Global Workplace Health and Safety Compliance: From the "Micro" (Protecting the Individual Traveler) to the "Macro" (Protecting the International Workforce)

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Laws regulating workplace health and safety are local to each jurisdiction. And therefore so is *compliance*. Regulation of workplace machine guarding, protective eyewear, and ergonomic keyboards, for example, differs depending on the jurisdiction, as do workers' compensation systems. This is why multinational employers approach most aspects of workplace health and safety compliance from a local perspective, from the ground up. A top-down, cross-border compliance strategy may not work if the laws to be complied with do not cross borders.

But even so, some workplace health and safety compliance challenges *do* transcend jurisdictional borders and *do* command the attention of a multinational's headquarters. Truly cross-jurisdictional aspects to workplace health and safety compliance tend to cluster at the "micro" and the "macro" ends of the spectrum—the "micro" level of protecting individual expatriates and individual business travelers, such as staff sent into danger zones, and the "macro" level of propagating company-wide initiatives on basic workplace health and safety topics, such as global cardinal safety rules and global pandemic plans applicable across a multinational's worldwide operations. Accordingly, this article addresses the "micro" and the "macro" levels of international workplace health and safety compliance. Part 1 of the article discusses multinationals' duty to protect individual employees overseas, in danger zones and otherwise, and Part 2 addresses cross-border workplace health and safety initiatives, like global cardinal safety rules and global pandemic plans launched across a multinational's workforces worldwide.

Part 1: Duty to Protect Individual Employees Overseas

Whenever a major safety threat erupts in some part of the world, multinationals scramble to understand what duties they owe their employees working in harm's way. For example, when a coup erupted in Egypt in early 2011, multinationals had employees stuck in life-threatening situations—employees like Google's regional marketing head Wael Ghonim, who was captured by Egyptian rioters and held for 10 days. Ghonim tweeted: "We are all ready to die.[1]" Then, on February 11, in a widely-publicized incident, an Egyptian mob beat and sexually assaulted CBS News Foreign Correspondent Lara Logan.

Beyond Egypt, employee security is vital to multinationals operating in war zones like Iraq and Afghanistan, in terrorism-prone areas like certain parts of the Middle East, and in high crime areas like certain parts of Africa and Latin America. In January 2011, for example, a Mexican gunman murdered Nancy Davis, an American missionary working in Tamaulipas State.[2] These international employee security risks extend even beyond places recognized as danger zones: Staff traveling to, say, Zurich or Sydney can get hit by drunk drivers or stabbed by robbers—and sue.

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1. *See* S. Green, *Corporate Counsel*, 2/9/11.
2. *See* Riccardi & Wilkinson, *L.A. Times*, 1/28/11.

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

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

1. Safety/security issues versus legal issues

Good corporate social responsibility means implementing effective workplace health and safety measures. In addition, occupational health and safety laws worldwide tend to impose a general duty of care requiring employers to offer reasonable safety protections.[3] What, specifically, constitutes adequate safety measures depends entirely on context: In a factory it might mean supplying gloves, machine guards and emergency-stop buttons. In an office it might mean supplying keycards, ergonomic keyboards, and staircase hand rails. In a war zone it might mean supplying guards, body armor and evacuation services. But in contexts like war, terrorism and crime, health and safety regulations can be vague, leaving employers with only the broadest default legal advice—"heed the duty of care." In the real world, employers need answers to highly specific questions. (*Can we provide guns? Does a State Department warning mean we must evacuate expatriates? What about locals? What about the "Rambo" employee who insists on staying put?*) Getting answers to these questions from a lawyer may be less helpful than getting answers from an expert in security or crisis management.

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

3. *See, e.g.*, Restatement (Second) of Agency § 492.

2. Health/safety regulation versus personal injury litigation

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

3. Local employees versus expatriates and business travelers

In assessing a multinational's exposure to employee personal injury lawsuits, distinguish foreign-local employees from expatriates and business travelers visiting temporarily. The population of locals may be far greater. When crisis erupted in Egypt, HSBC Bank had 1,200 Egyptian employees but just 10 in-country expatriates.[4] Even so, on a per-employee basis, exposure as to the visitors may be far greater, for two reasons:

- **Work hours vs. 24 hours**. An employer tends to be responsible for local employee safety/security only during work time. Locals caught up in an altercation off-the-job should not implicate the employer if their injuries are not work-related. Expatriates and business travelers, though, are different: While overseas on business, a visitor can be deemed to be "at work" 24 hours a day/7 days a week—even while out drinking.[5]

- **Capped local worker injury claims**. The US and some (but not all) other countries offer employees special systems that pay a guaranteed recovery for a workplace injury. Under "workers' compensation," an employee injured on the job (even in an act of violence) can bring a claim for a *capped*

4. *See* S. Green, *supra* note 1.

5. *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).

recovery without having to prove employer fault, even if the employer did nothing wrong. The trade-off inherent in workers' compensation is that it offers an *exclusive remedy*: Employees can be barred from suing employers outside the system. But the "workers' compensation bar defense" to personal injury civil lawsuits, clear as to local employees, gets fuzzy as to expatriates and business travelers injured abroad. These travelers might sue their employer for personal injuries either in the local host country or—more likely—in their home country (regular place of employment). US-based employees injured abroad might sue in an American court.

4. Personal injury lawsuits versus workers' compensation claims

A US employee maimed or killed stateside, even a victim of a mass killing like the Virginia Tech shootings or the Oklahoma City bombing, rarely ever wins an uncapped wrongful death claim against the employer. The workers' compensation bar affirmative defense/exclusivity of the workers' compensation system almost always stands, except as to certain intentional torts.[6] Our focus, though, is on Americans injured while working abroad. Does the fortuity of an incident occurring across the border let an employee beat the US workers' compensation bar and win an uncapped personal injury verdict from an American jury? The answer is "maybe." When a U.S.-based employee gets hurt on an overseas business trip of under a month, case law usually upholds state workers' compensation payouts and the exclusive remedy/bar defense.[7] The more complex scenario is where an American gets hurt while abroad on a business trip of over a month, or after the place of employment shifted abroad. These cases turn on their facts.[8]

Strategic employers sending American staff abroad, especially into danger zones, try to structure postings to retain both US workers' compensation remedies and the bar defense. This approach is fair because it offers American staff their very same remedy available for *domestic* workplace injuries and violence. Insurers sell a product called "foreign voluntary workers' compensation coverage" that pays no-fault workers compensation awards to covered employees injured outside the US. A common mistake, though, is to assume that merely buying this coverage automatically extends the workers' compensation *bar defense* to foreign-sustained injuries.

Multinationals need an affirmative strategy to extend the bar abroad. One theory is to offer foreign voluntary coverage expressly in exchange for a written consent to limit personal injury remedies to the state workers' compensation system and policy benefit. To induce the employer to buy no-fault foreign coverage, the expatriate covenants that the state system plus the policy will be his exclusive remedy against the employer for injuries sustained abroad.

Another strategy is to require that staff traveling into danger zones sign assumption-of-risk waivers acknowledging and accepting all dangers inherent in the posting. But in recent decades American courts have been reluctant to enforce employee waivers to defeat claims of employer negligence.[9] If an employer invokes assumption of the risk to block even a workers' compensation award, a US employee might argue unconscionablility. Waivers may be more appropriate for a family member like a "trailing spouse" who asks to accompany an employee overseas. That said, in this context a choice of forum clause selecting arbitration may be enforceable.

Part 2: Health and Safety Initiatives Launched across Workforces Worldwide

Having looked at multinationals' obligations to protect individual employees (particularly expatriates and business travelers) in the international context, we now turn to the other end of the spectrum: health and safety initiatives extended across a multinational's entire global workforce—that is, imposing global health/safety baselines, like cardinal safety rules and pandemic plans, across a multinational's worldwide operations.

Multinationals' workplace health and safety concerns increasingly transcend national boundaries. Proactive multinationals are now starting to take steps toward aligning, across their worldwide operations, those aspects of health and safety with a cross-border dimension. In general, these headquarters-driven cross-border health/safety initiatives fall into two categories:

- Targeted health/safety programs addressing serious risks that transcend national borders, such as pandemic policies and crisis plans focused on terrorism and natural disasters

6. *See, e.g., Ferris v. Delta* (2d Cir. 2001); *Werner v. NY* (NY 1981); *James v. NY* (NY 1973); *O'Rourke v. Long* (NY 1976); *Barnes v. Dungan* (NY App. 2005); *Briggs v. Pymm* (NY App. 1989).

7. *See, e.g., Sanchez v. Clestra* (NY App. 2004). *As to work on U.S. government contracts, see* Defense Base Act, 42 USC §1651.

8. *See, e.g., Kahn v. Parsons* (DC Cir. 2006).

9. *See, e.g., Lane v. Halliburton* (5th Cir. 2008).

- General health/safety standards imposed across worldwide operations, such as a global code of conduct safety provision, a set of company "cardinal safety rules," or a manifesto on health/safety principles like Sony's "Global Policy on Occupational Safety and Health"[10]

In a perfect world, a single set of global legal principles would govern a multinational's global health and safety policy. Indeed, there is such a thing as "international workplace health and safety law"—the International Labor Organization, the European Agency for Safety & Health at Work, NAFTA, industry associations and others have promulgated robust sets of cross-jurisdictional workplace health/safety standards. But even so, regulation of health and safety in actual workplaces remains stubbornly local. Every country imposes its own workplace safety code comparable to US OSHA, with hundreds or thousands of detailed regulations addressing minutely specific workplace risks. Any employer needing to know, for example, how to store chemicals, how to guard a paper shredder, or how to administer vaccine during a pandemic needs to start by checking law in each affected jurisdiction and also checking local collective agreements.

The multinational employer, however, increasingly wants to know: *How, in the face of disparate local safety regulations, does a multinational implement a workplace health/safety initiative across its worldwide operations?* The answer is to tailor the initiative accounting for legal compliance in each affected country. Keep the global initiative flexible and modify it in each jurisdiction. In addition to aligning with local safety regulations, nine other issues can come into play:

1. **Duty of care**: Most countries impose a duty of care on employers, and one big reason multinationals launch global health/safety initiatives is to comply with this duty, reducing legal exposure in new contexts like pandemics and terrorism. Breaching safety duties can mean criminal penalties—in May 2010, for example, Russia joined France, Italy, and many other countries in criminalizing certain workplace safety violations. As discussed in part 1, as to civil lawsuits, the first defense to an employee personal injury claim alleging breached duty of care should be to assert any local equivalent to the US state "workers' compensation bar" defense—but some jurisdictions (such as England) offer no such defense while others (such as in Latin America) let an employee surmount the bar by proving mere negligence.

10. Sony's policy is available at: http://www.sony.net/SonyInfo/csr/employees/safety/.

2. **Existing policies and rules**: Countries from Finland to Malaysia and beyond require employers to issue written *health and safety policies*, and countries from France to Japan and beyond require employers to post written *work rules*. Any new global health/safety initiative will likely bump into issues addressed in existing local health/safety policies and work rules. Amend accordingly: A global health and safety policy needs to align with these local rules, or else launching the global policy requires amending the local rules.

3. **Employee representatives**: Many jurisdictions, including Australia, Brazil, China, Finland, France, Malaysia, Mexico, Norway, Ontario, Poland, Quebec, South Africa, Sweden and Thailand, require employers (at least in some contexts) to sponsor health/safety representatives or committees, and then to consult with them on workplace health and safety. That means a new global health/safety policy will likely require amending local protocols, to accommodate it. In amending local health/safety plans to align with some new headquarters-level health/safety initiative, be sure to involve these representatives as necessary. Specialized health/safety representatives aside, many countries confer on ordinary labor representatives—trade unions, works councils, worker committees—a "mandatory subject of bargaining" right to consult on health/safety issues affecting terms and conditions of employment. (In some countries, government labor agencies may also play a role.) These representatives may not have an absolute right to veto a new health/safety initiative, but they may be able to void a plan that an employer implements unilaterally. And failing to consult can amount to an unfair labor practice.

4. **Medical attention**: Those global health/safety initiatives focused on pandemics and crises often implicate the special issue of workplace *medical care*. Employer-provided medical care raises legal issues including: employer (or workplace nurse) practicing medicine, doctor/patient privilege, regulation of prescriptions, drug importation and employer distribution of drugs/vaccines. In some countries, including Brazil and Italy, large employers have on-staff doctors who can facilitate solutions. But outside of "staff doctor" countries, a particular challenge is how an employer can require employees, during a pandemic, to submit to diagnostic exams or to take vaccines/medicines. The analysis often depends on whether the employer mandate is reasonable. A related issue is employee medical care *outside* the workplace: In countries where government medical care systems or insurance pick up

sick employees' medical costs, even employees who succumb in the workplace may be able to access medical treatment without adding to the employer's marginal costs. But be sure to account for the special problem of immigrants, expatriates, mobile employees and business travelers unable to access home-country medical systems.

5. **Isolation**: Another issue particular to global pandemic plans is how to reserve an employer's right to isolate, keep out, or "quarantine" employees who might be infected by a communicable disease outbreak. Pandemic plans may seek to restrict employee travel—business and personal—into infected areas, or restrict return-to-work after a trip into a problem region. Isolation orders and travel bans get scrutinized in light of employee rights, so a global plan should spell out procedures that are anchored in reasonable medical advice.

6. **Shut-downs**: Global crisis policies often cover workplace shut-downs, such as shut downs required by in a pandemic, hurricane, or terrorism. The main employment liability here regards *pay*: In many countries an employer that shuts down temporarily will be obligated to pay those employees willing to work. (*Sick* workers often collect sick pay from either the employer or the state under local sick-pay systems.) Some countries, though, let employers suspend operations—and pay—because of a genuine *force majeure*. Other countries allow mandatory furloughs. Account for these in the global policy.

7. **Data privacy**: Routine workplace health/safety procedures involve tracking and reporting accidents and incidents. In a global pandemic or crisis, tracking and reporting becomes vital. Employers may have urgent medical reasons to get workers to disclose whether they or their family members are affected, where they have recently traveled and whom they have been exposed to. Some employers use employee-travel-tracking software to monitor employees' whereabouts. But jurisdictions with robust privacy laws restrict employers from collecting (or forcing workers to divulge) most personal data—particularly health information, which in the European Union is subject to special restrictions on processing "sensitive" data. Therefore, process employee health-status data carefully. A global crisis or health plan should spell out those situations where workplace safety or public health concerns reasonably justify the employer's personal inquiries. Invoke any employer duty to report incidents to public authorities or to maintain a safe workplace.

8. **Discipline**: All global health/safety protocols should be flexible as to the discipline imposed for any given safety infraction, because the discipline issue implicates local law. Global pandemic and crisis policies can implicate discipline issues around employees refusing to report for work, refusing business travel or insisting on working from home. Local law may support a no-show employee whose refusal to work is reasonable, leaving employers free to discipline only for *unreasonable* absences. As such, pandemic or crisis protocols should impose clear rules prohibiting unreasonable employee behaviors. Build in procedures for communicating when the workplace is safe.

9. **Language**: Some jurisdictions, including Belgium, France, Indonesia, Mongolia, Quebec, Turkey, and much of Central America, specifically require that employee communications, or at least work rules, be communicated in the local language. Even in places with no "language law," any health/safety plan addressed to local employees should be comprehensible to them.

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For the most part, workplace health and safety is an inherently-local topic that depends intrinsically on each local jurisdiction's own workplace health and safety code and workers' compensation system. But in this age of multinational employers' headquarters-driven human resources initiatives, many multinationals find a strong business case to align a few key aspects of workplace health and safety across borders. In particular, there is the "micro" level issue of protecting individual expatriates and business travelers in the international context (such as staff sent into danger zones) and there is the "macro" level issue of propagating company-wide workplace health and safety initiatives (such as cardinal safety rules and pandemic plans) across a multinational's worldwide operations. Account for both issues strategically.

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