

**THE LITTLER REPORT**

# **MANAGING THE GLOBAL WORKFORCE—**

**A Legal and Practical Guide to Dangerous International  
Employee Assignments**

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## **AUTHORS**

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Philip M. Berkowitz

Michael G. Congiu

**Littler**

Employment & Labor Law Solutions Worldwide™

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This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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## MANAGING THE GLOBAL WORKFORCE— A Legal and Practical Guide to Dangerous International Employee Assignments

The continuing globalization of labor markets demands that employees be sent across borders on their employers' behalf. And, current events in the Middle East and other danger zones raise anew the special concerns of global employers who send their workers overseas.

This transnational movement of employees raises a host of legal and practical issues that, depending on the potential risks present in the country where the employee will be based, may vary dramatically. The potential dangers—natural disasters, kidnapping, terrorist attacks—are wide-ranging, but the key inquiries remain constant: to what extent did the employer have a legal or ethical obligation to prevent what occurred, and could the employer have prevented what occurred by implementing a thoughtful plan.

This Littler Report examines both the legal and practical issues facing employers under U.S. law, and in a sampling of other jurisdictions, and outlines a series of practical steps that employers can and should take to mitigate the risks inherent in having employees on international assignments. While there may be no way to absolutely prevent incidents of this nature, there is no substitute for effectively planning for the contingencies that may arise in international assignments.

Consider the following scenario: In late December 2009, two Scottish oil workers who had been kidnapped by an armed gang in Nigeria sued their employer, Sparrows Offshore Services Ltd. The employer had contracted to maintain oil cranes off the Nigerian coast for Exxon Mobil entities. The complaint, filed in Edinburgh, alleged that employees were instructed to reside in a particular compound in Eket, Nigeria which the defendants had never inspected; did not have secure external walls or effective security; and was guarded by “elderly, unarmed guards who spent much of the day asleep, who admitted persons indiscriminately or in return for a bribe.” The employees further alleged that “the compound was frequented by outlaws with concealed weapons who entered it in order that they might learn how to abduct residents there.”

The employees alleged that, despite numerous warnings of security threats, which allegedly resulted in short-term evacuations and lockdowns of the compound, they were kidnapped, tortured, beaten, and submerged in swamp water and forced to lie prone in mud for long periods. The captors allegedly told them that they had chosen the particular compound because “it had so lacked security as to enable them to do so whereas other compounds in the area [operated by other oil companies] were effectively secured

and guarded.” The employees were released after nineteen days of captivity. Following these events, the employer allegedly removed all expatriate workers from the compound.

The complaint alleged that Sparrows breached its duty “to provide [the employees] with a safe place of work and a safe system of work” and further breached the implied terms of the employees' contracts of employment. The complaint also alleged that Sparrows “knew or ought to have known” that a failure to provide a safe system of work would have resulted in the employees being “forcibly abducted” and victims “of an armed criminal enterprise.”<sup>1</sup>

The foregoing is just one stark example of the issues that may arise from having employees on international assignment, and highlights the need for companies to have comprehensive plans in place to comply with the various legal requirements in this context and, perhaps more importantly, to provide effective protection for employees working in dangerous areas of the world.

The first sections of this article examine both the legal and practical issues facing employers under U.S. law, and in a sampling of other jurisdictions. The concluding section of this article provides a series of practical steps that employers can and should take to mitigate the risks inherent in having employees on international assignments. Developing an appropriate plan in this context depends upon a host of factors, including the individual on assignment, the location and duration of the assignment, and the nature of the risks associated in particular country or region. This article examines these and other factors in detail, and provides a broad framework to inform the development of an appropriate plan for effectively managing international assignments.

### I. THE LEGAL PERSPECTIVE UNDER U.S. LAW

Under U.S. law, there are several sources of potential liability to an employer for incidents occurring on international assignments.

#### A. OSHA General Duty Clause

Unlike other countries, the United States does not have occupational health and safety legislation that expressly applies extraterritorially. The principal federal employee health and safety statute—the Occupational Health and Safety Act (“OSHA”)—has a General Duty Clause that applies only to domestic workplaces and requires employers to “furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”<sup>2</sup> So OSHA does not create a legal responsibility for

U.S. employers to ensure safe workplaces outside the United States (although foreign companies are, of course, subject to OSHA's General Duty Clause for employees on assignment in the United States).

## B. State Workers' Compensation Statutes

In addition to OSHA, state workers' compensation statutes govern the legal responsibilities for, and to a greater extent, the consequences of any injuries or deaths that are incurred during the performance of an employee's duties. Unlike OSHA, however, some uncertainty remains regarding the extent to which state workers' compensation statutes may be applied extraterritorially. For example, the District of Columbia Workers' Compensation Act (WCA)<sup>3</sup> includes—as does that of some other states—coverage for “traveling employees.” This doctrine was recently assessed by the Court of Appeals for the District of Columbia in *Khan v. Parsons Global Services, Ltd.*<sup>4</sup>

In *Khan*, the court declined to find that the claims of an employee kidnapped in the Philippines were covered by workers' compensation and, therefore, held that the employee was free to sue his employer for negligence and intentional infliction of emotional distress. The employee was working as an accountant in Manila on a long-term assignment. Several days after arriving, he dined alone at a local restaurant and was abducted by three men, who held him captive for approximately three weeks. The employee alleged that Parsons officials initially promised his wife that it would pay the ransom demanded by the kidnappers, but later took the position that doing so would undercut its long-term interests by providing an incentive to kidnap other Parsons employees. Nevertheless, Parsons paid the ransom—the day after it received a videotape of the kidnappers cutting off the employee's ear.

The employee's contract provided that the parties would accept the WCA as the exclusive remedy for injuries arising out of and in the course of his employment, and the district court held that the WCA barred the lawsuit. Although the court acknowledged the general rule that injuries sustained off work premises while *en route* to or from work are not compensable, the WCA recognizes an exception for the “traveling employee.” The district court held that the employee fell into that exception because he was kidnapped while walking between his hotel and a restaurant while on business-related travel.

However, the D.C. Circuit reversed, finding that the injuries did not “arise out of” nor were they “in the course of” employment. Thus, the employee was free to sue his employer, rather than be limited by the remedies available under the WCA. The court held that the traveling employee doctrine did not apply because the employee was on what was expected to be a long-term assignment in Manila;

he was *not* on a conventional business trip. Rather, the court held that a traveling employee exception more appropriately applies for “employees who were required to travel away from the employer's premises for a brief period, or who engaged in continuous travel because of the demands of their job.”

Although far from definitive, the *Khan* court's analysis—which includes a discussion of similar principles under Virginia, California, New York, and Minnesota workers' compensation law—nonetheless provides some guidance on the extent to which state workers' compensation statutes can be used to impute liability for incidents occurring on international assignments.<sup>5</sup>

## C. Negligence and Other Industry-Specific Theories

An additional source of potential liability under U.S. law arises under common-law theories of negligence, from the concept that the employer should have taken greater steps to protect the employee from injury. *Khan*, of course, is just such a case, upholding the employee's right to make claims against his employer under common law tort theories.

In *Hicks v. Waterman Steamship Corp. & Maersk Line, Ltd.*,<sup>6</sup> filed in April 2009, a cargo-ship steward sued under the Jones Act,<sup>7</sup> which provides seamen a cause of action against their employers for negligence, as well as under a common-law negligence theory, alleging that his employer negligently placed him in harm's way.<sup>8</sup> Taken hostage by Somali pirates, the steward sued his employers in Texas, alleging that they “knowingly sent their employees... into pirate-infested waters rather than taking safer routes.” He alleged that they were negligent in that they allegedly failed to “furnish him a safe place to work and a seaworthy vessel.”

## D. Cases Involving Non-Employers and Non-Employees

Employers are not the only potential defendants in negligence claims of this nature. Insurance companies are also fair game. In *Hargrove v. Underwriters at Lloyd's, London*,<sup>9</sup> an employee kidnapped in Colombia alleged the defendants had been negligent in their negotiations on his behalf with FARC guerillas. He also alleged that he was a third party beneficiary of the insurance policy between Lloyds and his employer, and sued for breach of contract and the duty of good faith and fair dealing. And, he alleged that the defendants had negligently trained or failed to train their employees in the proper handling of kidnapping.

The court first rejected the plaintiff's claim to the extent that it was based on a challenge to the negotiation of the ransom payment under the “act of state doctrine,” because it found that the payment of

ransom is prohibited by Colombia law. However, the court declined to dismiss the plaintiff's claims of misrepresentation and breach of the duty of good faith and fair dealing because the complaint did not make clear the factual predicate for those claims; if discovery showed that they, too, were barred by the act of state doctrine, then the court held that it would also dismiss those claims.

Another departure from the plaintiff-employee/defendant-employer scenario is when the plaintiff is a contractor. *Curtis v. Beatrice Foods Co.*,<sup>10</sup> is instructive not only because it involves a U.S. court's analysis of foreign law, but also because the case involved a non-employee contractor of the company. In *Curtis*, the district court declined to hold Beatrice Foods ("Beatrice") liable to the manager of a Beatrice subsidiary in Colombia—who essentially ran the subsidiary—who was kidnapped there. The manager (and his wife) had left Venezuela to accept the position, fully aware that the area in which they were to live "was in a state of great unrest." He had been specifically warned about kidnapping threats against him by the U.S. Embassy, and had received training from Control Risks, Ltd., a prominent firm that renders advice on security matters and kidnap negotiations.

The manager was held for eight months and was eventually freed after Beatrice paid approximately \$500,000 in ransom. While he was being held—which the court conceded was a "monstrous ordeal"—certain Beatrice executives and others were suspicious that the kidnapping was a hoax perpetrated by the plaintiffs, and they insisted that the manager's wife take a two-day-long lie detector test, which she passed.

The parties stipulated that the case was governed by Colombian law, and the court held, first, that the manager was an employee of the subsidiary, but not of Beatrice. Therefore, the manager could not pursue Beatrice for damages under Colombia's version of workers' compensation. The court also held that the kidnapping did not constitute a "work accident" because, under Colombian law, a work accident must "be caused by the nature of the work activities, and not merely occur in connection with them; essentially, [the law requires] that the work be a proximate or legal cause, and not merely a but-for cause."

The court also dismissed the manager's other claims, on the basis that he had been adequately warned of the danger but nevertheless took no remedying action despite those direct threats.

The *Curtis* case is just one example of how a foreign country's law might be applied to adjudicate a dispute arising from an international assignment. Perhaps more importantly, *Curtis* also illustrates how having a plan in place to handle the risks associated with international assignments can benefit companies in litigation, as

the court dismissed certain of plaintiff's claims in light of the training and advance warning of the risks involved in the assignment.

## II. LEGAL PERSPECTIVES OUTSIDE THE UNITED STATES

Of course, the legal requirements in foreign jurisdictions are essential to understanding the rights and obligations relevant to employees on international assignment. Many countries in North America and Western Europe have developed duty-of-care legislation, as have Australia and New Zealand. "While specifics vary by country, how far duty-of-care obligations reach is expanding. With each case, the definition of duty of care widens, and more injuries and illnesses are considered work-related."<sup>11</sup>

Although an exhaustive analysis of every legal requirement that may be applicable around the globe is beyond the scope of this article, the following is a sample of the various requirements found outside the United States.<sup>12</sup>

### A. The United Kingdom

The United Kingdom has enacted duty of care legislation through the Health and Safety at Work Act of 1974 (HSWA), and actions alleging breach of the duty of care can also be pursued under common law. Additionally, employees can pursue criminal claims under the Corporate Manslaughter and Corporate Homicide Act of 2007 (the "Manslaughter Act").<sup>13</sup>

Much like OSHA's General Duty Clause, the HSWA requires every employer to generally ensure the health and safety of every employee; and this requirement applies extraterritorially.<sup>14</sup> The Manslaughter Act imposes criminal liability on corporations where there is a gross breach of the relevant duty of care resulting in the death of an employee. The Manslaughter Act may apply extraterritorially where the negligent decisions were made within the United Kingdom. Duty of care cases generally hinge on whether the injury at issue was foreseeable.

*Longworth v. Coppas International Ltd.*<sup>15</sup> provides an instructive example of the degree to which English employers may owe a legal duty to ensure the health and safety of employees on international assignment. In *Longworth*, a widow brought an action alleging that her husband's employer should have taken more care to avoid her husband's death while on assignment in Iraq, which was caused by a bombing after hostilities broke out between Iraq and Iran. The widow essentially claimed that the company should have taken greater steps to evacuate employees after the bombing began, and the company defended by arguing that it lacked the power to require employees to evacuate and, in any event, the bombing was caused by the independent actions of a third party. In the end, the court agreed

that the employer had no legal duty to protect against this type of contingency.<sup>16</sup>

Courts in the United Kingdom have also recently addressed the extent of an employee's right to refuse an arguably dangerous assignment without consequence. In *Gizbert v. ABC News Intercontinental, Inc.*,<sup>17</sup> a former staff reporter was terminated after continuing to decline assignments to cover war zones. The reporter filed suit, claiming that his dismissal was unlawful under the U.K. Employment Rights Act's prohibition against dismissal for refusal to work under circumstances that present imminent danger. Although the court held that the potential for danger was not "imminent" enough to trigger the relevant Employment Rights Act provision, the reporter was nonetheless allowed to proceed under a more general unfair dismissal theory.

*Gizbert* raises an issue of whether an employee's refusal to accept assignments to arguably dangerous locales can serve as a basis for discipline. To be sure, these questions will need to be handled on a case-by-case basis with an eye towards the legal requirements applying to such situations, as well as the nature of the employee's refusal(s) and its effects on the company.

## B. Australia

In Australia, an employer's duty of care responsibilities are contained in state occupational health and workers' compensation laws (OHS), as well as common law. Unlike the United States, Australian workers' compensation laws are expressly extraterritorial, with certain limitations made based upon jurisdiction and the duration of the international assignment.<sup>18</sup>

An employer's primary duty under OHS legislation is to provide and maintain a working environment that is safe and without risks to employees' health, so far as is reasonably practicable, and failures to meet this requirement may give rise to criminal liability for the employer and even company directors or senior managers.<sup>19</sup>

As just one example, in *Nielson v. Overseas Project Corp. of Victoria*,<sup>20</sup> the spouse of an Australian employee on a two-year assignment in China for an Australian company severely injured herself after falling down a stairwell. The house was provided by the Australian company, and the stairwell's lack of a balustrade caused the employee's wife to fall down the steps. The employee sued his Australian employer, claiming that it breached its duty of due care to ensure that the employee's home was adequately safe. The Australian high court—after sifting through a series of complex (and controversial) choice of law issues—applied Australian law to determine that the company breached its duty of due care, and affirmed the damages award to the employee's wife.

## C. The European Union

Several EU Directives address EU employers' obligations to provide safe workplaces. Most notably, Directive 89/391/EEC of 12 June 1989 broadly outlines employers' obligations to prevent occupational risks, promote safety and health, and eliminate risk and accident factors. Beyond these broad pronouncements, the Directive instructs employers to implement health and safety measures per the following principles of prevention:

- Avoiding risks, and evaluating and combating avoidable risks.
- Adapting workplaces and equipment where appropriate.
- Replacing "the dangerous by the nondangerous or the less dangerous."
- Developing "a coherent overall prevention policy to cover technology, the organization of work, working conditions, social relationships and the influence of factors relating to the working environment."
- Giving appropriate instructions to employees.<sup>21</sup>

Also relevant here is the EU's directive regarding the posting of employees, which aims to prevent what has been termed as "social dumping"<sup>22</sup> and covers employees being sent to another Member State in three situations:

- When an employer posts a worker to another Member State on his own account and under his direction, under a contract which the employer has concluded with the party in the State for whom the services are intended.
- When an employer posts a worker to an establishment or to an undertaking owned by the group in the territory of a Member State.
- When the employer, being a temporary employment undertaking or placement agency, hires out a worker to a user undertaking established or operating in another Member State.<sup>23</sup>

This Directive requires that a posted worker be able to enjoy, at the very least, the certain minimum terms and conditions of employment that apply to workers in that Member State regardless of the law applicable to that employment relationship.<sup>24</sup>

In sum, although these directives would apply to some degree in all EU countries, the EU's principles on these issues are consistent with the rationale behind developing a comprehensive strategy for handling international employee assignments outside of the EU.



### III. THE INTERNATIONAL LABOUR ORGANIZATION

The International Labour Organization (ILO) has approximately seventy Conventions that cover occupational health and safety under its SAFEWORK arm.<sup>25</sup> The ILO has also published a rather detailed set of Guidelines for implementing the various SAFEWORK conventions, but the Guidelines are not expressly made applicable to workers on international assignment.<sup>26</sup> Although the relevant conventions may have some binding authority to the extent they have been ratified by nations or organizations, the Guidelines are primarily aspirational. As the Guidelines state: “Organizations must also be able to tackle occupational safety and health challenges continuously and to build effective responses into dynamic management strategies. These Guidelines on occupational safety and health management systems will support this effort.”<sup>27</sup>

### IV. PRACTICAL STEPS: IDENTIFYING AND PLANNING FOR SPECIFIC RISKS

Managing assignments to dangerous places is a significant challenge for employers. About ten percent of employees who are transferred from the U.S. are assigned to countries that are considered “dangerous or have harsh conditions of living.”<sup>28</sup> Careful planning and sound policies are necessary in order to mitigate the risks and to ensure a successful assignment.

In light of the above, a coherent and comprehensive strategy for dealing with the risks inherent in international assignments is essential. First and foremost, any company planning to assign an employee to a foreign country should consult legal counsel for a detailed understanding of the legal requirements both in their own country and of the host country.

Once that understanding is gained, another initial and critical step will be to gauge the specific threats posed in the host country, and to develop a plan based on those specific risks.

A preliminary question is: What locations are dangerous or risky? Specific characteristics of a country or region that would qualify the assignment as risky or dangerous include:

- Existence of war, civil insurrection, or terrorist activity
- Widespread, uncontrolled violence or disease
- Lack of infrastructure (e.g., places to buy groceries, medications and basic goods)
- Lack of family support services, such as schools and health care facilities
- Extreme physical conditions (sub-freezing temperatures, remote locations, etc.)<sup>29</sup>

The existence of war or civil insurrection brings with it different challenges than a country with an increased risk of natural disaster, and overall strategies should be informed by the specific risks posed in the host country. According to Forbes magazine,<sup>30</sup> the world’s most dangerous countries/zones are:

1. Afghanistan
2. Iraq
3. Somalia
4. Pakistan
5. Sudan
6. Yemen
7. Democratic Republic of Congo
8. Guinea
9. Russian Caucasus
10. Nigeria
11. Chad
12. The Sahel
13. Haiti
14. Colombia
15. Zimbabwe

#### A. A Focus on One Specific Risk—Kidnapping

Beyond the general identification of a particular country’s threat level, preparing a plan that contemplates a specific type of risk may also be appropriate. For example, the threat of kidnapping—as illustrated in the cases referenced above—continues to be a significant risk for employees on assignment in the developing world.

The threat of an employee being kidnapped while on assignment abroad is very real. According to one security consultant, there are roughly “50 to 60 American business-related kidnappings annually.”<sup>31</sup> The good news is that in the “vast majority” of kidnapping cases worldwide, the victims are released after the ransom is paid.<sup>32</sup>

Countries/regions currently posing the greatest kidnapping risks to employees are:<sup>33</sup>

- Brazil
- India
- Central America
- Mexico
- Venezuela
- Colombia
- Ecuador

- Iraq
- Afghanistan
- Pakistan
- Nigeria
- Somalia
- The Philippines

As an initial matter, employers sending employees or contractors to locales with an increased threat of kidnapping should take steps to consult with that employee or contractor, as well as his or her family, to discuss the nature of the risks involved and how to avoid those risks. This is an ideal opportunity to involve the assistance of an experienced security consultant, and to be thoughtful about whether the employee or contractor's living and transportation arrangements sufficiently protect against kidnapping risks.

Beyond these considerations, one of the common strategies of dealing with kidnapping risks is to purchase kidnap and ransom ("K&R") insurance. Indeed, it was estimated that 80% of Fortune 500 companies had purchased K&R policies as of 2005.<sup>34</sup> K&R policies can cover:

- Ransom monies
- Expenses for security consultants, independent negotiators, interpreters and public relations consultants
- Travel costs for the victim's family
- Psychiatric and medical fees
- Rewards paid to informants
- Salary replacement for the victim or his or her spouse
- Legal liability payments

Although K&R policies are critical components of a response strategy for an employee kidnapping, knowledge of a K&R policy may make the insured a target, and thus must be kept confidential. Indeed, some policies will be cancelled if the employer cannot prove that knowledge of the policy was kept on a "need to know" basis.

Beyond these considerations, employers should work with their carriers to ensure coverage for all kidnappings. Some policies exclude coverage for kidnapping that is considered an act of war, rather than a "criminal" act. Employers should therefore negotiate to have the policy written so that all kidnappings are considered criminal acts. Additionally, and as the *Curtis* case (discussed in Section I.D above) instructs, employers should also work to obtain coverage not only for employees, but for all essential personnel, including independent contractors who perform services on the company's behalf.

Although having a K&R policy is important, it will not be sufficient to avoid and protect against the risks of employee kidnapping. In addition to a K&R policy, employers should also consider the following:

- **Retain a security consultant.** Security consultants, often retained directly by the insurance carrier, will advise the employer on how to obtain the safe and timely release of the employee. They will work with the employer's crisis management team in "table-top simulations" of kidnapping or extortion situations, review (or put into place) travel security programs, and provide training on responding to a kidnapping or extortion.
- **Communicate with other employees in the event of a kidnapping.** Employers should have a plan for conveying information to other employees. The main message should be that the company is handling the situation and is helping the employee's family. Also, there may very well be a need to carefully limit the amount of information provided to prevent panic.
- **Have answers to certain key questions.**
  - Will the employee's pay, health insurance and other benefits continue while he or she is missing?
  - How will the company interface with the authorities?
  - Will the company pay the ransom if one is demanded?
  - Will the company provide any special assistance to the employee's family?

These are all critical questions that must be answered prior to an employee's international assignment and, ideally, should be discussed with the employee and his family prior to the assignment.

## B. Beyond Kidnapping

Kidnapping is simply one of many of the inherent risks associated with international assignments. As just a couple of additional examples, employees on international assignment may face the danger of being caught in terrorist attacks and other acts of war, as well as the increased potential for being affected by a natural disaster such as a tsunami or earthquake.

The nature of these (and other) specific risks must be incorporated into a company's planning. For example, if a particular country has a heightened risk for terrorism, acts of war, or natural disasters, the following items (in consultation with a security professional) may be considered:

- Communicate with assignees and their families prior to assignment about the appropriate lines of communication

and the anticipated response strategy in the event of an act of terrorism, natural disaster, or other crisis.

- Define a protocol for assigning “critical” status to disaster or crisis situations. It is important that companies have informed local sources to ensure that their assessment of the situation is valid and current.
- Formalize and communicate country or regional contact points and phone numbers.
- Ensure that employee emergency contact numbers, as well as home and office phone numbers, are on record with the home office and the country contact person.
- Conduct emergency evacuation briefings or updates upon assignment and at periodic points during assignments, particularly in areas of potential risk or conflict.
- Have a hotline for assignees’ families and loved ones to contact to learn up-to-date information on the safety and whereabouts of the employees.
- Have a number for employees to call in the event of an emergency to notify their loved ones of their location and status.
- Equip employees with GPS tracking devices to help locate them in the event of an emergency.
- Designate a series of locations for employees to meet in the event of a natural disaster or terrorist act.
- Train assignees on survival skills and other necessary skills for responding to the specific threats of a country, including ensuring that the assignee has the necessary language and cultural skills to successfully navigate emergency situations.
- Have an escape strategy in place to remove employees and their families when necessary.

## V. TOWARDS A COMPREHENSIVE STRATEGY

Beyond identifying and planning for the specific items addressed above, there are a host of items every employer should consider when deploying individuals to international assignments.

### A. Choose the Correct Candidate(s)

First and foremost, employers should be thoughtful about the individual chosen for the assignment.

Identifying the right individual cannot be based only upon professional or technical competence, but also must consider the employee’s personal traits. Examples of such key traits include:

- Having a strong personal motivation
- Having an independent and dynamic personality, paired with the ability to adapt to a different and challenging culture
- A willingness to work in a dangerous scenario
- Having sufficient language skills
- Having a positive approach towards adventure in general

Ideally, employers should work with a cultural consultant to help identify the best candidates for the assignment. Once the candidate is chosen, and beyond the company’s responsibility to put a comprehensive plan into place, the value of properly training that candidate to be responsible for his or her own health and safety cannot be overstated.<sup>35</sup>

### B. Determine the Appropriate Compensation and Benefits Package

Compensation is one of the main reasons why an employee will undertake an international assignment, and compensation and benefits become even more critical when employees are asked to accept assignment in a more dangerous locale. Most companies sending employees to dangerous locations pay specific allowances that will compensate the employee for extreme living conditions and/or danger, usually an extra ten to twenty-five percent of the base salary, depending on the location.

- **Hardship Pay**—Usually ten to twenty-five percent of base salary, to compensate employees for extreme living conditions.
- **Danger Pay**—Typically fifteen to twenty-five percent of base salary, in addition to all other compensation.<sup>36</sup>

Although compensation is a key factor motivating employees to accept dangerous assignments, companies need to provide additional benefits and put in place extra measures to guarantee a smooth adaptation to the new environment and the continuity of the assignment:

- Security briefing and training to ensure every assignee is informed about the security risks in-country, knows how to address them, knows where to go in an emergency and whom to call (in the company, and perhaps outside—e.g. security consultants).
- Bodyguards or armored vehicles (if required).
- Legal representation abroad.
- Travel benefits including extra trips, or allowance to make trips, for rest and relaxation on a periodic basis in a safe and secure location.

- Guarantee of secure housing including limitations on where assignees can live to eliminate situations that are particularly risky. Apartment complexes, gated communities or compounds, or the use of armed guards or security systems may be appropriate.

### C. Determine Assignees' Access to Health Care and Health Insurance

Although international health insurance is recommended, employers should consult with counsel to ensure that their benefits scheme does not run contrary to any local laws regarding compulsory coverage. Local regulatory regimens can be restrictive or exclusive, and may be tied to the employee's expected length of stay in the country. For example, Singapore requires that all employers purchase and maintain insurance for the medical expenses of foreigners working in the country.<sup>37</sup> Beyond navigating the insurance regimes of local jurisdictions, employers should also consider the following:

- Determine the appropriate strategy for medical care while on assignment. To what extent will the employee use a company doctor whom he or she is more familiar with? To what extent and under what circumstances will the employee be allowed to return home to receive medical care?
- Will medical crisis evacuation to home country or a nearby country be made available?
- Ensure that the assignee has all necessary vaccinations prior to assignments.
- Ensure that the assignee has been briefed on the risks, and signs, of dangerous insect, food and water borne illnesses.
- Determine whether the assignee will be allotted psychological or other mental-health services.

### D. Determine the Structure of the Assignment

Yet another consideration involves determining how the assignment should be structured. Beyond the preliminary question of how long the assignment should last—which would surely be informed by the company's ultimate goals, the employee's tolerance, and the potential for risk—one additional consideration involves whether the assignment will rotate between time on location and vacation, or amongst different assignees.

One option is the "rotational assignment" approach. Simply put, for every  $x$  weeks or months the employee works or travel to a dangerous location, he or she is eligible for  $y$  weeks or months off on paid leave at home or in a "nice" location at company expense.

Another possibility would be to hire additional staff so more employees share the travel burden and thereby make it possible for

each to spend a bit less time on assignment. Although adding this labor cost may not be a popular idea from an accounting standpoint, it may make the difference between an employee accepting or declining a particular assignment.

### E. Have an International Assignment Policy and Agreement

Finally, employers should not overlook the importance of having a thoughtfully drafted international assignment policy, as well as an individual international assignment agreement for the assignee.

These documents create a basic road map for all parties, and help to define the particular situation of assignees in terms of their compensation, benefits, and health and other insurance—some of the very same items discussed in this article in greater detail above. These documents also ensure that important steps are not forgotten or neglected. Employers are advised to consult with experienced legal counsel to assist in drafting these critical documents.

### F. Do Not Overlook Business Travelers

Although this article has focused primarily on international assignments, much of these principles and guidelines also apply to international travelers who travel to, and remain briefly in, some of the world's dangerous hotspots. Indeed, under U.S. law, the "traveling employee" exception to some states' workers' compensation laws applies squarely to these employees, thus heightening the need to ensure that plans for international assignees also contemplate international business travelers.<sup>38</sup>

## VI. CONCLUSION

Although a one size-fits-all approach is not appropriate, employers must be proactive on these issues to protect themselves from liability and, perhaps even more important in this context, to protect their employees and provide them with sufficient peace of mind to effectively conduct the business they are charged with while on assignment. Of course, no security plan should be undertaken without consulting with a fully qualified security professional.

## VII. ENDNOTES

- 1 The principal sources for these facts are a redacted Summons received by the authors from counsel for plaintiffs, and C. Thomson, "Kidnapped Scots oilmen sue bosses for £200,000 over 'failure' to protect them," *News.Scotsman.com* (Dec. 29, 2009) at <http://news.scotsman.com/scotland/Kidnapped-Scots-oilman-sue-bosses.5941992.jp>.
- 2 29 U.S.C. § 654. OSHA goes on to specifically delineate its jurisdiction to workplaces in the U.S. and certain U.S. territories. 29 U.S.C. § 653.
- 3 D.C. CODE ANN. §§ 32-1501 *et seq.*
- 4 428 F. 3d 1079 (D.C. Cir. 2005).
- 5 See *S. Motor Lines Co. v. Alvis*, 200 Va. 168, 104 S.E.2d 735 (1958); *Leonard Van Stelle, Inc. v. Indus. Accident Comm'n*, 59 Cal. 2d 836, 31 Cal.Rptr. 467, 382 P.2d 587, 591 (1963); *Markoholz v. Gen. Elec. Co.*, 13 N.Y.2d 163, 243 N.Y.S.2d 853, 193 N.E.2d 637 (1963); *Capizzi v. S. Dist. Reporters, Inc.*, 61 N.Y.2d 50, 471 N.Y.S.2d 554, 459 N.E.2d 847, 849-50 (1984); *Voight v. Rettinger Transp., Inc.*, 306 N.W.2d 133, 138 (Minn. 1981); *Epp v. Midwestern Mach. Co.*, 296 Minn. 231, 208 N.W.2d 87, 89 (1973).
- 6 See *Hicks v. Waterman Steamship Corp. & Maersk Line, Ltd.*, Cause No. 2009-26129 (Harris County, Texas, 270th Jud. D., (filed Apr. 9, 2009); see also T. Weidlich, *Maersk Cook Sues Over Job in 'Pirate-Infested' Waters*, BLOOMBERG (Apr. 27, 2009), at <http://bloomberg.com/apps/news?pid=20670001&sid=aAkA04yh88to> (last visited Feb. 10, 2011).
- 7 46 U.S.C. § 688. See also *Ridgway v. Combined Ins. Cos.*, 98 Idaho 410, 412-17 (Idaho 1977).
- 8 The case was recently remanded to state court after having been removed by the defendant to federal court. *Hicks*, 2009 U.S. Dist. LEXIS 119690 (S.D. Tex Sept. 16, 2009).
- 9 937 F. Supp. 595 (S.D. Tex. 1996).
- 10 481 F. Supp. 1275 (S.D.N.Y. 1980).
- 11 Lisbeth Claus, *International assignees at risk: employers have a duty of care for workers around the globe*, ALLBUSINESS (Feb. 1, 2010), available at <http://www.allbusiness.com/society-social/families-children-family/14068421-1.html> (last visited Feb. 10, 2011).
- 12 For a broad discussion on the duty of care legislation in western Europe and Australia, see International SOS white paper on *Duty of Care of employers for protecting international assignees, their dependents, and international business travelers*, available at <http://www.internationalsos.com/dutyofcare/> (last visited Feb. 10, 2011).
- 13 *Id.*
- 14 *Id.*; see also *The Littler Mendelson Guide to International Employment and Labor Law*, England § 13.
- 15 1985 SLT 111.
- 16 *Id.*
- 17 [2006] All ER (D) 98 (Aug.).
- 18 See *supra* note 12.
- 19 See *The Littler Mendelson Guide to International Employment and Labor Law*, Australia § 13.
- 20 223 CLR 331.
- 21 E.U. Directive 89/391/EEC, Art. 6.
- 22 See <http://ec.europa.eu/social/main.jsp?catId=471&langId=en>.
- 23 E.U. Directive 96/71/EC.
- 24 *Id.* at Art. 3. A correlated issue here, of course, would be the often complicated choice of law determinations that may arise under an employment agreement and the 1980 EC Convention on the Law Applicable to Contractual Obligations.
- 25 A list and links to those conventions and recommendations can be found at <http://www.ilo.org/safework/normative/conventions/lang-en/index.htm> (last visited Feb. 10, 2011).
- 26 The guidelines can be found at [http://www.ilo.org/safework/info/publications/lang-en/docName--WCMS\\_110496/index.htm](http://www.ilo.org/safework/info/publications/lang-en/docName--WCMS_110496/index.htm) (last visited Feb. 10, 2011).
- 27 *Id.* Of course, a company's responsibilities on these issues may very well be informed or mandated by a relevant collective bargaining or framework agreement.
- 28 *Companies try efforts to protect workers in world's danger zones*, USA TODAY (Aug. 24, 2010) available at: [http://www.usatoday.com/money/industries/travel/2010-08-24-dangertravel24\\_CV\\_N.htm](http://www.usatoday.com/money/industries/travel/2010-08-24-dangertravel24_CV_N.htm)
- 29 Although not exhaustive, a list of resources to help identify country-specific risks is as follows: U.S. Department of State Travel Warnings at [http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_1764.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html); The UK Border Agency provides a listing of the general, political and human rights situation in many countries at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogms/>; The Central Intelligence Agency's World Factbook compiles statistics about every country, e.g., government, military, transnational issues, economy at <https://www.cia.gov/library/publications/the-world-factbook/index.html>; Forbes Magazine publishes a list of the world's most dangerous countries, which offers some useful information at <http://www.forbes.com/2010/01/14/most-dangerous-countries-lifestyle-travel-haiti-afghanistan-iraq.html>.
- 30 <http://www.forbes.com/2010/01/14/most-dangerous-countries-lifestyle-travel-haiti-afghanistan-iraq.html>.
- 31 *For Employers Conducting Business Abroad, Kidnappings Remain an Ongoing Concern*, 224 Daily Lab. Rep. (BNA) C-1 (Nov. 22, 2010).
- 32 *Id.*
- 33 *Id.*
- 34 Samantha Kenney, *Regional Shortcomings and Global Solutions: Kidnap, Ransom and Insurance in Latin America*, 14:2 CONN. INS. L.J. 557, 560 (2007-08).
- 35 Assignees should be advised to: learn about their destination; be alert; vary their routine where appropriate; do not share information unnecessarily; be familiar with the kinds of crimes that are common in the area; take a security and/or risk management course; avoid places that could be targets; and to register with your country's embassy upon arrival. See *Overseas Digest* at [www.overseasdigest.com](http://www.overseasdigest.com) (last visited Feb. 10, 2011).
- 36 Indeed, there are companies that assist employers in defining the appropriate allowances depending on the assignment location, such as ORC, Airinc, Birches Group. The United Nations International Civil Service Commission, Mobility and Hardship Division also has a guide on hardship allowances that can be used as a model at [http://icsc.un.org/pp\\_mah.asp](http://icsc.un.org/pp_mah.asp).
- 37 *Introduction of Employer-Financed Medical Insurance Requirement for Foreign Workers* (press release by Singapore's Ministry of Manpower), at <http://www.mom.gov.sg/newsroom/Pages/PressReleasesDetail.aspx?listid=153>.
- 38 See *supra* notes 3-5.



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