

United States' Standards and Practices on Workplace Safety and Health: Considerations for Employers with Overseas Employees

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INTRODUCTION

This paper discusses United States (US) employers' Duty of Care for their employees assigned to overseas work, especially as related to workplace health and safety. This discussion focuses on what US employers should do to comply with federal or state Occupational Safety and Health Administration (OSHA) standards while their employees are on overseas assignment, how OSHA regulations affect foreign employers with employees assigned to work within the US, whether US employers should provide supplemental workers' compensation coverage for employees who travel outside the employee's home state or other jurisdiction, and what other risks might affect traveling workers and their families.

Occupational safety and health remains a key consideration for US employers, since each year nearly 5,000 employees die as a result of workplace injuries, while roughly 6 million workers suffer non-fatal workplace injuries, at an annual cost to US businesses of more than \$125 billion.^{1,2} The past several years have also seen an increasing focus on employers' Duty of Care for their overseas workers, with many publications stressing both employers' ethical duties and the legal liabilities associated with failing to keep these workers safe.^{3,4,5,6}

At present, there is not complete data on how many US workers suffer fatal or otherwise disabling workplace injuries or illnesses each year while deployed overseas. However, OSHA estimates that 35% of international travel by US citizens is in some way work-related.⁷ In 2013, 61.5 million US residents traveled outside the country with at least an overnight stay.⁸ One study of fatalities suffered by US residents while traveling overseas indicates that traffic accidents and cardiovascular events account for the overwhelming majority of overseas deaths.⁹ Beyond an employer's legal obligations, keeping employees and their families safe during overseas assignments is also best business practice, with expected improvements in productivity, avoidance of potentially significant costs for health care and emergency repatriation, and promotion of operational consistency.

REGULATORY BACKGROUND – Federal Agencies

In 1970, the US Congress created OSHA, mandating the Agency to promulgate and enforce standards for workplace health and safety. At the same time, Congress established the National Institute for Occupational Safety and Health (NIOSH), the mission of which is to advise OSHA, employers, and workers about current knowledge and research on workplace health and safety; and the Occupational Safety and Health Review Commission (OSHRC) which provides appellate review of enforcement actions taken by OSHA.

EMPLOYER DUTIES UNDER OSHA

The jurisdiction of OSHA, or of state OSHA plans in 25 states, extends to all employees with the exception of certain state and municipal employees and certain small business entities. Employees of foreign-based employers who work within the United States are bound by OSHA standards and regulations. However, Section 4 of the OSH Act specifies that OSHA's authority is limited to employment performed within geographical boundaries under the jurisdiction of the US, and not overseas.¹⁰

OSHA has broad powers to conduct workplace inspections, issue notices of violation and orders of abatement, levy fines, promulgate new standards, and restrain or enjoin employers from continuing workplace operations that are imminently hazardous, with legal support from federal district courts. Of importance, OSHA has a duty to maintain the confidentiality of trade secrets that may be discovered during an investigation.

A. The OSHA General Duty Clause

Under the OSH Act, employers must comply with specific standards promulgated by OSHA, as set forth in Title 29 of the Code of Federal Regulations (29 CFR).¹¹ In addition employers have an even broader duty to keep their workers safe. Under the General Duty Clause of the OSH Act (Section 5(a)), employers must "furnish to

each of [their] 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” — even if no specific OSHA standard addresses a particular identified workplace risk.

In order to address emerging workplace hazards where no specific standard yet exists, OSHA will frequently publish Technical Advisory Bulletins or other guidance documents. These guidance documents serve to alert employers about recognized workplace risks which employers should address under their General Duty Clause obligations. Such advisory documents do not in themselves have the force of a regulation, but identify a recognized hazard that could be covered by the general duty clause if it can be proven that the employer, with the exercise of reasonable diligence, could have recognized and mitigated a particular risk using established safety or administrative practices.

For example, in 2012 OSHA published a Technical Information Bulletin recognizing that international assignment poses specific risks to traveling employees, including a risk of contracting certain infectious diseases.⁷ This document makes number of recommendations for employers, including arranging for travel medicine consultations for workers who will be assigned to areas with known infectious disease risks.

B. OSHA-Mandated Written Plans (Including Emergency Action Plans)

Several OSHA standards require employers to prepare and implement written plans to keep employees safe. Examples include OSHA standards for respirator use, control of blood-borne pathogens, and selection and deployment of personal protective equipment (PPE). An additional important example of a standard requiring a written plan is the Hazard Communication Standard. This standard has recently been updated under the Globally Harmonized System for Hazard Communication¹² to allow US companies and their overseas trading partners to exchange goods and materials with universally consistent labels, placards, and safety data sheets. Although so far there are few legal precedents with regard to OSHA’s enforcement for traveling employees who may be covered by such standards and the written plans prepared to comply with them, employers would be well advised to continue to follow their written plans even when their employees travel overseas.

Among OSHA-required plans are **emergency action plans**, which many medium to large business employers must prepare, particularly if they are covered by the Process Safety Management Standard or might assign their employees to respond to hazardous material (Haz-Mat) releases or other emergencies. Corporations are subject to significant legal liability if they do not undertake emergency preparedness efforts. These emergency action plans must cover emergency reporting, evacuation, critical plan operations, employee accounting, rescue, medical duties, alarm notification systems, and worker training. Again, although OSHA would not be able to enforce adherence to an emergency action plan designed only for overseas use, employers would be wise to avoid the liability of failing to protect overseas workers and their families in the same way they protect on-shore workers.

C. Record Keeping

OSHA requires employers with 10 or more employees in certain industries to record on the OSHA 300 Log work-related illnesses and injuries that require medical treatment beyond first-aid, and to maintain these logs for 5 years. Additionally, OSHA requires employers to report within 8 hours certain serious on-the-job injuries or illnesses, such as those resulting in hospitalization or amputation. OSHA would not be able to enforce recording or reporting of such work injuries if they occurred at an overseas location. Nevertheless, employers with traveling employees would be well advised to track such cases in order to look for opportunities to prevent similar cases in the future.

D. Worker Training

Many OSHA standards, particularly the “vertical standards,” require workers be trained to recognize and control hazards to which they may be exposed, and furthermore that such training be documented and “effective.”¹³ Although OSHA would not be able to cite for lack of training about hazards that occurred only during foreign travel, employers would still be wise to ensure that training provided to employees, whether on-shore or overseas, is documented, consistent, and complete.

OCCUPATIONAL RISKS AND THE TRAVELING WORKER'S FAMILY

It is well known that certain hazardous substances can be brought home from the workplace on the worker's person or clothing, and thereby expose family members. Examples include lead, asbestos, other non-volatile hazardous materials, and infectious disease. Accordingly, employers should consider whether their traveling employees have the training and means to decontaminate themselves or change out of contaminated garments when leaving the work site, and whether employees must resort to laundering their own contaminated clothing or PPE at their foreign domicile.

Employers should consider medical care, medications, and access to care for employees with existing medical conditions. Infectious disease and air quality risk and prevention should be managed. Additionally, recent literature on the employer's Duty of Care to employees and their families emphasizes that employer's should also consider potential risks posed by war, terrorism, kidnapping, and natural disasters when assigning employees to overseas travel.

WORKERS' COMPENSATION

Workers' compensation insurance/coverage has been in existence throughout the US since the early part of the 20th century.¹⁴ Administration of the program varies from state to state, but in effect the system allows for payment of medical bills and disability without regard to fault or disability. There is alternate mandated coverage for other specific groups that include federal employees, Department of Energy employees, coal miners, and longshore and seafarers and, railroad employees.

Workers' compensation insurance covers employees but typically not volunteers or independent contractors. The economic and non-economic cost to the injured worker and family can still be significant and long lasting. The work injury or illness should be accurately reported and early reporting and treatment can aid employee recovery and return to work. Prevention of the work injury/illness is the best means of mitigating risk.

Coverage can be used for employees who are hired within the US, but travel and work outside of the country. Only a few states provide limited foreign coverage.¹⁵ Often this coverage only applies to workers who are in a specific country for a designated maximum number of consecutive days, usually based on the state where the employee normally works. Companies can also bind Foreign Voluntary Compensation, which is coverage not required under statutes but with benefits equivalent to statutory benefits, and also a policy for repatriation expense and endemic disease coverage. The traveler should fully understand the state's workman's compensation regulations and firm's insurance policies prior to travel abroad on assignment.

EMERGING INTERNATIONAL TRENDS

Although the US does not have a legal system for assuring safe workplaces that expressly applies to overseas travelers, a few other nations do have such systems which require employers based within their jurisdiction to fulfill a General Duty to keep their employees safe, whether on home soil or when traveling abroad. In the United Kingdom, the Health and Safety at Work Act of 1974 (HSWA) requires employers to assure the health and safety of their employees generally; and this requirement applies extra-territorially.¹⁶ In Australia, workers' compensation laws are expressly extra-territorial.¹⁷ In the European Union, employers are obligated to assure that their traveling employees receive the occupational safety and health protections required by the host nation.¹⁸

A benchmarking study published in 2011 catalogs preventive activities already being undertaken by corporations with overseas assignees, and gives illustrative examples of the kinds of risks that such employees encounter, as well as the liabilities that their employers can face.¹⁹ Many employers have developed considerable expertise in planning for safety and security at overseas locations, as well as for emergency on-site care and options for urgent repatriation if needed.

OPERATIONAL CHALLENGES

Employers often face daunting challenges in fulfilling their General Duty of Care to overseas employees and their families, while pursuing operational consistency and solid productivity. Especially in remote locations, the lack of medical, public health, and transportation or other infrastructure resources can make safety planning expensive,

and sometimes nearly cost-prohibitive. Cultural and environmental factors present additional challenges, including how best to manage expectations for medical care and emergency response for both expatriates and local employees. Although offering different levels of care may be ethically defensible in some situations, closing any such gaps in service for different employee groups will often be a value-added proposition, both for the employer and the local community.

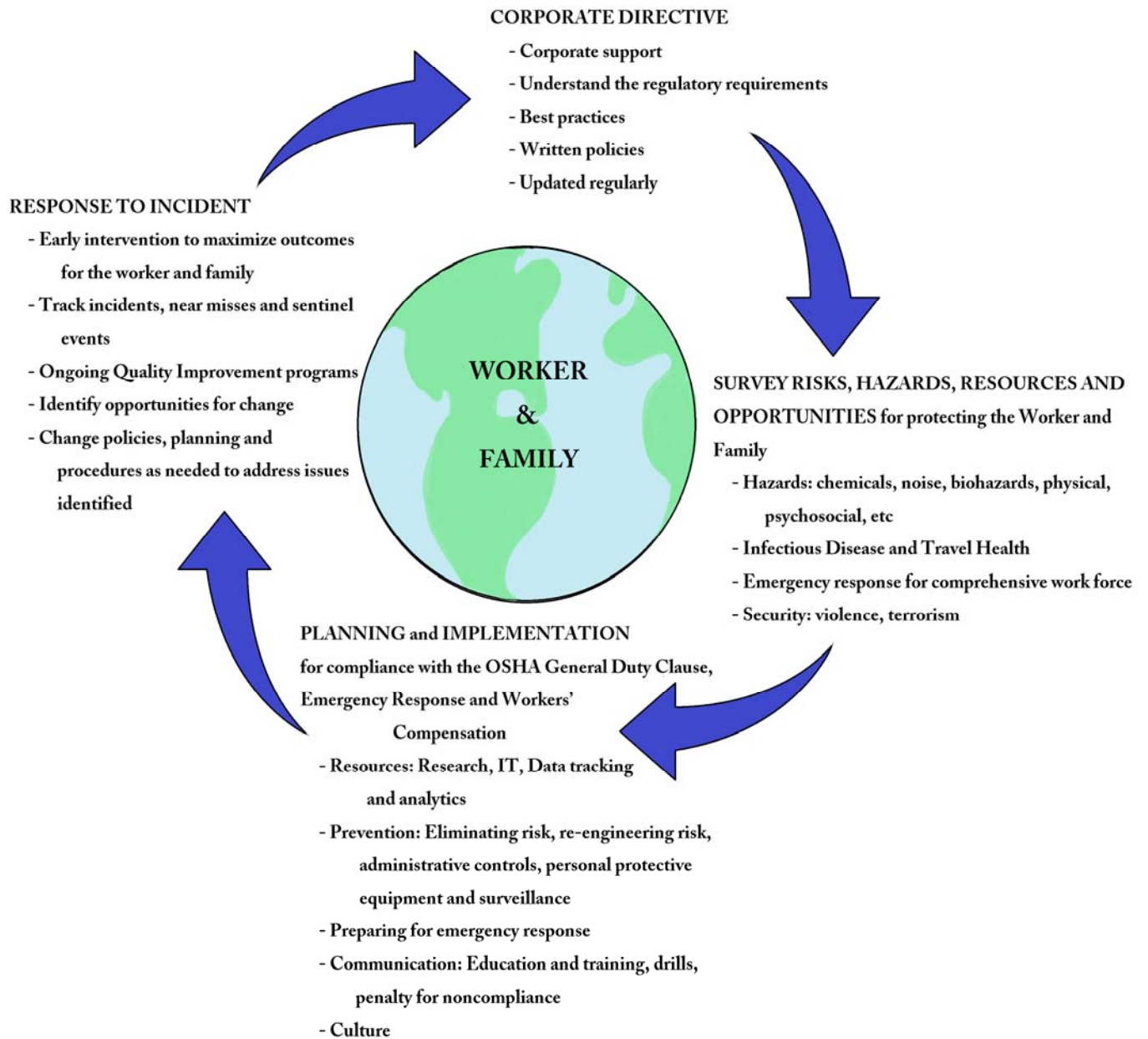
To address these challenges, employers will find that quality management tools are indispensable, including conducting periodic risk assessments and audits, benchmarking against best practices, and adjusting their action plans, as they seek to keep their employees safe globally.

CONCLUSIONS

Employers with workers on overseas assignment face complex challenges in keeping those employees safe. As discussed above, these employers have both ethical and legal duties, and face the challenge of considering workplace regulations imposed by both the home and host nations, risks to their employees from infectious diseases in certain parts of the world, risks due to terrorism, kidnapping, and other violent events, and the need to plan for urgent medical care or evacuation for workers and their families. To that end, employers would be well advised to plan ahead carefully, using the knowledge and experience of occupational medicine experts and other health and safety consultants.

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PROTECTING US AND THE FOREIGN WORKERS AND EXPATRIATES IN THE US AND ABROAD



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