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Overseas Business Travel Liability and the Duty of Care in Times of Ebola

As of late 2014, the United States faced no Ebola pandemic whatsoever. The odds of catching Ebola in an American workplace remained statistically zero. Only a handful of Ebola cases had made their way to the United States, and a few hospitals aside, every American workplace remained Ebola-free. Only two employees had caught Ebola on an American job site—both at the same Dallas hospital. Both survived.

And yet American employers have been battening down for the Ebola pandemic possibly to come. Industrial health and safety experts have been recommending Ebola protective measures. Conferences on Ebola have been scheduled. Law firms have issued bulletins explicating the theoretical legal issues that might emerge were Ebola to infect American workplaces. The US Occupational Safety and Health Administration has even drawn criticism for not giving employers enough detailed guidance on preventing Ebola.

Meanwhile, where an actual Ebola pandemic rages in real time and endangers countless workers is West Africa, particularly Liberia, Sierra Leone and parts of Mali and Guinea. The World Health Organisation had declared Africa's Ebola pandemic a "Public Health Emergency of International Concern." The pandemic has killed well over 5,000 Africans with "more than 150 Liberian medical workers [having] died from Ebola." (S. Fink, "Treating Those Treating Ebola in Liberia," *The New York Times*, Nov. 6, 2014)

As of 2014, the most urgent real-world Ebola risk threatening the American workforce is in Africa—that is, the danger US-based staff face when traveling for work to West Africa. Think of researchers, journalists, consultants, medical relief workers, infrastructure development teams, government staff, government contractors, and American expatriates who happen to live and work where Ebola strikes.

And so the most practical Ebola question that employers should be asking about their American staff is: *What is our liability risk as to our US-based employees and expatriates who contract Ebola while working overseas?*

But framing this as an Ebola question is too narrow, because we are addressing a legal issue that extends well beyond Ebola. The core question here is: *What is an employer's liability exposure to American business travelers and expatriate assignees who get hurt or killed while working abroad?* The answer is the same whether an employee gets infected with Ebola while working temporarily in Liberia, whether an employee gets kidnapped by criminals while working temporarily in Mexico, or whether an employee gets killed by a bomb while working temporarily in Israel.

Each monthly issue of *Global HR Hot Topic* focuses on a specific challenge to globalizing HR and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case's International Labor and Employment Law practice helps multinationals globalize business operations, monitor employment law compliance across borders, and resolve international labor and employment issues.

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This question of liability exposure for traveling employee injuries comes up constantly. Concurrent with the Ebola scare, this same question is getting asked about staff working near Syria, as ISIS beheads Western journalists and aid workers. This same question has been asked for years by organizations operating in war-torn Iraq and Afghanistan, by organizations operating in terrorism-prone areas of the Middle East, by organizations operating in crime-ridden parts of Africa and Latin America, and by organizations operating where natural disasters strike—think of the 2011 Asian tsunami and the Japanese nuclear meltdown in its aftermath. This same question of liability exposure for overseas employee injuries got asked back in 2008 when terrorists raided Mumbai's Taj Mahal Palace Hotel, and it got asked during the 2011 Arab Spring riots—think of employees like CBS News Foreign Correspondent Lara Logan (sexually assaulted by a rioting Egyptian mob) and Google regional marketing head Wael Ghonim (captured by Egyptian rioters and held for 10 days, Ghonim tweeted "we are all ready to die").

For that matter, this same question of liability exposure to staff injured or killed while working abroad extends beyond crisis zones—travelers and expatriates get hurt and killed even while visiting *safe places*. An American organization might face exposure to staff hurt on business trips to, say, Zurich, Sydney or Montreal, where any employee could get mugged, hit by a bus, caught in a fire or go down in a plane crash. For that matter, in left-hand traffic flow cities like London and Tokyo, visiting Americans are prone to stepping in front of speeding cars.

The question of the liability exposure an employer faces when staff get injured or killed on overseas business trips and expatriate assignments is always in play, not confined to Ebola or other intense but temporary crises. This question leads employers to the practical issue of what steps they might take to contain and limit their liability. Case law on employees injured and killed overseas is surprisingly well-developed, going back for decades. The reported cases tend to involve routine injuries in stable countries. In one case an employee somehow hurt her eye in the shower of a Canadian hotel. (*Capizzi v. So. Dist. Rptrs.* (NY 1984)) In another case a musician touring Brazil with legendary conductor Arturo Toscanini got hit and killed by a runaway bus. (*Tushinsky v. NBC* (NY App. 1942) But some overseas-worker-injury cases involve grisly situations. In one case a flight attendant on a layover in Rome got brutally and repeatedly raped by a serial rapist on her own flight crew. (*Ferris v. Delta Air Lines* (2d Cir. 2001)) In another case an employee got kidnapped out of a restaurant in the Philippines and "tortured" after his employer "delayed paying the ransom that was demanded until after [the] kidnappers carried out their threat to cut off part of his ear." (*Kahn v. Parsons Global* (DC Cir. 2008))

Some of these cases are fairly low-stakes injury compensation matters, but some of these disputes become big-ticket, even "bet-the-company" federal litigation. For example, the estates of the four Blackwater security guards who were murdered, burned and strung from a bridge in Fallujah in 2004 by an Iraqi mob brought a multiplaintiff federal wrongful death action that ended up on a petition to the United States Supreme Court—to defend the company, Blackwater engaged former Clinton investigator Ken Starr. (*Nordan v. Blackwater* (4th Cir. 2006, *cert.den.* 2007))

Because no employer wants its staff to get hurt and no employer wants to get sued, the first step to take in the overseas staff injury context, obviously, is to protect employees dispatched abroad from recognized hazards. Everyone reminds employers to heed the "duty of care." (Restatement (Second) of Agency § 492) Providers like International SOS and Europ Assistance offer employers concrete safety measures in the foreign-business-travel and overseas crisis contexts.

But after taking safety and crisis precautions, an employer next needs to take steps to solidify its legal position in case some employee—despite precautions taken—ends up getting hurt or killed overseas and sues. An employer strategizing on how to shore up its legal position in the international-travel-injury context must draw four key distinctions: (1) business travelers and expatriates versus local staff, (2) safety and security versus workplace health and safety law compliance, (3) health and safety precautions versus employee injury claims and (4) personal injury lawsuits versus workers' compensation claims. Our discussion here addresses these four key distinctions as a framework for an employer crafting a strategy to contain its liability exposure to staff injured or killed on overseas business trips and expatriate assignments.

Business travelers and expatriates versus local staff

Organizations assessing their liability exposure to their staff injured or killed in an overseas crisis, disaster, pandemic or even just a routine accident always seem to focus on *business travelers and expatriates* injured while working overseas only temporarily. Why? Why do organizations seem less concerned about their duty of care to their own *foreign local employees* possibly caught in harm's way overseas? Indeed, an organization's workforce in a crisis-stricken country may be predominantly foreign locals. For example, when Egypt's 2011 Arab Spring riots erupted, HSBC Bank employed 1,200 local Egyptian staff—but the bank focused evacuation efforts on just 10 employee expatriates who happened to find themselves in Egypt when riots broke out. (S. Green, *Corporate Counsel*, 2/9/11). Is it fair for an organization to focus its duty of care and safety efforts on business travelers and expatriates more than local staff?

Yes it is. When an overseas crisis, disaster or pandemic strikes, multinationals inevitably focus their duty of care and safety efforts on their travelers and assignees caught in harm's way more so than on locals, because on a per-employee basis, employer responsibility and liability exposure to business travelers and assignees are far greater. There are two factors here: work time and local worker remedies.

- **Work time**. Employers are responsible for their staff's safety and security during *work time*. A truck driver injured in a traffic accident may have a claim against his employer if the crash happened on the job driving his truck, but not if it happened off the job driving his own car. And locals caught up in a crisis, disaster, pandemic or accident are more likely to get injured o*ff the job*. Their injuries will implicate the employer only if work-related. An overseas business traveler or assignee, by contrast, will likely be deemed "at work" 24 hours each day, 7 days each week during the trip—even while away from the regular workplace at a party, out drinking at a bar or strolling across a public square. The rationale in the case law is that *but for* the foreign business trip or assignment, that traveler would have been safe at home, out of harm's way. (*See, e.g. Lewis v. Knappen* (NY 1953); *Matter of Scott* (NY 1949); *Hartham v. Fuller* (NY App. 1982); *Gabonas v. Pan Am* (NY App. 1951))
- **Local worker remedies**. Most countries offer employees special workplace injury compensation remedies that pay injured workers modest awards. Under these systems injured employees usually win easy compensation payouts, but they generally cannot win big-ticket, uncapped money judgments. By contrast—as we will discuss in detail—an injured business traveler or assignee implicates cross-border choice-of-law and choice-of-forum challenges and might get a chance for a big-dollar uncapped recovery. The "sticker price" of a worker injury claim can climb significantly if the claimant happened to get hurt while working temporarily overseas.

Safety and security versus workplace health and safety law compliance

Good workplace safety practices are vital to corporate social responsibility and legal compliance, and indeed all countries impose comprehensive workplace health and safety laws. Any employer that unreasonably breaches its duty of care and endangers its staff's health and safety is socially irresponsible and a lawbreaker. In static, stable, fixed workplaces, implementing sound workplace health and safety measures that meet an employer's duty of care and that comply with safety laws is a fairly routine exercise. The focus is usually on complying with job-specific workplace health and safety regulations that dictate precise safety protocols in specific types of workplaces. In factories, for example, workplace health and safety regulations might specify that to meet the duty of care, factory employers must supply goggles, machine guards, first aid kits and emergency-stop buttons. In offices, safety regulations might specify that office employers supply ergonomic keyboards, fire extinguishers, staircase handrails and low-glare computer screens. In hospitals, safety regulations might require hospital employers to supply needle disposal units, disinfectants, surgical masks and rubber gloves.

But these workplace health and safety regulations tend to go silent as to what precautions to take in unstable crises, like terrorist attacks, hurricanes and Ebola pandemics, particularly when the crisis strikes outside a regular work location. Often the only guidance that workplace health and safety regulations tend to offer in crises or disasters is the vague mandate to heed the catch-all "duty of care." This leaves employers on their own in deciding which specific precautions to take—and not take—during a crisis. By definition, every crisis is different. In a terrorism or war zone, someone might argue the duty of care requires an employer to supply a weapon, body armor, a local cell phone and an armored car. In a hurricane, someone might argue an employer should supply a flashlight, rain gear, canned food and potable water. In an Ebola pandemic, someone might argue for a hazmat suit, surgical masks, hand-washing stations and chlorine disinfectant. But these recommendations are all subjective and context-specific. Someone *else* might argue that each of these situations requires very different protections—like an evacuation. In a crisis, who is to say which safety measures are enough to meet the duty of care? How does an employer answer questions like: *What sterilization procedures are necessary when a medical worker removes a hazmat suit in the midst of an Ebola outbreak? In a war zone, should an employer give its employees guns? Does a State Department or Centers for Disease Control warning mean we must evacuate expatriates? How do we handle the "Rambo" employee who insists on staying put?*

Compounding the subjectivity and uncertainty here is the context of overseas business travel and expatriate assignments outside fixed workplaces. Workplace health and safety laws tend to be silent not only as to crises but also silent as to steps to take to protect staff traveling and living abroad. Even proactive internal corporate travel security plans may not offer much "granularity" as to specific steps to take, at least in a crisis "in the field". Also, business travelers and expatriates implicate jurisdictional conundrums: Which country's health and safety laws, agencies and courts control when an employee based in country *A* gets hurt or killed while working temporarily in country *B*?

Actually, the choice-of-law question is fairly clear at least as to administrative health and safety regulations: Workplace safety regulations of the host country, not the home country, tend to control. US OSHA, for example, does not reach abroad.

Host countries impose their own workplace health and safety laws. Ebola-stricken Liberia and Sierra Leone, for example, have detailed (if somewhat outdated) workplace health and safety codes. Local foreign occupational health and safety regulations are tough laws that can trigger tough penalties—in Canada, China, France, Italy, Russia and elsewhere, criminal penalties.

Even so, for a number of reasons administrative health and safety law charges are rare, under home and host country law alike, when business travelers and assignees get hurt or killed overseas, especially where the injury happens outside a fixed workplace. As a practical matter, host country health and safety law enforcers rarely bring administrative claims when inbound business travelers and "inpatriates" get hurt in-country outside a regular workplace. For that matter, sometimes the oversees employer of an injured traveler or expatriate has no local in-country registered corporate affiliate. Local health and safety enforcers in those situations have no ready employer target against which to enforce sanctions.

The point is that responsible employers dispatching staff abroad try to heed their duty of care and offer safety precautions. But the prospect of administrative workplace health and safety claims in the business travel or expatriate context is rarely much of a threat, because *home country* administrative health and safety laws do not tend to reach abroad and *host country* administrative health and safety laws do not often get invoked in the inbound traveler/inpatriate injury context.

Health and safety precautions versus employee injury claims

Legal systems impose the duty of care on employers in two very different ways. We just addressed the first of these ways—administrative occupational health and safety laws. But we saw that these safety laws rarely play much of a role when business travelers and assignees get hurt or killed overseas outside a fixed workplace. So an organization's liability exposure as to overseas-injured business travelers and assignees tends to focus on the second way that legal systems impose the duty of care on employers: *employee injury claims*.

A business traveler or assignee who gets seriously hurt or killed overseas will likely bring some sort of injury claim against the employer. (If the injury is fatal, the estate files.) No matter how fastidious an organization's travel safety protocols, after a traveler or expatriate suffers a serious injury overseas, the employer should expect to get served with some sort of injury claim. At that point, if employer fault is an issue in the claim, the fact that the employer had taken steps to heed its duty of care becomes all but irrelevant. With hindsight offering 20/20 vision, an injured employee can easily allege the organization's precautious were inadequate. The injury itself all but proves that the employer's preventive measures, however well-intentioned, were worthless. If the employee caught Ebola on a work trip to West Africa, no matter that the employer had provided a hazmat suit, facemasks and disinfectants—the employee will point to whatever breach infected him and argue the employer should have prevented it. If the employee got shot in an overseas terrorist attack or got raped in an overseas riot, no matter that the employer had provided body armor, a working cell phone and International SOS support—the employee will point to whatever step would have prevented the injury and argue the organization should have provided it. Even a traveler or assignee who gets hit by a car while crossing the street after a night out drinking with clients in Tokyo might allege the employer failed to provide adequate training on pedestrian safety in left-hand drive traffic.

Yes, travel safety precautions are vital. But an organization dispatching staff overseas, after putting safety precautions in place separately needs a strategy for minimizing its liability exposure to employee injury claims.

Personal injury lawsuits versus workers' compensation claims

To craft a strategy for minimizing exposure to overseas business travelers' and expatriates' personal injury claims, an organization must begin by distinguishing the two main legal theories that come into play: personal injury lawsuits and workers' compensation claims.

When an injured employee's regular place of employment is the United States, injury compensation claims involve American state *workers' compensation*. American workers' compensation systems invite injured employees to file state administrative claims for modest awards set by workers' compensation injury "schedules."

American workers' compensation awards are an *exclusive remedy*—injured employees cannot opt to sue their employers for personal injuries in uncapped civil jury trials demanding compensatory or punitive damages. Of course, every once in a while some injured employee *does* try to sue his employer by bringing a personal injury lawsuit in a civil or common pleas court demanding a jury and an uncapped personal injury verdict plus punitive damages. But American courts dismiss these lawsuits as soon as the employer raises the ironclad affirmative defense of workers' compensation exclusivity or immunity, the workers' compensation bar. Some courts even write this defense right into their procedure rules—Tennessee Rule of Civil Procedure 8.03, for example, lists the "affirmative defense" of "workers' compensation immunity."

The American workers' compensation exclusivity defense is virtually impregnable. It reaches most all American employees who get hurt, maimed or killed on the job—even tragic victims of crimes and terrorism like the Virginia Tech shootings and the Oklahoma City bombing. Workers' compensation immunity is

such a fundamental part of the fabric of our legal system that it occasionally plays a central, if silent, role in American social discourse. For example, a big debate in recent popular culture has been professional football players' claim that the National Football League somehow exposed them to progressive brain injuries during their playing careers. In this debate no one ever seems to mention the central role of the players' former *teams* that put the players on the field and in harm's way in the first place. Why is the focus on the NFL and not the teams? The workers' compensation bar, of course.

- **Beyond the United States.** We are discussing the American workers' compensation system, but this worker's compensation exclusivity bar extends farther. Many (though by no means all) other countries impose a similar concept on their domestic employees. For example, according to Kenya's Work Injury Benefits Act 2007 § 16: "No action shall lie by an employee… for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the [workers' compensation award] provisions of this Act in respect of such disablement or death."

The worker's compensation exclusivity bar therefore offers a rock solid defense to an American employee's personal injury claim for an injury that occurred in the United States. But here we are addressing employee injuries suffered while on overseas business trips and postings. The US workers' compensation system—and hence its exclusivity bar—get fuzzy when employees get injured while working *abroad*. And so a business traveler or expatriate injured or killed overseas might ignore the exclusivity bar and sue the employer for personal injuries in a court of either the overseas host country or the home country. In the lawsuit, if the exclusivity bar defense comes up, the employee will take the position that because he got hurt abroad, his lawsuit lies beyond the reach of his home state's workers' compensation system—and hence beyond the reach of its exclusivity bar defense.

While an employee injured overseas might sue in a court in either the overseas host country or in his home country, an *American* employee pursuing a personal injury claim is almost certain to select his home country American court, even if the employer has assets in and is subject to the personal jurisdiction of the host country where the injury occurred. American courts, American juries, American compensatory damages and American punitive damages offer American plaintiffs a far bigger upside in a personal injury claim.

Yet an overseas-injured employee with a job nexus to the United States who sues in an American court is vulnerable to his employer raising the affirmative defense of the workers' compensation exclusivity bar. The threshold question in the lawsuit will become: *Does the workers' compensation bar reach an American employee injured while working temporarily abroad?*

There is no easy answer. We already mentioned the long line of cases on this issue. Sometimes employees get to sue for uncapped damages in a jury trial; sometimes they do not. *(See, e.g., Nordan v. Blackwater (supra); Kahn v. Parsons (supra); Ferris v. Delta (supra); Werner v. NY* (NY 1981); *O'Rourke v. Long (NY 1976); James v. NY (NY 1973); Barnes v. Dungan (NY App. 2005); Briggs v. Pymm* (NY App. 1989))

Employers therefore need a strategy—some way to position themselves to strengthen their argument that the workers' compensation exclusivity bar reaches American-based staff injured while working temporarily overseas. The three most likely components to a strategy for protecting an American employer against American-court personal injury claims from staff injured while on overseas trips are: assumption-of-the-risk waivers, elections of remedies and arbitration clauses:

- **Assumption-of-the-risk waivers.** When an organization dispatching staff abroad focuses on its exposure to a foreign-arising personal injury claim, its first thought always seems to be to grab a form *assumption-of-the-risk waiver*. Before letting any business traveler or expatriate head off overseas (particularly into a danger zone), the organization thinks the employee should sign a boilerplate waiver that acknowledges and accepts the posting's inherent dangers. If the employee later gets hurt and sues, the waiver should offer a solid defense—right?

  Maybe not. Employee-signed assumption-of-the-risk waivers are extremely fragile and unlikely to get enforced. Question whether they are worth the effort. Question whether they lull organizations into a false sense of security.

  Employee assumption-of-the-risk waivers are vulnerable on two grounds: public policy and after-occurring bad acts.

  - **Public policy.** American courts are very reluctant to enforce advance employee personal injury waivers because they see the employees who sign these forms as presumptively coerced, victims of weak bargaining power. Courts assume these employees never had a meaningful choice. While courts may uphold express assumptions-of-the-risk outside the employment context (*e.g., Wheeler v. Couret* (SDNY 2001); *Arbegast v. Board of Ed.* (NY App 1985)), a line of cases going back over a century invalidates *employee* assumptions of risk as against public policy in the employment context. (*E.g. Lane v. Halliburton* (5th Cir. 2008); *Rogow v. US* (SDNY 1959); *Johnston v. Fargo* (NY 1906); *Restatement (Second) of Torts* § 496B comment f, § 496C, comment j) Some courts even have a name for the rule in these cases—the "employer/employee exception" to

assumption of the risk. (*Norris v. ACF Industries* (SDWV 1985)) Indeed, for an employer to invoke assumption-of-the-risk to block even a workers' compensation-type award might be held unconscionable.

- **After-occurring bad acts**. Employee-signed assumptions of risk are also fragile for the separate reason that injured employees can fairly easily sidestep them. All an injured employee need do is frame his personal injury claim around the employer's later bad acts or recklessness—advance waivers of at least intentional torts are void. After an injury happens overseas, the employee usually finds a lawyer smart enough to avoid building a personal injury case around the inherent dangers of the foreign locale. (That would be a weak legal theory indeed.) As to the cause of injury, injured employees inevitably point to employer intervening bad acts or recklessness. For example, if a government contractor sends security guards who signed assumption-of-the-risk waivers into a war zone and gives them guns, bullet-proof vests and GPS locators—but if they get killed anyway—their estates will sidestep their assumption-of-the-risk waivers by alleging the employer recklessly withheld from them armed backup and a quick evacuation. (*Cf. Nordan v. Blackwater, supra*)

  As another example, if an overseas-traveling employee gets kidnapped, he will not sue the employer alleging it never should have sent him to an inherently dangerous country. Rather, he will frame his lawsuit around the employer's actions later. In one case the basis for the lawsuit was a claim that the employer caused injuries by stubbornly hard-bargaining with kidnappers over the ransom. (*Kahn, supra*)

- **Elections of remedies.** A completely different strategy for protecting an organization against claims from staff injured on overseas trips is *election of remedies*. When a US-based employee covered by US workers' compensation gets hurt on an overseas business trip of less than a month, case law usually upholds state workers' compensation payouts—and so state law also usually upholds the workers' compensation exclusivity bar. The theory is that a short-trip traveler based in a US state remains a US state employee when hurt abroad; he can participate in the workers' compensation system but he remains subject to the exclusivity bar. (*See, e.g. Sanchez v. Clestra* (NY App. 2004)) Employees working on US government contracts are subject to this analysis under the federal Defense Base Act. (42 USC §1651) An exception, though, exists in some US states that impose a workers' compensation exclusion for all overseas-sustained injuries; those states treat all overseas-sustained injuries as outside workers' compensation. Those cases fall outside the exclusivity bar.

  A murkier scenario is the US-based employee injured or killed on a longer overseas trip (or an expatriate injured on an overseas posting where the Defense Base Act does not apply). Do these employees step outside their US state workers' compensation systems, sidestepping the workers' compensation exclusivity bar—and positioning them to sue their employers in uncapped personal injury jury trials?

  The answer is "maybe." These cases turn on their facts, and small nuances can change results. (*See, e.g., Nordan v. Blackwater (supra)*; *Kahn v. Parsons (supra)*; *Ferris v. Delta (supra)*; *Werner v. NY (supra)*; *O'Rourke v. Long (supra)*; *James v. NY (supra)*; *Barnes v. Dungan (supra)*; *Briggs v. Pymm (supra))*

  Strategic employers will ask: *How can we structure a foreign assignment to give our employee all the benefit of the no-fault workers' compensation remedy he would be entitled to if injured on the job here at home—while retaining for ourselves the workers' compensation exclusivity bar?*

  - **Appropriateness.** Asking this question is completely appropriate and socially responsible. The employer is merely trying to position its staff injured abroad to get the same no-fault worker's compensation remedy, subject to the same defense, as staff get back home. The employees end up exactly where they started. This is fair because no employee deserves a bigger payout just because he happened to get mugged on a business trip to Caracas or Johannesburg rather than on a trip to Chicago or Detroit. No one deserves a bigger payout just because he happened to catch a deadly infectious disease on a business trip to Monrovia or Freetown rather than Dallas or New York.

  Perhaps the surest way for an employer to extend American-style workers' compensation remedies to staff dispatched overseas while retaining the workers' compensation exclusivity bar is to offer voluntary insurance coverage in exchange for an election of remedies. Insurers sell a product called "voluntary workers' compensation" insurance that pays beneficiary employees a benefit mimicking US state no-fault workers' compensation schedule awards (the insurance benefit equals the payout for the same injury under state workers' compensation schedules). An employer can buy this insurance for an employee on an international trip who travels beyond the reach of US state workers' compensation.

  But in this context, merely buying voluntary workers' compensation coverage is not enough. A common mistake is the employer that buys voluntary workers' compensation coverage for overseas-traveling staff without insisting employee beneficiaries contractually elect the insurance benefit as their exclusive remedy for personal injuries. Without an employee-signed election of remedies, the voluntary insurance coverage is just a nice extra employee benefit. An employee who gets injured or killed abroad might accept the capped insurance benefit payout—and then in addition sue the employer for a multimillion dollar personal injury and punitive damages award. At that point, the voluntary workers' compensation insurance

policy looks like a mere a private arrangement with a private insurance company. It cannot likely confer on the employer the threshold legal defense of workers' compensation exclusivity. Maybe the cleanest way for an employer to address this Achilles heel scenario would be to offer overseas business travelers and expatriates voluntary workers' compensation coverage expressly in exchange for employee-signed elections of remedies. The employee contractually limits his remedy against his employer (in any future claim for overseas-sustained personal injuries) to the schedule limits of his state workers' compensation system—which, of course, equals the benefit paid under voluntary workers compensation insurance. That is, before embarking on the overseas assignment, the employee signs a commitment saying something to the effect of: *Voluntary workers' compensation insurance would pay me a benefit if I get injured overseas even if the injury is not my employer's fault. To induce my employer to buy me this insurance, I agree that if I get injured or killed abroad, my exclusive remedy against my employer will be the full extent of the workers' compensation schedule limits of my home state, or the limits of the voluntary insurance policy benefit, whichever is higher.*

An employee who refuses to sign this election of remedies, of course, would be ineligible for the overseas assignment. Even so, a court is not likely to hold the election of remedies presumptively coerced, because the election of remedies is inherently fair—it gives the employee the exact same remedy he would get for the same injury if suffered at home, within the jurisdiction of the American legal system.

- **Arbitration clauses.** In addition to election of remedies and assumption of risk, a supplemental strategy in the overseas business travel and assignment context is having employees sign a choice-of-forum clause selecting arbitration. Where an employee's personal injury occurs overseas and outside the exclusive jurisdiction of a US state workers' compensation system, an arbitration clause should be enforceable as to a claim in an American court, even if an arbitration clause is not likely enforceable as to claims properly in US state workers' compensation proceedings.

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No matter what protections an employer takes to safeguard staff in a crisis, a disaster, a pandemic or just on a routine overseas business trip, there is always a risk an employee will get hurt or killed. Workplace health and safety laws impose a duty of care on employers as to all their staff worldwide—overseas business travelers, expatriates and local workers alike. But these laws are vague as to how employers must heed the duty of care in the crisis/disaster/pandemic context, and these laws are also vague as to how employers must heed the duty of care in the overseas-business-travel context. For example, these laws are silent as to what to do to mitigate the risk of exposure to Ebola overseas.

International business travelers and expatriates hurt or killed abroad are more likely than local domestic staff to sue the employer in court for personal injuries. Employers dispatching staff on overseas trips and assignments must heed their duty of care. After taking reasonable precautions, these employers also need a viable strategy to minimize exposure to lawsuits. Insisting overseas travelers sign assumption-of-the-risk waivers might not be not too effective a strategy. A more viable strategy may be having mobile employees elect, as their exclusive remedy for personal injury claims against the employer, an insurance benefit that meets workers' compensation schedules.