

## Duty of Care owed by Danish companies to their overseas employees: a legal perspective



### Introduction

All employers in Denmark owe a duty of care towards their employees. With globalisation on the increase, companies are increasingly looking for business opportunities abroad. As a result, more employees are travelling or assigned to work abroad. Health and safety at work may vary between countries, posing a potential risk for employers as well as employees ranging from business continuity and reputational damage to ethical implications and legal impact.

This summary focuses on the situation where a Danish employer assigns a Danish employee to work in another country for a fixed period of time, e.g. work-related international travel and foreign assignments. The summary provides an overview of the legal framework in Denmark governing Danish employers' responsibility with regard to health and safety in such situations.

This summary does not address the situation where a Danish employee is employed locally by an employer in another country. In this situation, the employment abroad will generally be governed by local law and Danish law will thus not be relevant.

### Danish legal framework

#### *The Danish Working Environment Act*

In Denmark, the Danish Working Environment Act imposes a general duty on employers to provide their employees with a safe and healthy working environment. The Danish Working Environment Act is a framework act which lays down general objectives and requirements in relation to health and safety at work, e.g. requirements concerning establishment of a health and safety organisation, performance of work, organisation of the workplace, technical equipment, substances and materials, etc.

The Act is supplemented by a number of binding executive orders detailing the requirements to be met by employers in this regard. The binding executive orders relate to specific work activities and risks such as work involving lifting, manual handling, etc.

The Act applies to employees performing work for an employer. This should be interpreted broadly so as to apply to all employees performing any and all kinds of work covered by the employment relationship even if the work falls outside the scope of the work

normally performed by the employee. The Act does not apply to independent contractors.

The Danish Working Environment Authority is responsible for monitoring employers' compliance with health and safety law. The Authority is also tasked with ensuring a safe, healthy and constantly improving working environment by carrying out inspections, drafting appropriate regulation and providing information. In case of non-compliance, there are several sanctions available to the Authority. The Authority also drafts instructions in cooperation with the social partners.

### **Geographical restrictions**

The jurisdictional scope of the Danish Working Environment Act is limited to work being performed in Denmark, meaning that the Act does not apply to work carried out abroad even if the employee is a Danish citizen working for a Danish employer.

When an employer assigns an employee to work in another country for a fixed period of time (and the employee is not employed locally), the parties will often agree that Danish law will continue to apply. However, since the Danish Working Environment Act only applies to work carried out in Denmark, the Danish employer will have no direct obligations under the Act with regard to the work carried out by the employee abroad.

In order to avoid any misunderstandings it is recommended that it is specified in the international assignment agreement that the Danish Working Environment Act does not apply with regard to work performed abroad and the extent to which the Danish rules on working hours and rest periods apply.

#### *The Danish Liability for Damages Act*

In Denmark, employers are required to take out industrial injury insurance and pay contributions to the Danish Labour Market Occupational Diseases Fund. If an employee is injured while performing work for the employer, the employee will be entitled to compensation under the Danish Industrial Injury Insurance Act if the injury qualifies as an industrial injury or an occupational disease. Such compensation is covered by either the industrial injury insurance or the Danish Labour Market Occupational Diseases Fund. The Danish Industrial Injury Insurance Act is described in more detail below.

However, the Danish Industrial Injury Insurance Act does not cover compensation, for instance, for lost earnings or for pain and suffering. Therefore, the employee may choose to claim damages under the Danish Liability for Damages Act, and the employer may be liable to pay such damages if the health and safety conditions at work were not in compliance with health and safety law.

If an employee suffers an industrial injury while on assignment abroad, there are examples in Danish case law where in some cases the employee may claim damages under the Danish Liability for Damages Act from the Danish employer. In the assessment of the Danish employer's liability in such cases, the Danish courts have established on a few occasions that the Danish Working Environment Act is not directly applicable outside of Denmark, but the principles which follow from the Danish Working Environment Act may be applied in order to assess whether the Danish employer is liable. The crucial factor here is

whether, having regard to all of the circumstances involved, the case has the strongest ties to Denmark.

### **Case law**

In a High Court judgment from 2010, for example, the High Court held that a travelling field engineer who was injured while working in China was entitled to damages from his Danish employer. The employment contract had been concluded in Denmark where the parties were based, the main work address of the field engineer was in Denmark, the work in China was carried out separately from the local employees and all necessary communication took place directly between the field engineer and the office in Denmark. On that basis, the High Court held that the ties to Denmark were such as to make the employer subject to the duty to act reasonably and the duty of care imposed on employers under the general rules of Danish law in connection with industrial injuries – which, among other things, build on the principles mentioned in the Danish Working Environment Act. However, the High Court also said that it was evident that the provisions of the Danish Working Environment Act were not directly applicable in China, and in the assessment of liability weight was also given to the fact that, in case of assignments abroad, employers have no or only limited influence on the organisation of the workplace and no or only limited opportunity to supervise the work.

Therefore, in light of Danish case law, it cannot be ruled out that a Danish employee who suffers an injury at work/while on assignment abroad would be entitled to damages from the Danish employer and that, in their assessment of liability, the Danish courts would also consider the principles of the Danish Working Environment Act.

Consequently, Danish employers which assign their employees to work abroad should ensure to a certain extent that the work is performed under reasonable conditions and that the employee is not exposed to unreasonable risk and danger while working abroad.

If the employee is assigned to work in countries involving particular exposure to risk or danger, Danish employers should also ensure that the necessary measures are implemented to allow the employee to perform the work in the safest and healthiest conditions possible, including that the employee has been provided with the necessary information and training to handle the conditions. Otherwise, the employer risks a claim for damages if the employee is injured while working abroad.

Consequently, it is advisable for the employer to consider a number of measures before sending an employee abroad. For example, the following may be considered appropriate in this regard:

- check up on the working conditions that the employee may expect abroad
- give the employee the necessary information and instructions before the assignment in order to prepare the employee
- provide the employee with the necessary medical insurance
- give due consideration to the accompanying family members

If the employee is about to be assigned to an unstable region or an accident-prone area, the employer's precautionary measures should be increased and the following may be considered:

- assess the health status of the employee before the assignment and the risks of likely illnesses or injuries during the travel and stay abroad (within the limitations of the Danish Health Information Act),
- provide information and training on what to do in the event of sickness or an accident

It is recommended that the employer documents the measures that are taken and the procedures that apply where an employee is to be sent abroad.

It is important to note that employees also have certain obligations under the Danish Working Environment Act. Among other things, the employees must comply with the health and safety regulations and instructions which apply to the employer in general and their own work in particular. If an employee becomes aware of any errors or deficiencies which may affect health or safety and cannot be remedied by themselves, they must inform the employer.

An employee's failure to meet the obligations under the Danish Working Environment Act does not generally lead to any direct sanction under the Act. However, it may reduce the employer's liability to pay damages under the Danish Liability for Damages Act if the employee is contributorily negligent.

#### *The Danish Industrial Injury Insurance Act*

As described above, if an employee suffers an injury at work, the employee will be entitled to compensation under the Danish Industrial Injury Insurance Act if the injury qualifies as an industrial injury or an occupational disease.

Even though an employee has been assigned to work abroad for a specified period of time, the employee may – if certain conditions are met – continue to be covered by the Danish Industrial Injury Insurance Act. This may be the case in the following three scenarios:

- If assigned to work in another EU/EEA member state or in Switzerland, the employee will continue to be covered by the Danish Industrial Injury Insurance Act if the duration of the assignment is anticipated not to exceed 24 months and the employee is not assigned abroad to replace another person whose assignment has expired or is expiring
- If assigned to work in a country which has concluded an agreement with Denmark on industrial injury insurance, the employee will be covered by Danish law in this regard for the period and on the terms and conditions set out in such agreement
- If assigned to work in a non-EEA country which has no agreement with Denmark in the field of industrial injury insurance, the employee will still be covered by Danish law in this regard for up to 12 months of the employee's stay in the other country if the assigning employer is based in Denmark and the assigned employee is based in Denmark at the time of assignment. In addition, there are a number of other conditions which must also be met. If assigned by the Danish state or an organisation performing services or work on behalf of the Danish state, the employee will still be covered by Danish law without any time limitation

The above only describes the general conditions which must be met in order for the employee to remain covered by Danish law in this regard. It is always recommendable to seek legal advice in each individual case.

Notwithstanding that the employer has taken out an industrial injury insurance and pays contributions to the Danish Labour Market Occupational Diseases Fund, this is not sufficient to fulfil the duty of care. The employer is still obligated to make sure that the work is performed in a safe and healthy working environment. Otherwise, the employer risks being met with a claim for damages under the Danish Liability for Damages Act.

## EU legal framework

When an employee is assigned to work in another EU/EEA member state, the Posted Workers Directive (96/71/EC) will usually apply. Under the Posted Workers Directive, Danish employers must comply with health, safety and hygiene standards that are at least as favourable to the employee as those of the country where the employee is carrying out the work. Consequently, Danish employees assigned to work in another EU/EEA member state will – as a minimum – be covered by local health and safety law.

## Employees assigned to Denmark

When a foreign employer assigns an employee to work in Denmark for a fixed period of time, the Danish Posting of Workers Act will apply. Under the Act, such foreign employees will be covered by the Danish Working Environment Act while performing work in Denmark as well as by several other rules and regulations, including the Danish Act on Equal Treatment of Men and Women, the Danish Equal Pay Act, the Danish Anti-Discrimination Act and the Danish Act on Implementation of Parts of the Working Time Directive. Furthermore, foreign employers assigning employees to work in Denmark in connection with provision of services must register with the Register of Foreign Service Providers (RUT), which is maintained by the Danish Working Environment Authority.

## Local law

It is important to check local health and safety law before assigning any employees to work there in order to see if there are any regulatory requirements or minimum requirements which must be complied with in connection with assignment of foreign employees to work in that specific country and in order to make sure that the standards or working conditions of that country are acceptable so as to avoid the risk of a claim for damages under the Danish Liability for Damages Act. Assuming that regulation will be more or less the same as in the home country simply is not sufficient. A lot of countries operate with very different laws and take a very different approach to enforcement. Many legal issues may come into play and will require proper preparation and well-drafted paper work. Detailed advice should therefore be taken.

## Conclusion

Danish employers should understand the risk involved in assigning employees to work in a foreign country, and ensure that all types of risks have been considered and appropriate measures put in place – whether in the form of training, medical support and screening, insurance, security or the like.

Regardless of whether or not the employees are to be sent abroad on short business trips or as expatriates on longer

assignments, the employer should consider the need for assessing the risks related to health and safety. The employer should also ensure that corporate policies are given the necessary attention and that the applicable instruction/training procedures (depending on the circumstances) are duly executed. To the extent possible, all measures taken should also be recorded in writing to ensure that, if needed, the employer is able to prove that it has duly fulfilled its duty of care and other express obligations under the applicable legislation.

In that connection, Danish employers should note that the regulatory and legal landscape may vary from country to country, and also be aware that there is a risk that they may become liable to pay damages if they fail to secure acceptable working conditions in the foreign country in question.

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