

Global HR Hot Topic

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Duty to Protect Staff in Overseas Danger Zones Like Egypt



Challenge:

Working in a high-risk environment like a war zone raises vital issues of security—and employer risk exposure.

The political upheaval in Egypt had multinationals scrambling to understand what duties they owe their employees working in harm's way—employees like Google's regional marketing head Wael Ghonim, who was captured by Egyptian rioters and held for 10 days. Ghonim tweeted: "We are all ready to die." (See S. Green, *Corporate Counsel*, 2/9/11.) On February 11, an Egyptian mob beat and sexually assaulted CBS News Foreign Correspondent Lara Logan.

Beyond Egypt, employee security is vital to multinationals operating in war zones like Iraq and Afghanistan, in terrorism-prone areas like certain parts of the Middle East, and in high-crime areas like certain parts of Africa and Latin America. In January, for example, a Mexican gunman murdered Nancy Davis, an American missionary working in Tamaulipas State. (See Riccardi & Wilkinson, *L.A. Times*, 1/28/11.) These international employee security risks extend even beyond places recognized as danger zones: Staff traveling to, say, Zurich or Sydney can get hit by drunk drivers or stabbed by robbers—and sue.

Liability exposure in the overseas-employee-injury context can be significant, sometimes "bet-the-company" litigation. After four Blackwater Security guards were killed and strung from a Fallujah bridge in March 2004, their estates filed a multi-plaintiff wrongful death action that ultimately involved proceedings in several forums (*Nordan v. Blackwater*), including Ken Starr representing Blackwater before the US Supreme Court.

How must a multinational protect staff outside the US? Does the duty change if the country gets on a US State Department watch list? What is the risk analysis? Answering questions like these requires drawing four key distinctions:

1. Safety/security issues versus legal issues

Good corporate social responsibility means implementing effective workplace health and safety measures. In addition, occupational health and safety laws worldwide tend to impose a general duty of care requiring employers to offer reasonable safety protections. (See, e.g., Restatement (Second) of Agency § 492.) What, specifically, constitutes adequate safety measures depends entirely on context: In a factory it might mean supplying gloves, machine guards and emergency-stop buttons. In an office it might mean supplying key-cards, ergonomic keyboards, and staircase hand rails. In a war zone it might mean supplying guards, body armor and evacuation services. But in contexts like war, terrorism and crime, health and safety regulations can be vague, leaving employers with only the broadest default legal advice—"heed the duty of care." In the real world, employers need answers to highly specific questions. (*Can we provide guns? Does a State Department warning mean we must evacuate expatriates? What about locals? What about the "Rambo" employee who insists*

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Pointer:

Separate out the very different issues in play. Devise a strategy to contain risk.

on staying put?) Getting answers to these questions from a lawyer may be less helpful than getting answers from an expert in security or crisis management.

But after someone gets hurt, even an employer that had solicited expert advice and that had implemented expensive precautions may face a claim. After all, an employee who sues will be one who was injured or killed. And after an injury happens, an allegation that security was too lax can look compelling. To make the case, the victim just points to the injury itself. If the employer provided a bodyguard and a bullet-proof vest, the employee victim says the crisis demanded two bodyguards and an armored car.

2. Health/safety regulation versus personal injury litigation

Legal systems impose duties of care on employers in two separate ways: occupational health and safety laws administered by a government agency and private rights of action for workplace injuries. Distinguish these two. Occupational health/safety regulations are tough laws. A serious violation in some countries (France, Italy, Russia) can send a manager to prison. These laws can get incredibly granular, imposing detailed mandates in contexts as specific as machine-guarding, window-washing and iron smelting. But as mentioned, health/safety regulations tend to be vague about third-party actions, like war, terrorism and crime, beyond employers' control, and so they may play a lesser role in contexts involving violence. Therefore, multinationals assessing employment risk in danger zones focus more on their exposure to personal injury claims—such as US court lawsuits demanding a jury and millions of dollars.

3. Local employees versus expatriates and business travelers

In assessing a multinational's exposure to employee personal injury lawsuits, distinguish foreign-local employees from expatriates and business travelers visiting temporarily. The population of locals may be far greater. When crisis erupted in Egypt, HSBC Bank had 1,200 Egyptian employees but just 10 in-country expatriates. (See S.Green, *supra*.) Even so, on a per-employee basis, exposure as to the visitors may be far greater, for two reasons:

- **Work hours vs. 24 hours.** An employer tends to be responsible for local employee safety/security only during work time. Locals caught up in an altercation off-the-job should not implicate the employer if their injuries are not work-related. Expatriates and business travelers, though, are different: While overseas on business, a visitor can be deemed to be "at work" 24 hours a day/7 days a week—even while out drinking. (See, e.g., *Lewis v. Knappen* (NY 1953); *Matter of Scott* (NY 1949); *Hartham v. Fuller* (NY App. 1982); *Gaboras v. Pan Am* (NY App. 1951).)
- **Capped local worker injury claims.** The US and some (but not all) other countries offer employees special systems that pay a guaranteed recovery for a workplace injury. Under "workers' compensation," an employee injured on the job (even in an act of violence) can bring a claim for a *capped* recovery without having to prove employer fault, even if the employer did nothing wrong. The trade-off inherent in workers' compensation is that it offers an *exclusive remedy*: Employees can be barred from suing employers outside the system. But the "workers' compensation bar defense" to personal injury civil lawsuits, clear as to local employees, gets fuzzy as to expatriates and

business travelers injured abroad. These travelers might sue their employer for personal injuries either in the local host country or—more likely—in their home country (regular place of employment). US-based employees injured abroad might sue in an American court.

4. Personal injury lawsuits versus workers' compensation claims

A US employee maimed or killed stateside, even a victim of a mass killing like the Virginia Tech shootings or the Oklahoma City bombing, rarely ever wins an uncapped wrongful death claim against the employer. The workers' compensation bar affirmative defense/exclusivity of the workers' compensation system almost always stands, except as to certain intentional torts. (See, e.g., *Ferris v. Delta* (2d Cir. 2001); *Werner v. NY* (NY 1981); *James v. NY* (NY 1973); *O'Rourke v. Long* (NY 1976); *Barnes v. Dungan* (NY App. 2005); *Briggs v. Pymm* (NY App. 1989).) Our focus, though, is on Americans injured while working abroad. Does the fortuity of an incident occurring across the border let an employee beat the US workers' compensation bar and win an uncapped personal injury verdict from an American jury? The answer is "maybe." When a US-based employee gets hurt on an overseas business trip of under a month, case law usually upholds state workers' compensation payouts and the exclusive remedy/bar defense. (See, e.g., *Sanchez v. Clestra* (NY App. 2004). *As to work on US government contracts, see* Defense Base Act, 42 USC §1651.) The more complex scenario is where an American gets hurt while abroad on a business trip of over a month, or after the place of employment shifted abroad. These cases turn on their facts. (See, e.g., *Kahn v. Parsons* (DC Cir. 2006).)

Strategic employers sending American staff abroad, especially into danger zones, try to structure postings to retain both US workers' compensation remedies and the bar defense. This approach is fair because it offers American staff their very same remedy available for *domestic* workplace injuries and violence. Insurers sell a product called "foreign voluntary workers' compensation coverage" that pays no-fault workers compensation awards to covered employees injured outside the US. A common mistake, though, is to assume that merely buying this coverage automatically extends the workers' compensation *bar defense* to foreign-sustained injuries. Multinationals need an affirmative strategy to extend the bar abroad. One theory is to offer foreign voluntary coverage expressly in exchange for a written consent to limit personal injury remedies to the state workers' compensation system and policy benefit. To induce the employer to buy no-fault foreign coverage, the expatriate covenants that the state system plus the policy will be his exclusive remedy against the employer for injuries sustained abroad.

Another strategy is to require that staff traveling into danger zones sign assumption-of-risk waivers acknowledging and accepting all dangers inherent in the posting. But in recent decades American courts have been reluctant to enforce employee waivers to defeat claims of employer negligence. (See, e.g., *Lane v. Halliburton* (5th Cir. 2008).) If an employer invokes assumption of the risk to block even a workers' compensation award, a US employee might argue unconscionability. Waivers may be more appropriate for a family member like a "trailing spouse" who asks to accompany an employee overseas. That said, in this context a choice of forum clause selecting arbitration may be enforceable.