

# Sending Workers Overseas: Finnish Perspective on Employer's Duty of Care in Occupational Health and Safety Matters



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 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.

## 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)<sup>1</sup> (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 machines, 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 the employer's managerial prerogative against compensation. Managing directors are not considered employees, but company organs under the Finnish

Companies Act (624/2006, as amended) (in Fin: *osakeyhtiölaki*). Thus, the occupational health and safety legislation does not apply to them.

Another group falling outside the scope of applicability of the occupational health and safety legislation is independent contractors. Independent contractors typically have the freedom to decide upon, among others, how and when they perform their work. They are, thus, not subject to their contracting party's managerial prerogative and, therefore, not considered employees.

Since managing directors and independent contractors are not subject to the scope of applicability of occupational health and safety legislation, no liability under such legislation may be imposed on the party for whom the managing director or independent contractor performs tasks.

Agency workers are the employees of the agency, but due to the reason that, in practice, the user company typically guides and supervises the agency workers' work, the majority of the occupational health and safety obligations lie with the user company. Correspondingly, the liability under occupational health and safety legislation may be imposed on the user company.

Due to the principle of territorial jurisdiction, the Finnish occupational health and safety regulations apply only in Finland. Accordingly, the Finnish occupational health and safety authority only have competence to supervise work which is performed within the borders of Finland. This does not, however, mean that a Finnish employer may ignore its occupational health and safety obligations deriving from Finnish legislation when sending employees to work abroad regardless of whether the work is performed on a short business trip or on a longer assignment.

The starting point must be that the work can be performed as safely in the country of destination as in the employee's country of origin. Consequently, it is imperative that the employer is aware and analyses to the extent possible the health and safety risks relating to international working situations and also informs the employees of such risks. The employer must also ensure it offers the employees

<sup>1</sup> Through the OHSA, Finland has implemented the European 'framework' Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work.

information on how to best avoid the risks and work safely despite the destination. When it comes to longer assignments, cultural, political and other social factors must be taken equally into account along with the apparent health and safety risks as they may have implications on the employee's physical, but also psychological wellbeing at work.

Should the employer become aware of that any of the identified—or unidentified—health and safety risks have materialized, it must also take all reasonable action in order to try to prevent the same happening in the future. Whether that means, for example, contractual negotiations with the company for whom the employee is/has been working in the country of destination and/or, in the worst case scenario, calling the employee back home depends on the circumstances at hand in each particular case. Most importantly, the employer must take action.

Should the employer fail to take action, or fail to examine the health and safety risks in the first place, liability under Finnish legislation may follow.

As described in detail below, the employer's breach of occupational health and safety obligations may lead to both criminal and civil sanctions under Finnish legislation. Particularly due to the penal element, it is highly advisable for the employers to pay careful attention to their occupational health and safety obligations also when it comes to international working situations.

As regards the Finnish legal framework in occupational health and safety matters, it is also good to note that, when a foreign employer sends its employee to work in Finland so that Finland is deemed to be the employee's habitual place of work, it follows based on the Regulation (EC) No 593/2008 on the law applicable to contractual obligations (**Rome I**) that the OHSa and other Finnish occupational health and safety regulations must be followed, even if the legislation otherwise applicable to the employment would not be that of Finland.

If the employee, on the other hand, is posted to work in Finland for a limited period within the framework of transnational provision of services i) in a company belonging to the same group of companies with the employers (temporary assignment); ii) under the direction and on behalf of his employer based on a contract concluded between the employer and the user of the services operating in Finland (sub-contract); or iii) as an employee hired out to the user Company in Finland, under the Finnish Posted Workers Act (1146/1999, as amended)<sup>2</sup> 'only' the provisions of the OHSa must be followed.

In the aforementioned situations, liability for the breach of the applicable Finnish occupational health and safety regulations may follow just as if the employer was Finnish.

## Occupational Health and Safety Obligations under the OHSa

As mentioned above, the most fundamental occupational health and safety legislation 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 employers' duty to take action, i.e. the employer is required to take concrete measures in order to fulfil 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 legislation, it is advisable to remind the employees of these obligations not only in the policy for action on occupational health and safety, but also in the occupational health and safety instructions which the employer should prepare specifically for international working situations.

<sup>2</sup> 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**).

## 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 employees/their representatives under the Act on Occupational Safety and Health Enforcement and Cooperation on Occupational Safety and Health at Workplaces (44/2006, as amended) (in Fin: *laki työsuojelun valvonnasta ja työpaikan työsuojeluyhteistoiminnasta*). Even if the employees had elected an occupational health and safety representative who is often the employer'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.

## 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 group company or based on a sub-contract with another party.

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.

## 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 (39/1889, as amended) (in Fin: *rikoslaki*), 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 it/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 responsibility 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 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 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.

## 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 expatriates 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 praxis 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.



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