Sending Workers Abroad

A Scottish Perspective on the Employer's Duties in Relation to Health, Safety and Security

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.

Breach 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.

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 oversees 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.

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 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.

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.

Practical Tips

Some practical tips on matters to be considered when sending a worker abroad are provided below and along with the International SOS Foundation Travel Risk Management Toolbox which provides an essential checklist of health and security measures required for effective travel risk management.

Plan

\ Obtain detailed information about the risks associated with travel arrangements and work locations, taking specialist advice where necessary
\ Provide information to the employee on how to stay healthy, safe and secure during the trip, including guidance on general precautions to be taken to ensure food safety, consumption of safe drinking water, personal security, use of public transport and awareness of cultural differences

\   Stay informed of changing risk profiles by signing up to alerts from institutions such as the Foreign Commonwealth Office (FCO)
\   Provide clear instructions about any measures required to ensure safety and what to do in the event of sickness, injury or an emergency

Prepare

\   Identify in good time any precautions to be taken before the trip, such as immunisations or medication
\   Arrange to provide any equipment required such as water purification or first aid kits
\   Consider whether workers would benefit from special training to deal with particular risks such as security briefings or hostile environment training
\   Do not assume that employees will have knowledge about local conditions or cultural norms
\   Consider offering first aid training for remote locations

Support

\   Think about how will the worker be supervised or supported, particularly in the event of an emergency
\   Consider the use of a system to track the location of relevant workers and communicate with them when in remote locations or during an emergency
\   It may be helpful to provide employees with access to a 24-hour helpline to provide support or facilitate the provision of emergency assistance

Debrief

\   Ask returning employees about lessons learned and use that information when planning future trips
\   Identify any requirement for continuing occupational health support or surveillance

Case Study Examples

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 take 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.

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.

The reports of Palfrey and Dusek are based on materials originally produced for International SOS Foundation by Allen & Overy, in December 2015.

The Travel Risk Management toolbox

This toolbox provides an essential checklist that suggests health and security measures to take by organisations to fulfill their responsibilities and implement a travel risk and emergency management system.

Today, more and more organisations are operating globally. Overseas postings are a growing reality for a number of companies and these companies retain legal and social responsibility for their employees and dependants while they are abroad.

The Travel Risk Management Toolbox is a practical checklist that suggests health and travel security measures to implement along the travel cycle for travellers and international assignees[1]:

- pre-travel, what to implement from a preparation, information and compliance perspective
- during travel, how to deal with travel-related issues and ensure compliance
- post-travel, what to review and improve in the travel risk and emergency management system.

Health and travel security measures have to be defined according to the level of risk at a destination. These measures must be proportional and defined according to the risk environment, exposure and the type of work performed. They must be endorsed by senior management of the organisation and communicated to workers appropriately.

WITH THE SUPPORT OF THE INTERNATIONAL ORGANISATION OF EMPLOYERS

The IOE was created in 1920 to advocate in the tripartite International Labour Organisation (ILO) on behalf of the global employer and business community. Today, from its headquarters in Geneva, the IOE continues to defend and promote these same interests across a wide range of UN agencies, international organisations, intergovernmental processes and the media.

1. Centre for Research into the Management of Expatriation (CReME), Gwendolyn Cuizon, Expatriates in International assignments, 2009

IOE
International Organisation of Employers
Organisation Internationale des Employeurs
Organización Internacional de Empleadores
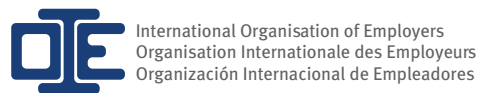
TRAVEL CYCLE FOR TRAVELLERS AND INTERNATIONAL ASSIGNEES

LEGAL AND SOCIAL RESPONSIBILITIES OF THE ORGANISATION

3. Organisation, planning and implementation

	Pre-travel	During travel	Post-travel
1. Health and safety policy	**Define:** • Why? Mission statement • Who? Organisation and responsibilities • How? Arrangements	**Implement:** • The mechanisms to deal with travel-related issues • The mechanisms to ensure compliance	**Review:** • Periodically • Modify as necessary
2. Risk assessment for identified risks and hazards	• Dynamic risk assessment of threats and hazards • Selection, implementation and/or adjustment of appropriate mitigation measures to reduce risk to an acceptable level		
a. Information and advice	• Pre-travel access to medical and security information • Destination guide information • Destination specific medical and security alerts	• 24/7 access to medical and security information while travelling • Referrals to medical and security support outside of home country	• Access to medical advice if illness is developed post-travel • Access to post-trauma advice after an security-related issue
b. Competence and training	• Briefing of health, safety and security arrangements • Destination-specific training • First aid training		
c. Fitness to travel, incl. travel health consultation	• Pre-travel medical examination where appropriate • Travel health consultation for up-to-date vaccinations	• Periodical examination, where appropriate • Health surveillance, where appropriate • Wellness/health promotion	• Post-assignment examination • Return to work from affected areas process
d. Travel health and security kits and supplies	• Provide travel medical kit (first aid, Malaria, etc.) • Provide travel security kit • Stock of necessary prescription medication (esp. long-term)		• Monitoring and refilling of travel health and security kits after utilisation
e. Medical or security emergency management	• Prepare emergency action plans to manage a medical or security emergency or crisis • Provide training on emergency plans		• Post-assignment medical and psychological support
f. Tracking and communicating	• Pre-travel access to medical and security information • Destination guide information • Compliance to travel policy and to the traveller's destination	• Implement tools, processes and procedures to track location of relevant workers and communicate with them • Tracking system and process to support crisis management	• Mechanism to allow ideas and suggestions from workers (two-way communication)
4. Evaluation	• Reporting and evaluating of key performance indicators • Internal and external auditing • Alignment with enterprise risk management (reporting on claims, opportunity to finance prevention actions through captive funds) • Integration in the general compliance strategy		
5. Action for improvement	• Corrective actions implemented where appropriate		

Contact Us

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Rona is a partner and head of Burness Paull's health, safety and corporate crime team.

Well known for her expertise in relation to major accidents, she regularly represents employers and insurers in relation to health and safety prosecutions, fatal accident inquiries, and environmental protection. Enforcement.

The team are described as a '*standout health and safety team renowned for its expertise across the full breadth of regulatory work, with particular expertise in offshore oil and gas matters. Assists clients with investigations and prosecutions, and also advises on compliance and provides training on health and safety issues*' in **Chambers 2016**.

The team provides '*consistently first-class support in HSE investigations*' **Legal 500 2016**.

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The International SOS Foundation seeks to improve the welfare of people working abroad through the study, understanding and mitigation of potential risks.

The Foundation was started in 2011 with a grant from International SOS, the world's leading medical and travel security services company. It is a fully independent, non-profit organisation working globally.

This document has been produced for the International SOS Foundation. For more information on 'duty of care' and the work of the foundation, please go to http://internationalsosfoundation.org/ *November 2016*