken were insufficient and that they had acted negligent, cf. the Act relating to compensation for damages. The question of whether the Act relating to compensation for damages was applicable in the case was not debated by the parties.

Since the employer had assumed liability, the details regarding the employer’s duty of care in this situation did not become a question during the court proceedings. However, the fact that the Norwegian Refugee Council assumed liability still gives some insight as to what would be viewed as negligence on the employer’s side in such a case.

The case shows that employers should pay close attention to the safety situation for their employees and should monitor developments and, when necessary, re-assess the risk analysis that was made before and in connection with the assignment. It also shows that whether or not Norwegian law is applicable to incidents in foreign countries in such cases, it might not be a question of further debate between the parties for various reasons.

### IV. REGULATION OF HEALTH AND SAFETY WITHIN THE EU/ECONOMIC AREA (EEA)

An assignment to another state within the EU/EEA will normally fall under the scope of the EU Posted Workers Directive (96/71/EC). According to the directive, an employer that is domiciled or registered in Norway must comply with work health and safety standards that are at least as favorable to the employee as the regulations in the country where the employee is carrying out his or her work.

VI. THE LAW OF THE OTHER COUNTRY

Much like the EU Posted Workers Directive affects the rights of employees working for foreign companies in Norway, there may be rules and regulations in the country where the assignment is to be performed that affect the working situation of the employee going abroad. Other jurisdictions might operate with very different regulations and have different enforcement practices compared to what the employer is used to. The employer should therefore consider the relevant rules of the foreign country and their relevance for the assignment.
DUTY OF CARE OBLIGATIONS OF EUROPEAN EMPLOYERS FROM…

SCOTLAND

Burness Paull

SENDING WORKERS ABROAD: A SCOTTISH PERSPECTIVE ON THE EMPLOYER’S DUTIES IN RELATION TO HEALTH, SAFETY AND SECURITY

I. THE EMPLOYER’S DUTY TO ENSURE HEALTH, SAFETY AND SECURITY

Under the Health and Safety at Work Act 1974 (HSWA), employers have a statutory duty to take all reasonably practicable measures to protect workers from risks to their health and safety whilst at work. Additionally, employers have common law duties to take reasonable care to prevent their employees and others to whom they owe a legal duty of care from being injured at work. There are also implied duties of mutual trust and confidence in the employer/employee relationship which reinforce these obligations.

This note covers the position under UK laws in force in September 2016. Employees, whether British nationals or otherwise, may have rights, and employers may have duties under the local laws of the jurisdiction of the location in which they are working which may also require to be considered.

HSWA states that “an employee is at work throughout the time when he is in the course of his employment.” The concept of “at work” has been interpreted widely and does not simply apply when the employee is at his usual place of work nor is it restricted to those tasks which are necessary to carry on a work activity. An employee has been regarded as “at work” when climbing out of bed in a cabin on an offshore installation, when travelling to or between work locations or visiting the premises of a client or customer whether in the UK or another jurisdiction.

Breaches of these duties will often lead to a requirement to pay compensation to the employee for injuries sustained but increasingly employers are also being held criminally liable. Scots criminal law generally does not extend to offences committed out with Scotland but because offences under HSWA relate to poor management of risks, the offence may occur in Scotland even if the consequence of that is an incident abroad. This means the company and the individual manager responsible could face prosecution in Scotland if a worker is exposed to a foreseeable risk of harm whilst working abroad.

Coroners Inquests in England and Wales examine the circumstances of the death of a British national killed abroad where the body is repatriated. Due to a change in the law in Scotland from Spring 2017 Fatal Accident Inquiries will be able to investigate the deaths of Scottish nationals killed whilst working abroad. Whilst Inquests and inquiries are not intended to be fault finding or establish blame, the evidence which may come out of such an investigation can establish a basis for a separate criminal prosecution.

II. RISK ASSESSMENT

At the heart of an employer’s duty is the familiar concept of risk assessment. Just as with work in the UK, where the employer is sending a worker overseas a suitable and sufficient risk assessment is an essential element of the proper management of the worker’s safety. The potential hazards to be considered in any assessment will depend on factors such as the nature and length of the trip, the location, the activities to be undertaken and the personal circumstances of the worker. In addition to hazards associated with working tasks or remote worksites risks may arise in relation to travel arrangements, political or cultural factors and exposure to illness or disease.

In some circumstances additional precautions will be required when the worker returns to the UK, for example where the employee has been exposed to a risk of disease or psychological trauma. A risk assessment requires to be reviewed whenever there is a change in circumstances and it is good practice to review any assessment regularly in any event.

III. CONTROL OF WORKSITE PRECAUTIONS

It is well established that an employer cannot delegate the duty of care to another party simply because the employee is working at another’s premises. Even where the employer has little practical control over the arrangements in a place at a third party’s premises, the duty to take all reasonably practicable steps (under HSWA) or reasonable care (under common law) still exists. What is reasonable or practicable in any given circumstances will vary from case to case. It is a question of balance. The employer must identify the hazards which may exist, the likelihood of those occurring and the prevention and control measures required. These may be control measures implemented by the third party or, in the absence of these, controls which the employer has put in place.

In many cases, the vast majority of controls will require to be implemented by the party managing the work location but that does not mean that the employer need do nothing. At the very least, the employer should carry out enquiries of the third party in order to ensure that there is an adequate system of risk control in place and that it is being properly implemented.

There must be good communication and co-operation between the employer and the party in control of the worksite. Where the worksite is operated by an affiliated company within the employer Group, the employer has a greater ability to directly control risks. However, all employers are expected to carry out a risk assessment to demonstrate that adequate controls and precautions are in place to ensure that risks to health, safety and security are as low as reasonably practicable and acceptable regardless of the work location or local laws and customs.

IV. WORKERS HAVE DUTIES TOO

HSWA places duties on employees as well as employers. Workers must take reasonable care for their own safety and the safety of others affected by their work activities. In particular workers have a statutory duty to comply with any requirements imposed by their employer in order to ensure their health, safety or security, whether at work in the UK or abroad. For that reason it is important to provide workers with a copy of the risk assessment relating to their travel and working arrangements and with adequate guidance on the precautions to be taken including any health and safety requirements they need to comply with during the assignment abroad.

V. CASE STUDY EXAMPLES

Dusek & Ors v Stormharbour Securities LLP – Mr Dusek was scheduled to take a helicopter flight to visit a hydroelectricity complex in south-east Peru. Whilst in transit the helicopter came into difficulties and crashed killing all passengers. The court concluded that because the helicopter flight would take place at high altitude it ought to have been identified as high risk. The judge stated that any reasonable and responsible employer would have realised that in the circumstances there was a real risk of danger and the proposed flight raised obvious and foreseeable safety risks. Stormharbour should have looked into the safety of the trip and carried out a risk assessment. Since they failed to take either step they breached their duties as employer.

Palfrey v Ark Offshore Limited – Mr Palfrey, an oil worker, was informed by his employer that he did not need to be concerned about contracting malaria in West Africa as he would be working offshore on an oil rig where there was no mosquito risk and he did not need anti-malarial medication. He subsequently contracted malaria, probably as a result of a mosquito bite during an overnight stay on an island in transit to the oil rig. Unfortunately he died from the disease. The High Court found that there was a clear failure on the part of Mr Palfrey’s employer to take reasonable care to ensure the safety of Mr Palfrey in the course of his employment, which included travel to and from the oil rig.

DUSESS PAULL 2016
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OBLIGACIONES DE PREVENCIÓN DE RIESGOS LABORALES RESPECTO DE LOS TRABAJADORES DESPLAZADOS AL EXTRANJERO

I. CONSIDERACIONES GENERALES

El objeto del Informe se centra en determinar las obligaciones o normativa que les resultaría aplicable, a las empresas españolas en materia de prevención de riesgos laborales respecto de los trabajadores que desplazan al extranjero.

Dentro del concepto de extranjero y a efectos de las obligaciones que asumen los empresarios, se debe distinguir los desplazamientos dentro del espacio común europeo, de aquellos desplazamientos fuera del mismo.

La protección de la seguridad y salud de los trabajadores en el trabajo, tiene un reflejo en la propia Constitución Española (arts. 40.2 y 45), pero de forma más contundente en los artículos 4.2 del Texto Refundido del Estatuto de los Trabajadores (en adelante TRE), que establece el derecho de los trabajadores a “su integridad física y una adecuada política de seguridad e higiene”, y en el art. 19 del mismo Texto Legal, cuando establece que “el trabajador, en la prestación de sus servicios, tendrá derecho a una protección eficaz en materia de seguridad, higiene y salud en el derecho español se regula en la Ley 31/1995, de 8 de noviembre, Ley de Prevención de Riesgos Laborales (en adelante LPR), así como en la normativa de desarrollo, que se ha venido estableciendo en el marco de la protección de los trabajadores de riesgos laborales, viene establecido en el art. 316 del Código Penal (Ley Orgánica 10/1995, de 25 de noviembre) establece que, “los que con infracción de la ley de prevención de riesgos laborales, y estando legalmente obligados, no facetan los medios necesarios para que los trabajadores desempeñen su actividad con las medidas de seguridad e higiene adecuadas, de forma que pongan en peligro grave su vida, salud o integridad física, serán castigados con las penas de prisión de seis meses a tres años, y multa de seis a doce meses”.

Además de lo expuesto, los datos causados por la falta de medidas de seguridad, podría conllevar la obligación de indemnizar por daños causados, así como la imposición del recaudo de prestaciones de seguridad social, establecido en el artículo 125 del Real Decreto-Letristo 1/1994, de 20 de junio, Ley General de Seguridad Social (en adelante LGSS).

Para velar por el cumplimiento de las obligaciones en materia de prevención de riesgos laborales, se han establecido un cierto número de instrumentos de carácter administrativo que se establecen en el Real Decreto-Legislativo 5/2000 de 4 de agosto, que se aprueba el Texto Refundido de Infracciones y Sanciones en el Orden Social, y en concreto los artículos 11 a 13 relacionan los incumplimientos, agravándose a penas privativas de libertad, así el artículo 23, de libertad, así el artículo 23, de libertad, así el artículo 23, de libertad.

El ámbito de aplicación de la Ley de Prevención de Riesgos Laborales, viene establecido en el art. 5 LPR, que nos dice que. 1. Esta Ley y sus normas de desarrollo serán de aplicación tanto en el ámbito de las relaciones laborales reguladas en el Texto Refundido de la Ley del Estatuto de los Trabajadores, como en el de las relaciones de carácter administrativo y estatutario del personal al servicio de las Administraciones Públicas, con las empresas españolas que desplacen temporalmente a sus trabajadores al extranjero. Además de cumplir las medidas de seguridad y salud, se deberán cumplir las establecidas por la legislación española.

Respecto de los incumplimientos que se consideren más graves puede incluso llegar a ser constitutivo de delito y conllevar penas privativas de libertad, así el artículo 316 del Código Penal (Ley Orgánica 10/1995, de 25 de noviembre) establece que, “los que con infracción de la ley de prevención de riesgos laborales, y estando legalmente obligados, no facetan los medios necesarios para que los trabajadores desempeñen su actividad con las medidas de seguridad e higiene adecuadas, de forma que pongan en peligro grave su vida, salud o integridad física, serán castigados con las penas de prisión de seis meses a tres años, y multa de seis a doce meses”.

Así el artículo 23, de libertad.

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pseudocódigos que, en este caso, se contemplan en la presente Ley o en sus normas de desarrollo. Igualmente serán aplicables a las sociedades cooperativas, constituidas de acuerdo con la legislación que les sea de aplicación, en las que existan socías cuya actividad consista en la prestación de un trabajo personal, con las peculiaridades derivadas de su normativa específica.

El mismo artículo excluye en su apartado 2 de su ámbito de aplicación, una serie de actividades, como son, las de: ‘policía, seguridad y resguardo aduanero, servicios operativos de protección civil y penitenciar, forenses en los casos de grave riesgo, catástrofe y calamidad pública, fuerzas Armadas y actividades militares de la Guardia Civil, a la relación laboral de carácter especial al servicio del hogar familiar’. De lo expuesto, se deduce que la normativa española en prevención de riesgos laborales (tanto la Ley de Prevención de Riesgos Laborales, como toda la normativa de desarrollo), será de aplicación a todos aquellos contratos de trabajo a los que se les aplique la legislación española, esto es, el Texto Refundido del Estatuto de los Trabajadores.

De lo expuesto se puede concluir que el criterio para determinar cuando se debe aplicar la normativa española de prevención de riesgos laborales, viene condicionada por la normativa aplicable al contrato de trabajo que vincula al trabajador con su empleador, y así, el artículo 10.6 del Código Civil establece que ‘si las obligaciones derivadas del contrato de trabajo, en defecto de sometimiento expreso de las partes y sin perjuicio de lo dispuesto en el apartado 1 del artículo 8, les será de aplicación la ley del lugar donde se prestan los servicios’, por tanto, será la libre voluntad de las partes las que establecerá la normativa aplicable al contrato de trabajo, y si dicha opción es por la normativa española, al encontrarse sometido el contrato de trabajo a la normativa aplicable al contrato de trabajo que vincula al trabajador con su empleador, esto es, el Texto Refundido del Estatuto de los Trabajadores.

“ARTÍCULO 6 CONTRATO INDIVIDUAL DE TRABAJO
1. No obstante lo dispuesto en el artículo 3, en el contrato de trabajo, la elección por las partes de la ley aplicable no podrá tener por resultado el privar al trabajador de la protección que le proporcionen las disposiciones imperativas de la ley que sería aplicable, a falta de elección, en virtud del apartado 2 del presente artículo.
2. No obstante lo dispuesto en el artículo 4 y a falta de elección realizada de conformidad con el artículo 3, el contrato de trabajo se regirá:
   a) por la ley del país en que el trabajador, en ejecución del contrato, realice habitualmente su trabajo, aún cuando, con carácter temporal, haya sido enviado a otro país, o
   b) si el trabajador no realiza habitualmente su trabajo en un mismo país, por la ley del país en que se encuentre el establecimiento que haya contratado al trabajador, a menos que, del conjunto de cincuentas, resul- te que el contrato de trabajo tenga vínculos más estrechos con otro país, en cuyo caso será aplicable la ley de este otro país”.

Lo expuesto en los párrafos precedentes, encuentra una excepción en lo establecido en el artículo 1.4 del TRET, que establece que “4. La legislación laboral española será de aplicación al trabajo que presten los trabajadores españoles contratados en España al servicio de empresas españolas en el extranjero, sin perjuicio de las normas de orden público aplicables en el lugar de trabajo. Dichos trabajadores tendrán, al menos, los derechos económicos que les correspondieran de trabajar en territorio español”. Por tanto las empresas españolas que contraten a un trabajador español, para prestar servicios en el extranjero, deberá cumplir respecto del mismo como mínimo las obligaciones establecidas en la Ley de Prevención de Riesgos Laborales y la normativa de desarrollo de la misma, todo ello sin perjuicio de cumplir de forma específica las obligaciones que se establezcan en el país de destino.

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DUTY OF CARE OWED BY EUROPEAN ORGANISATIONS TO THEIR MOBILE WORKERS

In this regard, emphasis is placed on the employer’s instructive obligations under the WEA, i.e. a duty to ensure that the employee has access to relevant information and training and holds an adequate level of risk-awareness for the work to be performed. Accordingly, before sending the employee abroad, the employer should take all reasonable steps to ensure that the employee is:
- Suitable to conduct the work in question (in terms of education, training, experience, etc.),
- Informed about the risks and dangers involved (in respect of the planned work activities as well as the situation in the country where the work will be performed), and
- Informed about how to avoid such risks and dangers and how to act in case of an emergency.

It is recommended that the employer documents the measures that are taken and the procedures that apply where an employee is to be sent abroad.

In the event an area where the work will be performed is associated with substantial risks of illness or accidents, the employer must not give access to such an area to anyone who has not been provided with the satisfactory instructions.

The above responsibilities should not be perceived as a duty to conduct a complete investigation of the employee’s skills, and it does not impose an obligation to ensure that the employee has in fact assimilated all information and instructions that have been properly provided. Further, the employee is responsible for avoiding unnecessary risks overseas.

II. REGULATION OF HEALTH AND SAFETY IN SWEDEN

RESPONSIBILITIES

As stated above, the main piece of legislation in the area of work health and safety is the WEA, along with supplementary regulations issued by the Swedish Work Environment Authority. The WEA first and foremost aims to prevent work-related illness and accidents, although it is also intended to achieve a safe and sound working environment in general. The provisions of the Act include general obligations to secure a safe working environment and to prevent – as far as possible – exposure to risks and hazardous events. The WEA provides that the employer has to take proper precautionary measures in order to fulfil its safety obligations towards the employees. Moreover, the employer is obliged to safeguard compliance with the WEA’s general obligations when planning, managing and monitoring the business.

The work environment issues should be approached and dealt with in a systematic and orderly way. This means that such issues must be taken into account in the daily business decision-making and continuously assessed. In addition, action plans, risk analysis, routine documents and follow-up procedures shall be put in place whenever necessary for the achievement of a safe and sound work environment.

The implementation of work environment actions must be implemented in co-operation with the employees, usually represented by safety delegates appointed by the employees or by the local trade union (with which the employer is bound by a collective bargaining agreement). The work should be documented to the extent necessary given the business conducted.

In the context of overseas assignments, the above leads to the conclusion that a caring employer should, in addition to the obligations explained under “jurisdiction”, consider a number of measures before sending an employee abroad. For instance, the following may be considered appropriate in this regard:
- Perform, and continuously keep up-to-date, adequate risk analysis of the assignment;
- Provide the employee with necessary medical support;
- Make sure that sufficient insurance coverage is put in place; and
- Give due consideration to accompanying family members.

If an employee is about to be sent to an unstable region or an accident-prone area, the employer’s precautionary measures should be increased and the following measures may be considered:
- Assess the health status of the employee before the travel and the risks of likely illnesses or injuries during the travel and stay-abroad;
- Provide immunisation programmes for the countries to be visited in accordance with international guidelines; and
- Provide information and training on what to do in the event of (I) sickness or injury or (II) an emergency or disaster during the trip.

A caring employer should also consider whether providing information to and monitoring of the employee on return from the trip is adequate.

LIABILITY AND SANCTIONS

There is not much Swedish case law governing the employer’s obligations – in a work environment law context – towards employees who are sent on overseas assignments. Nevertheless, it can be safely assumed that the failure to comply with certain obligations described above (especially the duties to conduct proper risk assessments and provide adequate instructions to the employee) may result in various sanctions being imposed upon the employer and/or managerial representatives of the employer.

Some failures may be punishable as criminal offences. Under the 1962 Penal Code, there is a specific offence applicable where certain general criminal acts have been committed intentionally or by way of negligent non-compliance of the WEA. Such offences include causing another’s death, causing bodily injury or illness and creating danger to another. Primarily, the person to charge for such offences is sought from among the company’s representatives.

Regardless of whether any individual is found guilty for any work environment-related offences, the employer (the legal entity) can be ordered to pay statutory penalty fees for such breaches. Generally, the penalty fees are ordered by a court as a result of prosecution. However, in case of minor breaches the prosecutor may, subject to certain limitations, order the penalty fees without the involvement of a court. Penalty fees can be imposed irrespective of whether any intent or negligence can be attributed to the employer.

In addition to the above, an employee suffering from the employer’s non-observance of its work health and safety responsibilities may commence a civil claim in a Swedish court. Such a claim may often be based on the employment agreement/relationship, but could also be founded upon liability in tort.

It should be noted that the employer has obligations towards the employee both during and after an overseas assignment. During the assignment the employer should monitor developments and, when necessary, re-access the risk analysis that was made before and in connection with the assignment. Upon return to Sweden, the employer is – for instance – obliged to ensure that the employee has access to occupational health care in case the employee was exposed to traumatic (or otherwise difficult) experiences.

III. REGULATION OF HEALTH AND SAFETY WITHIN THE EU/EEA-AREA

An assignment to another state within the EU/EEA-area would normally fall within the scope of the EU Posted Workers Directive (96/71/EC). In such cases an employer which is domiciled or has its registered office in Sweden must comply with work health and safety standards that are at least as favorable to the employee as the regulations in the country where the employee is carrying out his or her work.

V. THE LAW OF (THE) OVERSEAS COUNTRY

Consideration must be given to the regulatory requirements in relation to matters such as health and safety of the overseas country before sending personnel there. An assumption that regulation will be much as it is in the home country is not sufficient. Many overseas jurisdictions may operate to very different laws, and have a very different approach to enforcement, this is why advice should be taken beforehand.

VI. THINGS TO REMEMBER

For an employer who takes its duty of care seriously the most important thing to bear in mind is to be proactive. It is crucial to conduct proper risk assessments and to provide the employee with the necessary training and information in due time before the employee leaves for overseas assignments. On a general level it is important for the employer to institute proper corporate policies and procedures to address relevant risks and to ensure that proper training procedures, assistance facilities and emergency plans are made available and readily understandable to its employees. Finally, remember that every assignment is unique – the measures that could reasonably be expected from the employer vary from case to case.

ADVOKATFIRMAN VINGE KB. 2015
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When dealing with any particular case, all these rules must be examined. In any case, it should be pointed out that foreign law can never be applied if it would produce an outcome that is absolutely incompatible with the Swiss legal system.

I. THE APPROPRIATE COURT

Generally speaking, the Swiss courts will claim jurisdiction in legal actions taken in the place of the defendant’s domicile or the place where the worker’s tasks are usually performed.

II. AN EMPLOYER’S OBLIGATIONS ARISING FROM THE DUTY OF CARE

In Switzerland, employment law is made up of a set of rules from private law and public law. When dealing with any particular case, all these rules must be examined.

With cases relating to work outside Switzerland, extra care must be taken when examining the duties of an employer. By virtue of Article 328 of the Swiss Code of Obligations (CO), RS 220, which is the main point of reference in Swiss law, an employer’s overall duties are as follows:

- duty of information,
- duty of prevention,
- duty of monitoring/ensuring the rules are followed, and
- duty of intervention.

How an employer intervenes, and how strongly, will depend on a range of factors (the organisation’s aims, the employee’s ability and experience, the work environments, the knowledge of the organisation and the other enterprises involved in the same sector) and will have to be judged against the principle of proportionality.

Thus the higher the risks for the employee, the more the employer’s intervention will need to be resolved and determined, perhaps even intrusive, for the employee, who will have to comply with their employer’s instructions.

Generally speaking, it must be assumed, obviously, that an employer does not have responsibility for an employee’s spouse or children. There are situations, however, in which an employer must act on their behalf, especially in sensitive international settings where the physical or mental wellbeing of the spouse or children might be jeopardised. Most probably this will also apply to any other partner the employee lives with.

Among the risks employers are often not aware of, and which deserve mention, are their responsibility for travelling employees and the application – albeit partial – of the duty of care after the work relationship has ended. Where they have failed in their duty of care, employers and their representatives – especially decision-making bodies – must face various penalties. In civil cases, this will mainly entail making reparation for the damage and intangible harm caused. Penalties may also be imposed not just by the administrative authorities but also under the criminal prosecution system, and in fact after accidents, incidents or even harassment, it is not uncommon to see the prosecution authorities conducting enquiries that can lead to criminal penalties.

III. THE EMPLOYER’S RIGHTS

The main article dealing with the rights of an employer in Switzerland is Article 521a CO, the counterpart to Article 528 CO, its mirror image.

Workers must carry out the work entrusted to them with care, and must loyally safeguard the employer’s interests. This duty of diligence, like the employer’s duty of care, can and must be specified in the contract, taking into account the professional risk, training, technical know-how, the job in question, the level of responsibility and the objectives stated in the contract. Depending on the circumstances, employees are themselves bound to comply with the measures to ensure greater safety and reduce risk, in the same way as with precautions on building sites. Failure to comply with these measures may force an employer to impose sanctions up to and including dismissal with immediate effect (Art. 357 CO).

IV. CONCLUSIONS, RECOMMENDATIONS AND OBSERVATIONS

In conclusion, it should be noted that employers have probably broader responsibilities than some of them would expect, in particular in international environments and where partners and next of kin are concerned.

Among our recommendations, we would like to stress the prevention that every employer must demonstrate: employers must seek legal advice, get information about working conditions, analyse operating environments so that they can both take preventive measures and respond appropriately if there is an accident or a problem. Greater prevention means fewer disputes and, therefore, less involvement in court cases.

To make action plans more effective, and to defend its rights as strongly as possible in the event of a dispute, an employer must at times be able to show that it has taken the appropriate measures, if necessary through full documentation and the drafting of suitable measures.

Finally, it should be said that the duty of care is more than a moral or ethical duty: it is a legal obligation and probably the foundation stone on which the representatives of an enterprise can build a human resources policy. Not surprisingly, this policy will be based on conducting a thorough risk analysis, deciding on the steps to be taken, and monitoring of them, and having the capacity to respond appropriately should these risks materialise. Therefore these steps exceed by far the conclusion of a simple accident or travel insurance.

Given these requirements, it is easy to understand the emergence, in enterprise circles, of employees with responsibility for hygiene, health and the work environment.
From the small and medium enterprise to the global multinational corporation, it is well understood that performance is dependent on attracting and retaining a talented workforce. With digital innovations, work is increasingly conducted across borders by a mobile workforce whose performance depends on their safety, health and well-being while on assignment. In 2016 companies spent an estimated 1.3 trillion US Dollars on business travel and this is estimated to rise to $1.6 Trillion by 2020. Disruptions in business travel for health and safety risks can put these investments in business travel at risk and expose employers to legal liability as well as reputational harm.

Attracting a millennial workforce also depends on an organisation’s ability to offer overseas assignments and adequately manage the associated health and safety risks of such assignments. A recent international survey estimates that 71% of millennials expect and want to do an overseas assignment during their career. A key component of attracting and retaining this young talent is to actively meet or exceed the duty of care to mitigate foreseeable risks in overseas travel.

European employers sending employees abroad have obligations imposed in some cases by EU regulations, domestic law and in common law countries, imposed by case law, to ensure that they act prudently to avoid or mitigate the health and safety risks inherent in business travel and overseas assignments. The following research will assist you in navigating the complexity of both the individual countries’ laws included here as well European Union laws.

Although the specific approach taken differs across countries, the message from the legislation, regulations, common law cases and other guidance is clear: employers have an obligation to actively prevent harm to their employees who travel on business. An adequate prevention programme across the jurisdictions surveyed means:

- Conducting risk analyses of overseas assignments – Risk analysis by the employer is required in nearly every law, case or regulation in Europe. While the precise definition of an adequate risk analysis varies, the general requirement is for a risk analysis that evaluates the working conditions abroad as well as evaluating the vulnerability of the employee (or the accompanying family members) to health and safety risks if the destination is risky.

- Providing timely and accurate information – Each jurisdiction requires employers to arm employees with sufficient information about the health and safety risks of an overseas assignment, including in some jurisdictions specific instruction on how to avoid danger or act in an emergency.

- Providing help to employees while overseas – Many of the jurisdictions also require the employer to ensure that medical support, first aid, medical insurance and emergency response services are available and adequately communicated to employees before and during an assignment. Even where an employer is sending employees to work at third-party premises, the employer can be held accountable for the conditions onsite if these pose a foreseeable risk to employees. Some jurisdictions also require that the employer be in communication with travelling employees.

When developing a corporate travel policy be sure to cover these requirements to ensure compliance with your national legislation but more importantly, to ensure that are managing your key asset, your talented global workforce.

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