

**POLICY PAPER**

# Can you get sued in Switzerland?



The rights and obligations of Swiss companies and organisations vis-à-vis their travelling and expatriate staff

**Michel Chavanne**  
attorney  
r & associés, Lausanne

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## DISCLAIMER

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Where work is being done in a dangerous environment this paper should not replace or supplement the provision of specific legal advice, nor is it designed to be used directly by employers or employees for managing human resources. The paper should not be relied on exclusively, as it is not as exhaustive or complete as certain complex situations may require.

The masculine form is used merely simplify the text. No discrimination is intended.

The original French version is the only version which should referred to in case of uncertainty.

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## ABOUT THIS PAPER

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This paper deals with the rules on employee protection in Swiss law that apply to employers, especially organisations working in high-risk and dangerous (complex) environments. It forms part of the follow-up to the review entitled “*Can you get sued? Legal liability of international humanitarian aid agencies towards their staff*”, published by SMI in 2011.<sup>4</sup>

SMI’s 2011 paper looked at the legal situation in five countries – France, Italy, Great Britain, the United States and Sweden – and concluded that, in each of them, besides their moral and ethical concerns about the wellbeing of their teams of employees, international aid agencies were bound by legal standards and rules on the duty of care and the liability arising from employer/employee relations in their respective States.

## ABOUT THE AUTHOR

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Michel Chavanne is a lawyer and a specialist on employment law within the Swiss Lawyers’ Federation (*Fédération suisse des avocats*, or FSA). In the course of his career he has had a variety of positions and responsibilities in a Swiss humanitarian organisation working in countries at war and conflict zones, and subsequently in an institute responsible for performing tasks in the public interest. Since 2004 Michel Chavanne has been a partner at *r & associés*, a Lausanne law firm where he gives advice on all legal matters of kinds, especially employment law, where he puts his expertise at the service of both employees and employers.

Alec Crippa is a partner of *r & associés* as well. After many years as a clerk to the Justice and Judge at various courts in the Canton of Zurich, Alec Crippa became a Partner with KPMG Switzerland and Head of KPMG’s legal department in Lausanne. He joined *r & associés* in 2007 and focuses on corporate, employment and construction law.

## ACKNOWLEDGEMENTS

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We would like to express our gratitude to the Swiss Federal Department of Foreign Affairs, SMI’s main sponsor. The paper has also received support from International SOS,<sup>5</sup> whose publications on the duty of care<sup>6</sup> were also used as a reference in the drafting of this review.

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<sup>4</sup> KEMP Edward & MERKELBACH Maarten, *Can you get sued? Legal liability of international humanitarian aid workers towards their staff*, Security Management Initiative, Geneva, 2011.

<sup>5</sup> [www.internationalsos.ch](http://www.internationalsos.ch).

<sup>6</sup> CLAUS Lisbeth, *Le devoir de protection des employeurs à l’égard des expatriés, de leurs personnes à charge et des voyageurs d’affaires*, International SOS, 2009 and CLAUS Lisbeth, *Duty of Care and Travel Risk Management Global Benchmarking Study*, International SOS, 2011.

Below, very briefly, we give the main conclusions of the review.

### **The applicable law**

First and foremost, it has to be said that deciding which law is applicable to a work relationship is not easy, especially in international situations.

The parties to an agreement – i.e., the employer and the worker – may agree, on certain conditions, to apply certain national rules. Where the parties have made no decision, Swiss law provides that in principle the law that applies is the law of the State in which the worker habitually carries out the work in question.

In any case, it should be pointed out that foreign law can never be applied if it would produce an outcome that is absolutely incompatible with the Swiss legal system.

### **The appropriate court**

Generally speaking, the Swiss courts will claim jurisdiction in legal actions taken in the place of the defendant's domicile or the place where the worker's tasks are usually performed.

### **An employer's obligations arising from the duty of care**

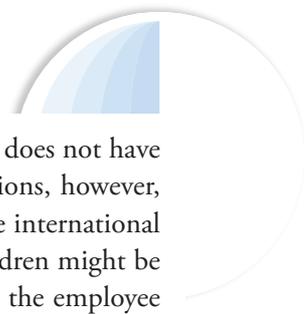
In Switzerland, employment law is made up of a set of rules from private law and public law. When dealing with any particular case, all these rules must be examined.

With cases relating to work outside Switzerland, extra care must be taken when examining the duties of an employer. By virtue of Article 328 of the Swiss Code of Obligations (CO; RS 220), which is the main point of reference in Swiss law, an employer's overall duties are as follows:

- duty of information;
- duty of prevention;
- duty of monitoring/ensuring the rules are followed;
- duty of intervention.

How an employer intervenes, and how strongly, will depend on a range of factors (the organisation's aims, the employee's ability and experience, the work environments, the knowledge of the organisation and the other enterprises involved in the same sector) and will have to be judged against the principle of proportionality.

Thus the higher the risks for the employee, the more the employer's intervention will need to be resolute and determined, perhaps even intrusive, for the employee, who will have to comply with their employer's instructions.



Generally speaking, it must be assumed, obviously, that an employer does not have responsibility for an employee's spouse or children. There are situations, however, in which an employer must act on their behalf, especially in sensitive international settings where the physical or mental wellbeing of the spouse or children might be jeopardised. Most probably this will also apply to any other partner the employee lives with.

Among the risks employers are often not aware of, and which deserve mention, are their responsibility for travelling employees and the application – albeit partial – of the duty of care after the work relationship has ended.

Where they have failed in their duty of care, employers and their representatives – especially decision-making bodies – must face various penalties. In civil cases, this will mainly entail making reparation for the damage and intangible harm caused. Penalties may also be imposed not just by the administrative authorities but also under the criminal prosecution system, and in fact after accidents, incidents or even harassment, it is not uncommon to see the prosecution authorities conducting enquiries that can lead to criminal penalties.

### **The employer's rights**

The main article dealing with the rights of an employer in Switzerland is Article 321a CO, the counterpart to Article 328 CO, its mirror image.

Workers must carry out the work entrusted to them with care, and must loyally safeguard the employer's interests. This duty of diligence, like the employer's duty of care, can and must be specified in the contract, taking into account the professional risk, training, technical know-how, the job in question, the level of responsibility and the objectives stated in the contract.

Depending on the circumstances, employees are themselves bound to comply with the measures to ensure greater safety and reduce risk, in the same way as with precautions on building sites. Failure to comply with these measures may force an employer to impose sanctions up to and including dismissal with immediate effect (Art. 337 CO).

### **Conclusions, recommendations and observations**

In conclusion, it should be noted that employers have probably broader responsibilities than some of them would expect, in particular in international environments and where partners and next of kin are concerned.

Among our recommendations, we would like to stress the prevention that every employer must demonstrate: employers must seek legal advice, get information about working conditions, analyse operating environments so that they can both take preventive measures and respond appropriately if there is an accident or a problem. Greater prevention means fewer disputes and, therefore, less involvement in court cases.



To make action plans more effective, and to defend its rights as strongly as possible in the event of a dispute, an employer must at all times be able to show that it has taken the appropriate measures, if necessary through full documentation and the drafting of suitable measures.

Finally, it should be said that the duty of care is more than a moral or ethical duty: it is a legal obligation and probably the foundation stone on which the representatives of an enterprise can build a human resources policy. Not surprisingly, this policy will be based on conducting a thorough risk analysis, deciding on the steps to be taken, and monitoring of them, and having the capacity to respond appropriately should these risks materialise. Therefore these steps exceed by far the conclusion of a simple accident- or travel insurance.

Given these requirements, it is easy to understand the emergence, in enterprise circles, of employees with responsibility for hygiene, health the work environment.

**Ten recommendations for good practice in the duty of care to travellers and expatriates<sup>4</sup>**

1. Increase awareness at all levels within the enterprise
2. Involve all the key stakeholders in planning the duty of care
3. Expand policies and procedures for travel risk management
4. Audit service providers from the duty of care perspective
5. Communicate, educate and train staff and stakeholders
6. Assess risk prior to every employee trip
7. Track travelling employees at all times
8. Implement an employee emergency response system
9. Implement additional management controls
10. Ensure that service providers are fully involved and coordinated

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<sup>4</sup> Devoir de Protection et Gestion du Risque Voyage - Étude Comparative Internationale, International SOS, 2011.



## SECURITY MANAGEMENT INITIATIVE (SMI)

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The Security Management Initiative (SMI) aims to serve the international aid community and its national and international staff to operate safely and securely across the insecure environments in which they work. SMI strives to contribute to reducing the human and program costs of agencies operating in these environments, thereby enabling agencies to better fulfill their mission. SMI functions as a focused human resource centre for risk and security management of NGOs and international agencies working in hostile environments. SMI provides authoritative research, training and advisory services in risk and security management for national and international NGOs and aid agencies. SMI is part of the Geneva Centre for Security Policy (GCSP).

### International SOS Foundation

With the increase of globalisation, more and more individuals are working further afield and are exposed to risks which can impact health, security and safety. The foundation, established in 2011, has the goal of improving the welfare of people working abroad through the study, understanding and mitigation of potential risks. The foundation was started with a grant from International SOS. It is a fully independent, non-profit organisation.

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c/o

International SOS

12 route François-Peyrot P.O. Box 436

1215 Geneva 15

Switzerland

Phone: +41 22 719 11 00

clientservices.ch@internationalsos.com

www.internationalsos.ch



7 bis Avenue de la Paix

P.O. Box 1295

CH-1211 Geneva 1

Switzerland

Phone: + 41 (0)22 906 1600

Fax: + 41 (0)22 906 1649

info.smi@gcsp.ch

www.security-management-initiative.org



Geneva Centre for Security Policy  
Centre de Politique de Sécurité, Genève  
Genfer Zentrum für Sicherheitspolitik

www.gcsp.ch