



U.S. Legal Brief: Duty of Care and Managing Liability Risk for International Assignees

Now more than ever, employers are likely to be sued in the United States for injuries or deaths that occur to their employees located and traveling overseas. Many of these suits, whether or not they are likely to succeed, allege employer liability based on a supposed breach of its “Duty of Care” owed to those employees.

Consciousness of duty of care obligations has expanded on a global level over the past decade. Accordingly, more globally-mobile employees are seeking (or are being sought out by) legal counsel when things go wrong. To that end, multi-national companies, development organizations, NGOs and universities that have even limited contacts with the United States should endeavor to better understand both their legal obligations and how to mitigate liability risk.

Growth of Duty of Care Litigation in the United States

As International SOS explained in its seminal work on this topic, “Duty of Care of Employers for Protecting International Assignees, their Dependents, and International Business Travelers,” as a general matter, employers have an obligation to act in a prudent and cautious manner to avoid the risk of reasonably foreseeable injury to their employees. While lawsuits that allege breaches of this duty have come to be known colloquially in this space as “duty of care litigation,” from a purely legal perspective, such lawsuits are essential negligence actions. The basic applicable law has not changed; an employee alleges that his or her employer owed a duty, that the duty was breached, and that the breached caused the injury. What has changed, however, is the *recognition* that the United States can be an appropriate forum for lawsuits arising out of injuries that occur just about anywhere on the globe. Now more than ever, both employees and plaintiffs’ lawyers better understand this fact.

The recent uptick in cases like these demonstrate the trend. An international development organization was sued in Washington, D.C. for injuries that resulted from a water tower accident in Mali (*Adelson v. AED, et al.*). A faith-based humanitarian organization was sued in New York by a former employee that had been kidnapped in Sudan, who alleged that her employer had not adequately prevented her from being a target. (*Wagner v. Samaritan's Purse*). A USAID contractor was sued in Maryland by the family of its project manager who had been murdered in Pakistan (*Vance v. CHF International*). An infrastructure engineering company is being sued in California by a former employee who had been wrongly imprisoned in Qatar, who alleges that his employer did not properly warn him of the risk to his legal rights associated with accepting that posting. (*Huang v. MWH Global*).

Cases like these are no longer rare. Organizations that do business internationally are targets, and defendants are not just limited to government contractors. One need only consider a recent lawsuit against a private school in Connecticut to understand that point. In *Munn v. The Hotchkiss School*, a student alleged that her school had breached its duty to her when, during a school trip to China, she contracted a rare tick-borne disease. The jury in that case agreed, and entered a judgment against the school for \$41.7 million.

Organizations cannot inoculate themselves from lawsuits like these. Anyone can file a suit, and companies should expect that one will follow any serious incident. Therefore, it is no longer prudent to believe that it won't happen. That said, companies can institute policies and practices to mitigate their liability risk. Many that acknowledge their duty of care obligations have begun to do just that. Those that have not are putting their companies and their employees at risk.

Pre-Incident Risk Mitigation: Four Tasks

While there are a number of things an organization can do to mitigate its liability risk before an incident occurs, most of those discrete tasks fall into one of four areas of focus: Research, Warn, Train and Document. Described in more detail below, devising a duty of care plan that incorporates these four steps for every international project can go a long way helping you defend a potential lawsuit.

Research

- Determine what are the foreseeable risks to your employees that will be deployed to that location.
- Remember that risks come in many forms, and run the gamut from safety and security risks, to health risks, to risks to legal rights.
- Risk is always location specific, so devise a policy that will focus on understanding that location. One-size-fits-all policies are not as effective.

Warn

- Once you understand the foreseeable risks, advise your employees going to that location about them.
- Not all risks can be mitigated, and therefore it is important to inform your employees of the inherent risks of working on that specific project or in that location.
- Risk advisories and waivers help, but they are not a liability panacea.
- A robust warning process does more than mitigate potential liability; it will help keep your employees safer, and can serve an important screening function.

Train

- Augment warning and advisories with training. This helps establish that the employee understood the risks associated with the location where he or she will be located. With training, employees can also learn how to mitigate risk and make sound decisions on their own. Incorporate this training into security briefings, which should be updated as the situation changes.
- Include security/safety, operational, physical and mental health, and legal issues into the training modules.
- Some training is better than no training. Training that allows employees to ask clarifying questions, though, is the gold standard.

Document

- All of the other three steps lose much of their value if you fail to document that they occurred.
- Build into your procedure processes to document what has been done. These include having both the employer and the employee acknowledge that, for instance, the training was provided and the topics were understood.
- Keep all such documentation with each employee's file. Periodically audit your processes to confirm you will have access to the documentation if an incident does occur.

Post-Incident and Conclusion

An organization's liability for a potential incident is not cemented at the moment the incident occurs. How you respond can exacerbate your organizational liability and threaten the value of your pre-incident planning. Therefore, think carefully about how your company will respond post-incident. Who will manage the process? How will information be communicated? Which stakeholders will be in the room? What are your obligations to the employees of subcontractors? Lack of communication between relevant and appropriate parties can often lead to negative consequences when each party is unsure of roles and responsibilities during a crisis. All of these considerations are important, and should be incorporated into a crisis management plan. Having one will put you two steps ahead in the tragic event that one of your employees suffers harm, and will allow your organization to focus on managing its response, not how to manage it.

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Reference:

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