How to Minimize Overseas Business Travel Personal Injury Liability and Comply with the Duty of Care

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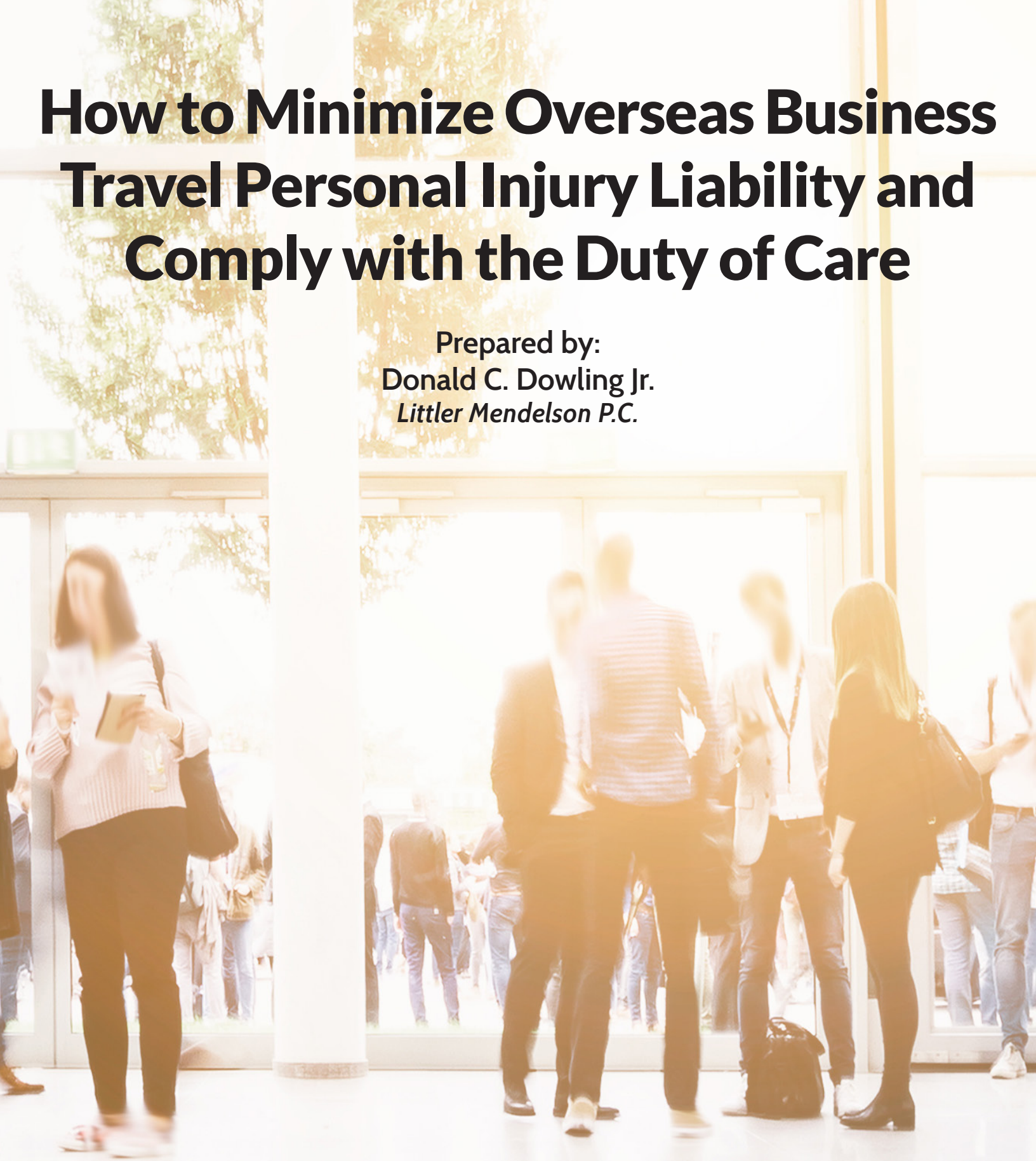

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How to Minimize Overseas Business Travel Personal Injury Liability and Comply with the Duty of Care

By Donald C. Dowling, Jr.

Even with Zika having made its way to parts of the United States, many Americans face their greatest risk of Zika exposure traveling abroad on business trips and on expatriate/global mobility assignments. For that matter, Americans traveling or moving abroad on company business risk contracting other diseases, having accidents, or falling victim to crime, terrorism, civil unrest and natural disasters—not to mention exposure to pandemics like flus and Ebola, or just coming down with a routine illness or having a heart attack or stroke while on overseas business travel.

Workplace health and safety laws require employers follow the "duty of care," but health and safety statutes are maddeningly vague in the scenario of an employee suffering an illness or injury while traveling or on assignment *outside the home country*. For example, health and safety laws like OSHA offer no practical guidance instructing how to protect an employee from contracting Zika while working abroad temporarily, or what steps to take when an employee traveling abroad on business encounters terrorism, crime, war or a natural disaster. U.S. OSHA's one-page *Technical Information Bulletin TIB 02-04-12* on "Safety and Health During International Travel" does not mention terrorism, crime, war or natural disasters, and it begins by saying it "is not a new standard or regulation and it creates no new legal obligations. It is advisory in nature…."

Everyone tells employers to "heed the duty of care," and of course state-of-the-art safety precautions for overseas traveling staff are very important. But no matter what preventive steps taken up front, an employer always faces the risk that a staffer will get sick, hurt or killed while working temporarily overseas. After that injury happens comes the inevitable claim arguing the employer should have taken even more precautions. When (despite an employer's precautions and attention to the duty of care) an employee or non-employee contractor gets sick or injured working outside the home country, there is the risk of a personal injury claim arguing the employer was at fault.

This article offers practical strategies for minimizing exposure to the potential personal injury claims of U.S.-based business travelers and assignees who suffer illnesses or injuries while on an international trip or assignment. Specifically we address extending the U.S. state workers' compensation bar overseas, confronting the shortcomings of assumption-of-risk waivers, using the "election of remedies" concept, and arbitration clauses.

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, we draw six key distinctions:

1. Preventive safety measures on the front end *versus* minimizing liability if an injury occurs later

2. Business travelers and expatriates *versus* local staff
3. Statutory health and safety law compliance *versus* compliance with the "duty of care"
4. Complying with the duty of care *versus* minimizing the risk of an employee personal injury claim
5. Personal injury lawsuit exposure *versus* the workers' compensation bar defense
6. Employee *versus* independent contractor as international traveler

First distinction: **Preventive safety measures on the front end *versus* minimizing liability if an injury occurs later**

Our question here is: *What steps can an employer take to contain and limit liability for personal injuries that business travelers and assignees suffer overseas?* Case law on business travelers and expatriate employees injured and killed overseas is surprisingly well-developed and goes back for decades. Many of 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)) 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 big-ticket, even "bet-the-company" federal litigation. For example, the estates of the four 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 itself, the security company engaged former Bill Clinton prosecutor Ken Starr. (*Nordan v. Blackwater* (4th Cir. 2006, *cert.den.* 2007))

No employer wants its staff to get hurt and no employer wants to get sued. So the first step to take in the overseas staff injury context, obviously, is *preventive*: Protect employees dispatched abroad from recognized hazards. The ubiquitous if anodyne advice here is that employers heed the "duty of care." (Restatement (Second) of Agency § 492) Law, best practices, expert advice and common sense and corporate social responsibility all require that an employer dispatching an employee on an overseas trip or assignment heed its "duty of care."

That said, general advice to heed the care duty leaves employers without practical guidance in the international business travel and global mobility context. Each foreign business trip and expatriate assignment is unique and presents its own set of physical risks (not to mention that risks often emerge *during* the trip or assignment). No law or regulation tells an employer what specific steps it must take—and what specific precautions it need *not* take—to heed its duty of care when it dispatches an employee overseas on a specific trip or assignment. Global safety consultants like International SOS and Europ Assistance can advise as to specific foreign travel scenarios, but no law or regulation tells a boss precisely what specific precautions to take when (for example) the weather forecast predicts a hurricane will hit a city an employee is traveling through, or what precautions to take when a staffer of childbearing age visits

a city where Zika has been detected, or what precautions to offer an assignee posted in a city with a high crime rate, a region with civil unrest—or a war zone. Businesses often ask a lawyer what safety steps to take as to staffers traveling abroad, particularly in overseas danger zones. But because statutory safety law is so vague in the foreign-travel context and because every foreign-travel-risk situation turns on its own facts, lawyers may not be as well-positioned as international travel safety consultants to advise on specific cross-border travel safety protocols. Indeed, a lawyer being asked a tough international business travel safety question might be expected to recommend the most conservative, least risky alternative—cancel the trip, or evacuate.

This point is that the first step here is to take whatever precautions deemed appropriate to heed the duty of care and corporate social responsibility to globally-mobile staff—ideally, take precautions consistent with advice from a global travel safety expert. In our discussion here we do not address safety tips for foreign business travel; we leave to international travel safety experts advising on which safety measures best protect employees embarking on foreign business trips. But then, the separate, second step is to *take appropriate measures to solidify the employer's defense in case, despite precautions taken, some internationally mobile employee ends up sick, hurt or killed overseas and sues for personal injuries*. After doing whatever necessary to heed the duty of care on the front end, separately take appropriate measures to shore up a defense if, God forbid, an injury nevertheless occurs. Our discussion here addresses that second step—how to shore up a defense in advance if a traveling employee later gets injured overseas.

***Second distinction*: Business travelers and expatriates *versus* local staff**

Employers assessing their liability exposure to their staff injured or killed in an overseas crisis, disaster, pandemic or even just a routine illness or accident always seem to focus on globally-mobile staff, 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? After all, an organization's workforce in a crisis-stricken country may be predominantly foreign locals. For example, according to media reports, when Egypt's 2011 Arab Spring riots erupted, one multinational bank employed 1,200 local Egyptian staff—but that bank focused evacuation efforts on its 10 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 small numbers of business travelers and expatriates without offering similar services or precautions to 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, both 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.

Of course, locals in any country caught up in a crisis, disaster, pandemic or accident are more likely to get injured in the chaos *off* the job. Their injuries will not implicate the employer if not 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 and 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, employees injured on the job usually win easy compensation payouts, but they generally cannot win big-ticket, uncapped money judgments. By contrast (as we will discuss), an injured international business traveler or assignee triggers 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 staff injury claim may climb significantly if the claimant who happened to get hurt was a traveler or assignee working temporarily overseas.

***Third distinction*: Statutory health and safety (OSHA type) law compliance *versus* compliance with the "duty of care"**

Good workplace safety practices are vital to corporate social responsibility and legal compliance. All countries impose comprehensive workplace health and safety (OSHA type) statutes. Any employer that unreasonably breaches its duty of care by flouting these laws endangers staff health and safety, is socially irresponsible and is by definition a scofflaw.

In static, stable, fixed workplaces, implementing sound workplace health and safety measures that meet an employer's duty of care and that comply with local workplace safety (OSHA type) statutes is a fairly routine exercise. Employers focus 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 supply needle disposal units, disinfectants, surgical masks and rubber gloves.

But otherwise-detailed and granular workplace health and safety regulations tend to get vague and fuzzy as to precautions to take in unstable unfixed workplaces out in the field overseas, and in chaotic contexts like terrorist attacks, hurricanes and Zika outbreaks. Often the only guidance that workplace health and safety regulations might offer in unfixed foreign workplaces or in crises or disasters is the vague mandate to heed the catch-all "duty of care." (*See, e.g.*, U.S. OSHA *Technical Information Bulletin TIB 02-04-12* on "Safety and Health During International Travel") This leaves employers on their own in deciding which specific

precautions to take—and not take—during a crisis.

Of course, we cannot fault legislators or drafters of health/safety statutes for leaving employers in this predicament, because by definition every crisis is different. 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 an employer must evacuate expatriates? How to handle the "Rambo" employee who insists on staying put?* 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 a Zika outbreak, someone might argue for mosquito protections and staying out of damp areas with high mosquito populations. 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. Even proactive internal corporate travel security plans may not offer much granularity as to specific precautions. In a crisis outside a fixed workplace, who is to say which specific safety measures are enough to meet the duty of care? Answers depend on too many variables, starting with the nature of the job—security guards and nurses, for example, inevitably face more risk than accountants and cooks.

Another question that gets asked here is the territorial application of workplace health/safety statutes in the international business travel and global mobility context. *Which country's health and safety laws, agencies and courts control when an employee based in country* A *gets sick, 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. U.S. OSHA, for example, simply does not reach abroad "extraterritorially."(29 U.S.C. § 653(a)) This said, in a few countries including Brazil the local workplace health/safety code can actually reach globally-mobile staff working temporarily overseas. *Host* countries impose their own workplace health and safety laws. Zika-stricken Latin American countries and Ebola-stricken African countries for example, all have detailed (if often 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, they can trigger criminal penalties.

In any event, for a number of reasons administrative health and safety (OSHA type) charges are rare, under home and host country law alike, when globally-mobile staff (especially business travelers, as opposed to expatriates) get hurt or killed outside their home country—particularly where the injury happens outside of work hours and away from a fixed workplace. As a practical matter, *host* country health and safety law enforcers rarely bring administrative claims when overseas-based business travelers and "inpatriates" get hurt in-country outside a regular workplace.For that matter, often the payrolling employer of the injured traveler or expatriate has no local in-country registered corporate presence for local health and safety enforcers to target and pursue sanctions against.

The point is that responsible employers dispatching staff abroad try to heed their "duty of care" and offer adequate safety precautions, but the prospect of administrative workplace health and safety (OSHA type) claims in the international business travel or expatriate context rarely amounts to much of a threat. Home country administrative health and safety laws do not tend to reach abroad and host country administrative health and safety laws rarely get invoked in the inbound traveler/inpatriate injury context when the mobile employee suffers an illness or injury outside a fixed workplace.

***Fourth distinction*: Complying with the duty of care *versus* minimizing the risk of an employee personal injury claim**

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 (OSHA type) statutes—but we saw that workplace health and safety codes rarely play much role when business travelers and assignees get hurt or killed overseas and outside a fixed workplace. So an employer'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 personal injury lawsuits*.

A business traveler or assignee who gets seriously hurt or killed overseas is positioned to 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—that is, no matter how carefully the employer tried to heed the duty of care before the injury happened—*after* a traveler or expatriate suffers a serious injury overseas the employer might anticipate some sort of personal 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 employer precautious were inadequate. The injury itself all but proves that the employer's preventive measures, however well-intentioned, were worthless. For example, if a pregnant employee caught Zika on a work trip to Latin America, even if the employer had provided mosquito repellant and a mosquito net, the stricken employee will point to whatever breach infected her and argue the employer should have prevented it. If an employee got shot in an overseas terrorist attack or got raped in an overseas riot, even if 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 taken it. Even a traveler or assignee who gets hit by a car while crossing the street after a night out drinking with clients in London, Tokyo or Valleta might allege the employer failed to provide adequate training on pedestrian safety in left-hand drive traffic. In these scenarios, where the employer's argument amounts to: *We heeded the duty of care by taking steps* A, B *and* C, the injured employee's counter-argument will inevitably be: *Obviously steps* A, B *and* C *weren't enough. You failed to heed the duty of care because you failed to take step* D*."*

That is, an injured mobile employee wanting to sue his employer will never allege: *"Gosh, you took rigorous precautions—my injury must have been unavoidable!"* Rather, expect that injured employee to claim: *"Those steps were ineffective—you committed intervening negligence by not doing more!"*

***Fifth distinction*: Personal injury lawsuit exposure *versus* the workers' compensation bar defense**

We have seen that while taking actual travel-safety precautions is vital, an organization dispatching staff overseas both needs to take precautions and lay the groundwork for a defense to mobile employees' personal injury claims. Where an injured employee's home country is the United States, lay the groundwork for that defense under American law. Overseas-injured employees based in the U.S. almost always sue employers for personal injuries in American courts. While other countries tend to offer employees richer remedies for *dismissal* claims (because of U.S. employment-at-will), expect a U.S.-based employee with a *personal injury* claim to sue stateside—where remedies, damages awards and access to juries are significantly more claimant-friendly than in probably any other country on Earth.

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

When the injured employee's regular place of employment is the United States, employment-context personal injury 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." Generally, 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. Every once in a while some injured employee tries 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 almost always 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 procedural 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 the American legal system that it occasionally plays a central if silent role in American social discourse. For example, a big debate in recent popular culture was 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 seemed to mention the central role of the players' *former teams* that had put the players on the field and in harm's way in the first place. The focus was on the league and not the teams because of the impregnable workers' compensation bar.

- **Beyond the United States.** Our discussion here addresses U.S.-based traveling staff and the American workers' compensation system, but our

analysis extends farther because the 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 offers a rock-solid defense to an American employee's claim for a personal injury that occurred in the regular domestic U.S. workplace. But here we are addressing employee injuries suffered while U.S.-based mobile employees worked abroad on business trips and postings. The U.S. workers' compensation system—and hence the U.S. worker compensation exclusivity bar—gets fuzzy when employees get injured while working abroad. Expect a business traveler or expatriate injured or killed overseas to try to clear the exclusivity bar and sue the employer for personal injuries in a court of either the overseas host country or the home country. (Again, this employee will more likely assert this personal injury claim in the U.S., because of juries and significantly higher compensatory and punitive damages.) In the lawsuit, if the employer raises the exclusivity bar defense, expect the employee to take the position that because he got hurt abroad, the lawsuit lies beyond the reach of his home state's workers' compensation system—*and hence beyond the reach of its exclusivity bar*.

Yet an overseas-injured employee with a job nexus to the United States who sues in an American court is vulnerable to his employer pushing back and insisting the affirmative defense of the workers' compensation exclusivity bar still holds. And so 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* (NYApp. 2005); *Briggs v. Pymm* (NY App. 1989)) Employers therefore need a strategy—some way to position themselves to strengthen their defense to personal injury claims brought by 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 (business travelers or expatriates) abroad focuses on its exposure to a foreign-arising personal injury claim, its first thought always seems to be to insist the traveler sign 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 may be 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*.

- *Waiver void because of public policy.* American courts are very reluctant to enforce advance employee personal injury waivers because the employees who sign these forms are thought to be 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 tends to invalidate employee assumptions of risk as against public policy in the employment context. (*E.g. Lane v Halliburton* (5th Cir. 2008); *Rogow v. US* (SD NY 1959); *Johnston v Fargo* (NY 1906); Restatement (Second) of Torts § 496B comment f, § 496C, comment j) Some courts even a name 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.

- *Waiver ineffective because of after-occurring bad acts.* Employee-signed assumptions of risk are also fragile for the separate reason that injured employees might fairly easily sidestep them. All an injured employee need do is allege intervening negligence or bad acts, framing the personal injury claim around the employer's alleged later bad acts or recklessness—after all, 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 (a weak legal theory indeed). Rather, expect injured employee to allege employer intervening bad acts or recklessness as causing the injury, not inherent dangers endemic to the overseas business travel or posting.

  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 might 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, an overseas-traveling employee who gets kidnapped will not sue the employer alleging it never should have sent him to an

inherently dangerous country teeming with kidnappers. 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 U.S.-based employee covered by U.S. 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 U.S. state retains a U.S. place of employment when hurt abroad; he can participate in the workers' compensation system but remains subject to the exclusivity bar. (*See, e.g. Sanchez v. Clestra* (NY App. 2004)) Employees working on U.S. government contracts are subject to this analysis under the federal Defense Base Act. (42 USC §1651) An exception, though, exists in some U.S. states that impose a workers' compensation exclusion for all overseas-sustained injuries—those states treat all overseas-sustained injuries as outside workers' compensation, and so those cases fall outside the exclusivity bar. Therefore, at this point in our analysis the employer must check the extent to which the applicable state workers' compensation system covers in-state-based employees (employees with an in-state place of employment) who get injured while on temporary overseas business trips. Some states' worker compensation systems will cover employees on overseas trips for a month or so; others states might not. (*See* Brenda-Lee Ravdel and Stephen Barth, "A Survey of U.S. State Workers' Compensation Laws and their Application to Traveling Employees" (May 2015), HospitalityLawyer.com HL Converge blog (online))

A murkier scenario is the U.S.-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 U.S. state workers' compensation systems, sidestepping the workers' compensation exclusivity bar—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 about extending the workers' compensation bar outside the U.S. is completely appropriate and socially responsible. The employer is merely trying to position

> its staff who get injured abroad to get the same no-fault worker's compensation remedy, subject to the same defenses, as staff get back home. Employees end up exactly where they started. This is fair and should not be argued to be unconscionable: 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 business trip to Chicago or Detroit. No one deserves a bigger payout just because he happened to catch Zika on a business trip to São Paulo rather than on a business trip to Miami.

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 "supplementary" or "voluntary" workers' compensation insurance that pays beneficiary employees a benefit mimicking U.S. 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 taking an international business trip or assignment who travels beyond the reach of U.S. state workers' compensation. But in this context, merely buying voluntary workers' compensation coverage is not enough. A common mistake is the employer that buys supplementary or 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 private arrangement with a private insurance company. It cannot likely confer on the employer the threshold statutory 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 my own 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. This arrangement is fair for me, because it replicates the very remedy I would have if I suffered the same injury back home, in my regular workplace.

An employee who refuses to sign this election of remedies, of course, would be ineligible for the overseas assignment. Even so, a court should not hold the election of remedies presumptively coerced, because the election of remedies is inherently fair—as we pointed out, the election of remedies gives the employee the exact same remedy he would get for the same injury suffered at home, within the jurisdiction of the American legal system, and so cannot plausibly be argued to be unconscionable. An attack on the fairness of the election of remedies in this context proves too much—it is an attack on the fairness of the state-run workers' compensation payout schedules themselves.

- **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 U.S. 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 administrative claims properly in U.S. state workers' compensation proceedings. Arbitration might be an appropriately dispassionate forum for a personal injury claim, as compared to a jury trial.

Sixth Distinction: Employee *versus* independent contractor as international traveler

We have been discussing *employee* business travelers and *employee* expatriates, but of course in today's world more and more businesses engage the services of staffers as *contractors*—be they structured as individual independent contractors or as "leased employees" (payrolled employees of a manpower or staffing agency that, via a business-to-business services contract, supplies their services to the principal business). According to a February 2017 report in the *Wall Street Journal* called "Contracted: The End of Employees" (by Lauren Weber, Feb. 2, 2017):

> Never before have American companies tried so hard to employ so few people. The outsourcing wave that moved apparel-making jobs to China and call-center operations to India is now just as likely to happen inside companies across the U.S. and in almost every industry….The contractor model is so prevalent that [one company] ranked by Fortune magazine as the best place to work for seven of the past 10 years[] has roughly equal numbers of outsourced workers and [regular payrolled] employees, according to people familiar with the matter….The shift is radically altering what it means to be a company and a worker. More flexibility for companies to shrink the size of their employee base, pay and benefits means less job security for workers…. Companies…are rapidly increasing the numbers and types of jobs seen as ripe for contracting. At large firms, 20% to 50% of the total workforce often is outsourced, according to staffing executives. *** "We will outsource every job that we can that is not customer-facing," David Cush, [an] airline's chief executive, told investors last March.

For our purposes as to overseas business travel and personal injury liability exposure, engaging non-employee contractor staff poses the duty of care question as to a non-employee contractor that a business might dispatch on international business trips and assignments. These overseas trips happen

increasingly these days, as non-employee contractors ascend to more and more integral roles within multinational organizations. Our question, therefore, becomes: *How does a business protect itself from a personal injury claim when a non-employee contractor suffers an injury on an international business trip or assignment?*

The analysis here—how to minimize exposure to personal injury claims of overseas-traveling non-employee contractors—is the same as what we discussed as to traveling employees. A business principal should, in the first instance, heed the duty of care as to its regular non-employee contractor staff. After all, the same common-law duty of care" (and corporate social responsibility) that an employer owes payrolled employees almost certainly extends, as well, to regular non-employee contractors who report daily to the workplace and provide services exclusively to the principal business. A business should never expect to defend against a contractor's personal injury claim by arguing the law lets it ignore dangers that threaten contractors who work day in and day out for the organization, just because of how they happen to be payrolled.

In fact, the duty-of-care analysis we discussed as to traveling employees becomes yet more imperative in the non-employee contractor context because the state worker's compensation bar affirmative defense is less likely to apply. Yes, the workers' compensation bar might well reach a "leased employee's" *nominal/payrolling employer* (the staffing agency). But the bar defense may not necessarily be available to that employer's B-to-B customer (the principal business that receives the injury victim's services and that dispatched the hapless worker on the overseas trip). In short, the "duty of care" liability exposure analysis as to overseas-traveling non-employee contractors comes out against the principal business on both ends: The common law duty of care and corporate social responsibility likely reach the non-employer principal, but the workers compensation bar may not necessarily apply.

A business dispatching non-employee contract staff on international trips and assignments should therefore take the very same steps we discussed for minimizing exposure to overseas-arising employee personal injury claims: *Heed the duty of care on the front end, and to minimize exposure to personal injury claims that might nevertheless arise, do not over-rely on assumption-of-risk waivers; rather, consider elections of remedies plus arbitration clauses*. In addition, in the non-employee contractor context, consider negotiating with the nominal payrolling employer (the "business partner" that supplies staff services) some sort of indemnification, some sort of risk-sharing arrangement or some sort of workers' compensation employer agency structure—that is, contractually enhance the position that a non-employer customer/principal can be deemed an "employer" for workers compensation bar purposes.

* * *

Workplace health and safety laws impose a duty of care on employers as to all their staff worldwide, be they overseas business travelers, expatriates or local workers. But these laws are vague as to how employers must heed the duty of care in the global mobility context and in the overseas crisis/disaster/pandemic context. No matter what protections an employer takes to meet its duty of care in protecting globally-mobile staff, an employer always faces a risk that an overseas business traveler or expatriate will

get sick, hurt or killed while working abroad (whether or not in an overseas crisis, disaster or pandemic).

International business travelers and expatriates hurt or killed abroad are far more likely to sue the employer in court for personal injuries than are domestic American staff injured stateside. After an employer dispatching personnel on overseas trips and assignments takes all reasonable precautions to heed its duty of care, it separately needs to lay the groundwork for a defense to any potential personal injury lawsuit. Insisting U.S.-based globally-mobile staff and overseas business travelers sign assumption-of-the-risk waivers might not be not too effective a strategy. A more viable approach may be having U.S.-based mobile employees and independent contractors elect, as their *exclusive remedy* for personal injury claims against the employer, an insurance benefit that meets the benefit levels of workers' compensation schedules. Also consider having globally-mobile business travelers and expatriates consent to mandatory arbitration of personal injury claims.

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