



White Paper on Employer's Duty of Care for Employees Working Overseas

僱主為僱員於海外工作履行
謹慎責任白皮書

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Introduction

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This paper presents the findings of a study to identify the nature of health and safety risks faced by Hong Kong-based employees who are required to travel and work overseas, together with human resource policies and procedures that are used by Hong Kong employers to manage and respond to such risks. The first part of this Paper discusses the extent to which a Hong Kong-based employer's duty of care for the health and safety of its employees has extra-territorial application by reference to legal duties imposed upon an employer at common law and by health and safety-related legislation, as well as broader obligations arising from principles of corporate social responsibility. The second part of this Paper presents the research findings from the study together with recommendations to inform best practice human resource policies and procedures with a view to improving the management of health and safety for employees required to travel and work overseas.

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With Hong Kong's position as a major financial centre and a commercial hub in the Asia Pacific region, and with the impact of globalisation resulting in increased transnational business opportunities, Hong Kong based companies are faced with an ever-increasing requirement to send their employees abroad on business-related activities. As a result the modern day workplace has changed dramatically in terms of the demands it places upon employees. Many employees are expected and required to be mobile, flexible and ready to travel at short notice in pursuit of business opportunities, or to manage operations, personnel or crises overseas. Others are required to spend longer periods of time on assignment or secondment in a foreign jurisdiction as part of their training, knowledge exchange or career development.

Whilst many employees welcome the prospect of overseas travel and assignments, employees travelling and working overseas may be exposed to a number of risks that fall outside of the scope of risks contemplated by health and safety management systems applicable to workplaces in Hong Kong. For instance, employees who contract an illness or pandemic disease may, in countries with weak healthcare infrastructure, be exposed to an increased level of risk. Employees assigned overseas for lengthy periods can face psychological risks such as depression, and extreme solitude brought on by being in remote or unfamiliar surroundings. As borders open and markets

emerge in areas that are politically, socially or economically unstable, risks related to personal safety and security present alongside more readily assumed health-related risks. Cases such as the CBS News Foreign Correspondent Lara Logan who was sexually assaulted by a mob amidst a riot in Egypt, and Google's regional marketing head Wael Ghonim who was captured by Egyptian rioters and held for 10 days, are vivid illustrations of the security risks inherent in working in countries with weak governance and political instability. Perhaps of greater concern in recent times is the fact that security risks are not just present in locations that might be commonly perceived as high-risk, but have emerged in seemingly low-risk destinations such as Sydney, Paris and Brussels, which have all suffered from terrorist attacks involving civilian casualties. When employees are involved in incidents that occur during times when they are not involved in work-related activities, unless they are covered by insurance, there may be no obvious remedy for any loss or injuries they sustain. Most travel insurance policies, in any event, do not cover claims relating to personal injuries or loss of earnings in the event that the employee is unable to work for a period of time or unable to return to work at all, increasing the likelihood of an employee looking to his or employer for a remedy. This Paper sets out to identify the risks faced by employees and employers as they face this changing landscape, and to offer practical recommendations to mitigate such risks.

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The Nature and Extent of an Employer's Duty of Care

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The legal duty of care owed by employers to employees whilst they are working in Hong Kong arises out of obligations imposed by health and safety legislation designed to regulate health and safety standards in the workplace, as well as a duty of care arising under the common law.² Breach of the statutory duty of care or of the common law duty of care enables an employee to bring a civil claim against the employer for losses suffered as a result of the breach of duty of care. These losses can include the cost of any medical care or out-of-pocket expenses, compensation for the pain and suffering associated with any physical or mental injury, and loss of past and future earnings in the event that an employee is unable to work for a period of time or has reduced earning capacity as a result of the injuries suffered. An employee who is injured at work by accident or who suffers from certain occupational diseases has the right to receive compensation from his employer under a compulsory insurance-based no fault scheme. Receipt of compensation under this scheme does not preclude an employee from

bringing a civil claim, subject to principles of double recovery.

(i) Common Law Duty of Care

At common law, the duty of care owed by the employer to the employee is established on the basis of the existence of an employment relationship. The duty of care is an affirmative duty, requiring positive action by the employer to ensure the safety of workers. The duty of care is a single duty, though it is often referred to as fourfold, to provide: competent co-workers; a safe place of work; safe plant and tools; and a proper system of work with effective supervision. The duty is not an absolute one, but rather requires an employer to take reasonable care to provide a safe place of work. The duty of reasonable care is a personal, "non-delegable" duty. It is thus no defence for an employer to say that he has delegated his responsibility to the employee himself or to another company to which the employee is assigned, even if the workplace is located overseas.

Lee Wai Man v Wah Leung Finance Ltd [2004] 1 HKLRD 1023

The employee was employed as a project manager to manage the construction of a building in Shanghai. During a site inspection the employee was blown by a sudden gust of wind into an unguarded hole that had been created for the installation of water pipes, and fell nine floors to his death. The employer denied liability on the basis that the worksite was in Shanghai and the employer, based in Hong Kong, could not reasonably ensure safe conditions on the site. The court found the defendant in breach of its non-delegable duty to take reasonable care for the deceased employee's safety, because it had not itself taken any steps to inspect the site and satisfy itself that the Shanghai developer or main contractor in charge of the site had adopted a safe system of work. The court held that because the developer and the employer were both subsidiary companies within a group of companies headed by a public listed company in Hong Kong the employer was in a position to have much more say and control over the safety procedure adopted at the site. Since the employer had delegated its non-delegable duty to a third party, it had to bear the consequences of the failure of the third party to ensure the reasonable safety of the employee.

² For a comprehensive account of the duty of care owed by employers towards employees working in Hong Kong see R. Glofcheski, Chapters 9-11 in R. Glofcheski and F. Aslam (eds.) *Employment Law and Practice in Hong Kong* (Sweet & Maxwell Asia, 2nd Edn, 2016).

In a similar ruling an off-site contractor's contractual undertaking to an employer to provide a safe place of work to the employer's workers on the contractor's site was held to be insufficient to discharge the employer's duty of care.

Ng Koon Ki v Hilti (Hong Kong) Ltd [2004] 2 HKLRD 634

The employee was a technician who was given the responsibility of anchor testing on construction sites. The work was considered by the court to be "dangerous work which required the technician to go on to a construction site, an inherently dangerous place, and to work at a height, on the exterior of the building, again an inherently dangerous place of work." There was evidence that the employee had attended a one day safety course but this was considered by the court to be perfunctory in its coverage of topics and attended by the employee primarily in order to gain access to the sites rather than to gain a proper appreciation of safety training related to the performance of this type of work. The court held that in the circumstances the employer should have itself inspected the site to ensure safe working platforms.

"The primary obligation for a safe system of work must lie with a workman's immediate employer. If he is to send his workman to other places to undertake the work that he has contracted to do, he must have in place a proper system of inspection to ensure that working conditions for his employees are safe. He must have in place a proper system of training for his employees to ensure that they know when they are encountering unsafe working conditions. His employees should have been instructed that if the working conditions are not safe, they should decline to undertake the work until such time as working conditions are made safe. Hilti did none of these. The only step that it took was to make a contractual provision for the contract on the site to provide a safe working platform." – per Saunders J.³

The duty on an employer to take all reasonable care to ensure the safety of an employee working abroad can extend to a requirement to ensure that an employee has received medical advice and taken preventative measures when travelling to an area that has a risk of disease.

Palfrey v Ark Offshore Ltd [2001] All ER 304

The employee had died from malaria after travelling to West Africa in order to work on an oil rig operated by a third party. The trips involved an overnight stay on an island where the employee had been bitten by mosquitoes. The employer was found to have breached its duty of care by failing to ensure that employees went to see a doctor or took other medical advice to receive relevant inoculations.

The duty extends to a requirement to carry out a risk assessment to assess the suitability of proposed transport arrangements for an employee whilst overseas. Two negligence claims brought in the U.K. in 2015 illustrate the application of the duty of care in these circumstances.

³ [2004] 2 HKLRD 634 at para. 32.

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Dusek v StormHarbour Securities LLP [2015] EWHC 37 (QB)

The High Court held that the employer owed its employee a duty to take reasonable care to ensure that he was not subject to unnecessary risk when he was required to take a chartered helicopter ride abroad in the course of his employment. Although the employer had not chartered the flight itself, it was nonetheless held liable for breach of the duty of care on the grounds that it knew that the flight involved obvious potential dangers since it was passing over a remote, inhospitable, inaccessible and mountainous area in the Peruvian Andes, and yet had failed to inquire into the helicopter company's safety record, or whether the Peruvian company which chartered the flight had flown with the helicopter company before, had carried out a risk assessment or had made any investigations concerning the safety of the flight. The court held that the employer had a duty to take reasonable care to safeguard its employee from the danger involved. In the circumstances of the case that required the employer to "make at least some form of inquiry into the safety of the trip and carry out some form of risk assessment". The employer's failure to do so breached its duty of care to its employee, and was held to be a cause of his death when the helicopter crashed, killing all the passengers. The court held that there were readily available safe alternatives to the chartered flight, and that if the employer had enquired about the safety of the flight they would have ordered their employee not to take it.

After the verdict the deceased employee's wife made the following statement:

*"My husband's life was thrown away by StormHarbour's disregard for his safety ... I can tell my children that today's decision will hopefully change the way that other employers approach business travel to remote regions of the world, and if that means that even just one less wife, child or parent suffers what we have had to suffer over the last two and a half years, then something positive has come out of this pain."*⁴

Cassley v GMP Securities Europe LLP [2015] EWHC 722

An employee was killed when a private charter flight he took in the course of his employment crashed between Cameroon and the Republic of Congo. The primary cause of the crash was held to be pilot error, a matter which the employers could not have identified or done anything about prior to the flight. The court held that the employer had breached its duty to take reasonable care to ensure that its employee was reasonably safe when travelling in the course of his employment. The employer should have satisfied itself that the trip was reasonably safe by, among other things, asking the charterer about the carrier, the route, how the charterer had satisfied itself that the proposed flight was safe, whether the carrier had an air operator's certificate, the carrier's insurance position, whether the carrier had been recommended, and whether the charterer had used the carrier before to its satisfaction. Although the court found that there had been a breach of duty, the claim failed on the grounds that the breach of duty was not causative of the death of the employee.

⁴ The wife's emailed statement was reported by Bloomberg on January 19, 2015: <http://www.bloomberg.com/news/articles/2015-01-19/stormharbour-liable-for-banker-s-death-in-chopper-crash>

An employer's duty of care extends to taking reasonable steps to guard employees from victimisation or harassment by fellow employees,⁵ and to guard employees from criminal assaults or injuries in carrying out their tasks.⁶ Where one type of employment is more dangerous than another, the duty of care is more onerous. In the context of working or travelling

overseas, particularly in or to locations that are not as safe as Hong Kong, the courts have held that employers need to exercise a greater degree of care. Again, this is not an absolute duty; where the employer cannot eliminate the risk, its duty is to take reasonable precautions to reduce the risk as far as possible.

***Li Hoi Shuen v Man Ming Engineering Trading Co Ltd*- [2006] 1 HKCFI 53**

An employee who was provided accommodation by his employer whilst he was working in mainland China was murdered by two of his fellow sub-ordinate workers who were sharing the accommodation with him. The court held that the employer was under a duty to provide accommodation that was safe. The duty of care was held to be more onerous where the employee was required to work outside of Hong Kong:

*"This is particularly so in a place like mainland China which is renowned for its level of criminal activities especially in small cities where the employee is unfamiliar with the local circumstances and has no knowledge of the level of public security there. A foreigner makes a good and vulnerable target for criminal activity. On the other hand, the employer is in China to do business in mainland China. He is more familiar with the local circumstances and has the resources to ensure his employee's safety. The employer must see to it that his employee is reasonably safe in using the accommodation which he provides for the employee whom he causes to work in a place which the employee is not familiar with and where his personal safety is at risk. The duty of care which an employer has to discharge for his employee working in the mainland is more onerous than that owed to his employee working in Hong Kong."*⁷ - Per Deputy Judge To

In the *Li Hoi Shuen* case the court regarded the risk of violence as a "very real one", given that the subordinate workers were "out-of-province workers" who came from "poor and remote areas in the mainland where people may have different ideas as to moral and social values." It is instructive that the Court considered that the risk of violence could have been avoided by measures which could have been implemented at minimal cost: the employer could have instructed the employee not to reside in the warehouse or prohibited the two subordinates from residing there, or installed locks and partitions in the part of the warehouse occupied by the employee.

(ii) Occupational Health and Safety Ordinance (Cap. 509) (OSHO)

Section 6(1) of OSHO provides that "every employer must, so far as reasonably practicable, ensure the safety and health at work of all the employer's employees".⁸ A person is "at work" only during the time when the person is actually at a workplace. OSHO has a broad definition of "workplace" which is construed as being, with certain exceptions, "any place where employees work".

The statutory duty extends to: providing or maintaining plant and systems of work; making arrangements for ensuring safety and absence

⁵ *Cheung Chak Fui v Sun Hing Organization Plastic Management Ltd* (unrep., HCPI 91/2008, [2011] HKEC 1299.

⁶ *Wong Wai Ming v Hospital Authority* [2000] 3 HKLRD 612 (at first instance) and [2001] 3 HKLRD 209, CA.

⁷ [2006] 1 HKC 349 at para 41.

⁸ A comparable duty is imposed on 'proprietors' in the industrial sector by section 6A of the Factories and Industrial Undertakings Ordinance (Cap. 59) (FIUO). A 'proprietor' is defined as including the person for the time being having the management or control of the business carried on in the workplace.

of risks to health in connection with the use, handling, storage or transport of plant or substances; providing all necessary information, instruction, training and supervision to ensure the safety and health at work of employees; maintaining the workplace in a condition that is safe and without risks to health, and providing or maintaining a working environment for employees that is safe and without risks to health. Regulations made under OSHO impose obligations upon employers to provide for accident prevention, fire precautions, workplace environment control, hygiene at workplaces, first aid and manual handling operations. These duties are not absolute; rather they impose a duty to take measures to ensure, so far as is reasonably practicable, health and safety. The expression "so far as is reasonably practicable" goes beyond that of reasonable care, and suggests a consideration of the risks known at the time of the accident, and a consideration of what measures would be reasonably practicable to ensure health and safety in light of those risks.

Failure to comply with the statutory duty of care is a criminal offence for which an employer is liable on conviction to a fine. An employer who fails to comply "intentionally, knowingly or recklessly" also faces a term of imprisonment of up to six months. Directors, secretaries, managers and other officers may be liable for prosecution under the OSHO if an offence has been committed with their consent or is attributable to their neglect.

Although OSHO has no extraterritorial application, there appears to be no reason in principle why a Hong Kong employer could not be prosecuted for breaches of OSHO even though the injury or accident has occurred overseas where the failure to exercise the duty of care causing the injury occurred in Hong Kong

(e.g. failure to provide all necessary information, instruction, training and supervision to ensure the safety and health at work of employees).⁹ Whilst primarily OSHO imposes criminal liability, breach of its provisions may expose an employer to liability in a civil claim for breach of statutory duty.¹⁰ Section 62 of the Evidence Ordinance provides that a person convicted of a criminal offence will, for the purposes of a civil action, be presumed to have committed that offence. Thus, where the wrongful act comprising the criminal element of the offence includes the same elements needed to establish civil liability, the plaintiff can prove his civil case without the need to adduce further evidence.¹¹

(iii) Employee's Compensation Ordinance (Cap. 282) (ECO)

The right to compensation under the ECO is no fault based; in other words, an employee is not required to prove negligence or fault on the part of the employer; the right to compensation arises out of the existence of an employment relationship. Section 5(1) of the ECO requires the employer to pay compensation to employees who suffer "personal injury by accident arising out of and in the course of the employment". The ECO has extra-territorial application; it applies not only in cases where an employee has suffered an injury in the workplace, but also where an employee is injured outside of Hong Kong.¹² Further, section 5(4)(g) of the ECO provides that an accident shall be deemed to arise out of and in the course of the employment if it happens while the employee, with the employer's express or implied permission, is travelling by any means of transport for the purposes of and in connection with his employment between Hong Kong and any place outside Hong Kong, or between any place outside Hong Kong and any other such place.

⁹ The same principle is applicable to a prosecution under FIUO.

¹⁰ By contrast to the operation of OSHO breach of section 6A of FIUO does not confer a right of action in civil proceedings.

¹¹ *Lee Hang Kuen v Chan Hong* (unrep., HCPI 548/2002, [2006] HKEC 312).

¹² Section 30B of the ECO.

Hsu Shu Chiao v Lung Cheong Toys Ltd. (unrep., CACV 754/2001), [2002] HKEC 188

An employee was required to work in Guangdong, China. His employer provided transportation from his workplace in Dongguan to Shenzhen, where he would get onward transportation back to Hong Kong. On the day in question, he was required to work late and missed the transportation. Pursuant to a standing agreement with his employer, he took a taxi that was involved in an accident in which the employee was killed. The trial judge held that the accident did not arise out of and in the course of employment, and that the travel was not otherwise in the course of the employment, because it was not connected to his work.

On appeal, the Court of Appeal decided in favour of the applicant relying on s.5(4)(g) of the ECO. The employee was working outside Hong Kong and, at the time of the accident, he was travelling with the permission of his employer in connection with his employment between a place outside Hong Kong and another such place. Cheung JA observed:

"... Many of the travelling cases decided in the past were in the context of a local environment of an employee travelling to and from his work. The courts were not concerned with cross-border travelling ... such as many Hong Kong residents are doing these days. In deciding this case, there is no escape from this new social dimension, which takes into account of a modern employment relationship and the practical consideration that, while a person injured on a road in Hong Kong may be covered by compulsory third party insurance, there is no certainty that the same protection is afforded him in another jurisdiction".¹³

- Per Cheung JA

Chan Ho Yuen v Multi Circuit Board (China) Limited [2011] 5 HKC 565

Two employees were involved in a road traffic accident on the Guang-Shen highway; one was killed the other seriously injured. The employees had been to an annual dinner held in the employer's factory in Shenzhen. Although attendance at the dinner was not compulsory employees were expected to attend. Following the dinner the employees decided not to take the transportation that had been provided by their employer to take them back to Hong Kong. Instead, they informed their employer that they were going to a karaoke bar with another colleague, Mr. Lee, and would return to Hong Kong in Mr. Lee's car. The District Court ruled that the employer was not liable to pay employees' compensation because the accident, which had caused the death and injuries of the employees, did not occur in the course of their employment. However, on appeal, the Court of Appeal held that the employees had implied permission from their employer to travel back to Hong Kong in Mr. Lee's car, and that the detour to the karaoke bar was only a temporary interruption (2.5 hours) of the journey back to Hong Kong. The accident had in fact occurred on the route back to Hong Kong and was accordingly considered to be in the course of their employment for the purposes of the ECO claim.

It is instructive to note the observations made in the District Court regarding the nature of activities that might be regarded as falling within the "course of employment":

"... The court should take into account the new social dimension in cross-border employment cases in deciding what falls within the course of employment and what falls outside ... it may be the business culture in other places that a sales employee has to entertain the clients of his employer in karaoke parlours or even night-clubs and they can only discuss business matters in such kind of social gatherings. Practicably and for the benefit of his work, the employee does not have a choice and he has to attend such kind of social gatherings. There may also be cases where the employer just asks the employee to take whatever public transport that is most convenient, and the employer is not concerned about the safety of the transportation concerned. In such circumstances, I agree that the court should, for the protection of the employee, give a liberal interpretation as to what is incidental to the course of employment and what is not."¹⁴ Per Lok J

¹³ [2002] HKEC 188 at para. 26.

¹⁴ [2010] HKDC 208 at para. 119.

Hong Kong Courts Take an Expansive Approach

From a legal perspective there is a clear imposition of a duty of care on employers in respect of the health and safety of their employees whilst working or travelling overseas. In other jurisdictions, such as Australia, the courts have expanded the duty of care to include injuries sustained by employees while undertaking non-work activities during leisure periods. Hong Kong courts seem increasingly willing to recognise a duty of care in circumstances where risk or injury takes place overseas but outside of the "workplace" or other than in the course of work activities. How far this will extend to include leisure activities is hard to predict. As more and more Hong Kong employees are required to travel overseas it is likely that the courts will continue to construe the employer's duty of care in an expansive manner in order to ensure that employees who suffer loss or injury whilst travelling on a work-related trip are adequately protected. The rationale being that but for the overseas business trip or assignment, the employee would have been safe at home, and not exposed to the risk in question. The tragic deaths in February 2013 of 9 Hong Kong residents who were involved in the crash of a hot air balloon in Egypt illustrate the nature of this issue. In that case all the deceased had been travelling as tourists. However, if any of them had been employees travelling in the hot air balloon as a leisure activity organised by an employer, it is arguable, that the employer's duty of care would have extended to this type of leisure activity, and that in the circumstances of the case the employer would have had a duty to ensure that its employees were reasonably safe in using the operator of the hot air balloon.

The extent to which an expansive approach will be taken in cases of civil unrest, terrorist threats and natural disasters is perhaps less clear. An employer's legal obligation is to ensure health

and safety, so far as reasonably practicable, which is a question of fact in each case. There is no specific legal requirement regarding how an employer ought to respond to terrorist threats or natural disasters, but an employer's duty of care towards his or her employee remains, regardless of what the risk is. What liability is likely to turn on in a civil claim based on breach of duty of care is the extent to which events of this nature can be regarded as foreseeable. Understanding the nature of and the likelihood of the risks that an employee sent overseas may face is thus the first step in an employer discharging its duty of care. This requires the employer to undertake a risk assessment. A risk assessment is an integral part of an employer's non-delegable duty of care.¹⁵ In making a risk assessment, an employer must take into account the location to which the employee is required to travel, the means and route of transportation, and the employee's individual characteristics and any particular susceptibility of the employee of which the employer is or ought to have been aware. This means that employers ought to take into account the employee's knowledge of the overseas destination and culture, personal characteristics (for example gender, age, religion, race or ethnicity), experience and cross-cultural competence (such as urban living experience, international experience, and language fluency), and emotional intelligence (namely, self awareness, self management, social awareness and relationship management) that might expose the employee to risk in a particular location. An employee who has never lived or worked outside of Hong Kong and who has not travelled extensively may be more vulnerable in a more dangerous urban environment such as Lagos, Nigeria, than an employee who has spent time working or travelling in comparable locations.

¹⁵ See *Uren v Corporate Leisure (UK) Ltd & Ministry of Defence* [2011] EWCA Civ 66 in which Smith LJ observed: "It is trite law that the common law duty of an employer to an employee cannot be delegated: see *Wilson's and Clyde Coal Co v English* [1959] A.C. 60. It seems to me that the duty to undertake a risk assessment is so closely related to the common law duties of the employer that it would be remarkable if the duty to undertake a risk assessment were delegable and yet the general responsibility for safety were not. In my view, the judge was clearly right to hold that the risk assessment duty is non-delegable." (At para. 71).

Corporate Social Responsibility

Beyond an employer's legal obligation towards employees required to travel and work overseas, many employers accept that they owe a social and moral obligation towards employees who are placed in situations that expose them to the risk of harm. Ensuring the health and safety of employees travelling and working overseas is not just the right thing to do, it is a business imperative that can help employers earn and maintain their social license to operate.

Ensuring the health and safety of employees who are required to travel and work abroad is likely to have a direct impact upon the reputation and brand of the employer, employee morale, engagement, motivation, retention, and business continuity. It is also likely to result in reduced costs for avoidable expenses such as evacuation costs, and increased productivity by avoiding or mitigating disruption to the business. Increasingly, this is recognised by investors, and other stakeholders, who expect companies to adopt health and safety measures that comply with internationally accepted standards designed to promote the wellbeing of employees. Since 2012 Hong Kong listed companies have been required to report on health and safety standards affecting their employees. In 2016 the HK Exchange introduced amendments to the Environmental Social and Governance (ESG) reporting requirements, which change the previously voluntary reporting requirements to an obligation to report on a 'comply or explain' basis.¹⁶ Where a significant number of an employer's employees are being required to travel overseas, the measures taken to ensure their health and safety ought to be disclosed as part of this reporting requirement.

From a risk perspective, it should be noted that employees on international assignments generally have the choice of where to bring a claim and may elect to bring a claim in the country in which an accident or injury occurred, or where the company is headquartered, where those laws are more favourable to their claim. Duty of care responsibilities should therefore be construed to the highest international standards in line with corporate social responsibility principles rather than simply looking to be in strict compliance with local Hong Kong laws, since these may fall short of duty of care obligations in other jurisdictions.

¹⁶ A copy of the Hong Kong Exchange Environmental, Social and Governance Reporting Guide can be obtained at: http://en-rules.hkex.com.hk/net_file_store/new_rulebooks/hk/HKEX4476_3841_VER10.pdf

Study to Ascertain the Nature of the Risks Facing Hong Kong-Based Employees Whilst Travelling or Working Overseas and Human Resource Policies and Procedures Used in Response

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(i) RESEARCH METHODOLOGY

With the dual purpose of establishing what types of risks Hong Kong-based employees have faced while working or travelling overseas, and how Hong Kong employers are managing human resources in response to increasing global travel and international assignments the author conducted 9 semi-structured interviews with senior managers responsible for overseeing the health and safety of employees in their organisations. All of the participants were based in Hong Kong, with extensive experience in their respective functions. A

convenience sample was used with the assistance of the International SOS Foundation, who solicited the participation of existing clients of International SOS in Hong Kong. The sample is not intended to be representative of Hong Kong employers as a whole, but rather was selected on the basis that the participants were likely to have had experience of dealing with cases of health and security risks suffered by employees whilst travelling or working overseas and therefore in a position to share experiences and recommendations of practical value. The profile of participant employer companies and personnel interviewed appears in Table 1 below.

TABLE 1. Profile of Participant Employer Companies and Personnel Interviewed

EMPLOYER COMPANY	TYPE OF BUSINESS	POSITION OF PERSON INTERVIEWED	LISTED IN STOCK MARKET	APPROXIMATE NUMBER OF EMPLOYEES
1	International Hotel Ownership and Management	Director of Corporate Human Resources Services Administration	LISTED	4,400/ 28,900 (including all subsidiaries)
2	Energy Supplier	Director of Group Security	LISTED	7,360
3	Construction and Mining	Functional Support Manager, Incident Investigation, Pre-Contracts, Project Launch & Security	LISTED	16,461
4	Construction and Engineering	Assistant Human Resources Manager, HK Payroll	LISTED	7,223
5	Engineering and Installation Design and Management	Group Human Resources Manager	LISTED	4,500
6	International Hotel Group	Group Director of Human Resources	LISTED	8,000
7	International School	Head of Co-Curricular Activities	NOT LISTED	220
8	Information and Communications Technology	Head of Risk Management and Compliance	LISTED	23,300
9	International School	Director of Finance and Business Administration	NOT LISTED	300

Interviews were chosen over a survey instrument for several reasons. First, because the nature of and treatment of accidents or injuries sustained by an employee whilst overseas on a work-related assignment is a sensitive topic. Managers were likely to have been reluctant to fill out a questionnaire disclosing sensitive information or data relating to their employees, particularly if the incident occurred within a workplace context. Thus, telephone interviews were conducted on conditions of anonymity. Secondly, semi-structured interviews allowed for follow-up questions relating to challenges and solutions, which could be used as a basis for the development of recommendations based on best practices, a desired outcome of the study.

Each participant was asked to describe the policies and procedures that are currently in place in their organisations to address duty of care responsibilities towards employees required to travel and work overseas, and to provide real-life examples of risks faced by their

employees in the preceding 5 years. After each interview the type of risks faced by employees and the solutions or strategies adopted or likely to be adopted by employers in response to such risks was discussed with the next interviewee for validation. The interview notes were then reviewed to identify two sets of data: (i) the nature of risks faced by employees who were required to travel and work abroad, and (ii) HR policies and procedures that were used to manage and respond to the risks.

(ii) RESEARCH FINDINGS

The interviews revealed a wide variety of both health and security-related risks that employees were exposed to in their work-related travel overseas. A summary of the nature of these risks appears in Table 2. The two most common incidents related to accidental injuries sustained outside of the workplace, either in hotel accommodation or in public places, and employees being present in locations, which had been the subject of a terrorist attack.

TABLE 2. SUMMARY OF FINDINGS: RISKS FACED BY EMPLOYEES OF PARTICIPANT EMPLOYERS

NATURE OF RISKS FACED BY EMPLOYEES WITHIN THE PAST 5 YEARS	FREQUENCY AMONG PARTICIPANT COMPANIES ¹⁷
Terrorist Bombings	4
Bodily Injury due to Accident Outside of Workplace	4
Death Due to Illness	2
Express Kidnapping/Mugging	2
Civil Unrest Involving Violence	2
Zika Virus	1
Middle East Virus	1
Sexual Harassment of Female Employees	1
Serious Illness Requiring Evacuation	1
Injury due to Violent Attack	1
Injury Whilst Travelling in Employer-provided Vehicle	1
Illness due to Disease Contracted whilst Overseas	1
Illness due to Food Poisoning	1
Earthquake	1

¹⁷ The number denotes the frequency of incident, rather than the number of employees involved in each incident.

Study to Ascertain the Nature of the Risks Facing Hong Kong-Based Employees Whilst Travelling or Working Overseas and Human Resource Policies and Procedures Used in Response

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The employers' responses to the incidents reported all involved measures that were part of pre-existing policies and procedures, and enabled the employers in question to respond to each situation in a timely and effective manner. The policies and procedures referred to by the participants interviewed are listed in Table 3.

None of the incidents reported subsequently became the subject matter of litigation or dispute. The policies and procedures described by the participants revealed an emphasis on preventative measures, which had generally been informed by appropriate risk assessment procedures.

Table 3: SUMMARY OF FINDINGS: EMPLOYERS' DUTY OF CARE POLICIES AND PROCEDURES

PREVENTATIVE MEASURES (Ranked in order of most commonly used by Participant Employer Companies)
Comprehensive travel insurance for duration of overseas travel
Air travel booked through reputable airlines
Use of approved hotels, and approved on-the-ground transportation
Provision of contact numbers and procedures for contacting 24-hour emergency assistance hotline
Use of a travel tracker app.
Briefings to employees on location-specific risks
Sign-off from senior management in event of travel to high-risk destination
Ensuring all cars or buses to be used by employees are driven by licensed personnel and equipped with seatbelts
Travel website outlining support and relevant emergency contact numbers
Use of pre-vetted travel agents
Use of only one provider to organise all of the logistics and bookings for each trip
Checking laws and regulations in overseas destinations
Providing information relating to access to medical support and advice (e.g. nearest reputable hospital)
Providing staff with risk assessment charts
Ensuring employees have had relevant vaccinations
Internal helpline in Hong Kong
For group travel, ensuring some staff are trained in first aid
Weekly check-ins to confirm employee well-being
Provision of dedicated car and driver
Ensuring employees travel with or are accompanied by someone who speaks the local language
Monitoring health conditions of workers on site
For group travel, carrying out reconnaissance trips to destinations and accommodation
RESPONSE MEASURES
Checking travel tracker app. to ensure no employees are in high-risk location
Contacting operating business overseas to confirm all staff are accounted for
Using travel tracker app. to send message to employees in high risk location
Suspending travel to high-risk destinations
Issuing SMS alerts
Evacuation

CONCLUSION

With regard to the nature of risk to which employees of the participating employer companies were exposed, of particular note was the extent to which security-related risks featured prominently. This was evident both in the number of incidences reported by interviewees and in the level of concern accorded to this type of risk by interviewees.

All of the participating employer companies demonstrated a high degree of awareness regarding an employer's duty of care and all had health and safety policies and procedures in place, though the extent and nature of these, insofar as they were strategically designed to limit the extent to which employees would be exposed to health and security-related risks whilst overseas, varied significantly.

All of the participating employer companies were users of comprehensive travel insurance to cover medical and security related emergencies experienced by their employees whilst overseas. However, not all of the participating employer companies had dedicated policies and procedures in place that extended much beyond travel insurance coverage. Most significantly, the practice of conducting an employer-led risk-assessment for overseas travel was limited and *ad hoc* in nature.

Whilst travel insurance can provide a valuable resource in responding to cases of emergency it will not, by itself, be enough to discharge an employer's duty of care particularly where the nature of the risk to which an employee was exposed was foreseeable. Travel insurance will in most cases not cover any losses other than direct out-of-pocket expenses, so it will not provide an employee with compensation for any injuries suffered or for loss of earnings should the employee be unable to work for any period

due to his/her injuries. The very nature of travel insurance is a financial risk management tool; it cannot discharge an employer's duty of care. Whilst response services are often embedded into travel insurance the core responsibility for a travel insurer is to cover expenses; there is generally no legal responsibility to respond to emergencies, or to help companies fulfil their duty of care. This over-reliance on travel insurance presents a significant risk to both employers and employees, since it is often used instead of rather than as a supplement to a thorough risk assessment.

RECOMMENDATIONS

As the world of work changes in response to the rapidly changing global marketplace, increasing demands are being placed on employees to travel outside of Hong Kong to destinations that carry risk to their personal health and safety. Hong Kong employers have both a legal and moral obligation to do what they can to minimise the extent of any risk to which employees may be exposed. Health and safety risk assessments, plans or measures that have been designed to protect workers in Hong Kong will rarely be adequate to discharge an employer's non-delegable duty of care for employees sent overseas. Employers need to be aware of the fluctuating locality and nature and extent of health and security risks, so they are able to respond with adequate measures to ensure their employees are informed about risks that exist and so that they and their employees can take steps to protect against such risks. Many of the measures that employers can take are low cost and easy to implement. What is required, above all else, is a commitment on the part of employers to ensure that adequate health and safety policies and procedures that are designed for overseas travel and work assignments are in place.

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The recommendations that are proposed below draw upon the policies and procedures already in place among the employers that participated in the study, although no one participating employer currently adopts all of these measures. Whilst the participating employers are all large organisations with ample resources many of the measures designed to ensure the

highest possible degree of safety and security for employees when travelling overseas are low cost practical measures that can be adopted by any employer regardless of size or resources.

The recommendations are presented as a 3-Pillar Risk Management Model: Policy, Prevention, and Protection

3-Pillar Risk Management Model: Policy, Prevention, and Protection

Policy

1. Plan, develop, organise and implement a specific health and safety policy for overseas travel and assignments (Overseas Travel Health and Safety Policy) that sets out the responsibilities of the employer, the responsibilities of the employee sent abroad, the requirement for a prior risk assessment, guidance on specific practical subjects that need to be considered, sources of further information, and a pre-travel checklist.
2. Measure, audit and review performance of the Overseas Travel Health and Safety Policy and procedures on a regular basis.

Prevention

1. Ensure that all work related travel is subject to a formal risk assessment. The Labour Department's Code of Practice on Safety Management¹⁸ defines "risk assessment" as the overall process of estimating the magnitude of risk and deciding whether or not the risk is tolerable. It also includes the process of recognising that a hazard exists and defining its characteristics.
2. Risk assessments should list the significant hazards identified in respect of both the location and activities being undertaken by the employee, the controls and procedures to be used to mitigate the risks, any specific actions required, and an assessment of the residual risk. Risk assessments should include input from the employee being sent on the particular assignment.
3. Employees should be provided information on the need for pre travel medical/dental check ups, personal safety (general precautions to be taken to ensure food safety, consumption of safe drinking water, personal security and money precautions), the safe use of public transport and taxis, or driving abroad, and dress, religious and cultural awareness.
4. An assessment should be made as to whether more robust training or support is required for employees prior to deployment.

¹⁸ A copy of the Labour Department's Code of Practice on Safety Management can be found at: <http://www.labour.gov.hk/eng/public/os/manage.pdf>

- 5. Employees should be provided with up-to-date guidance and information about the country they are visiting including current security issues, cultural and religious sensitivities and local embassy contact details, obtained from sources such as local Governments, Foreign Office, and International Health Authorities (e.g. World Health Organisation); and/or ensure employee has access to an up-to-date country travel risk tool.
- 6. Require employees to communicate with someone in Hong Kong as soon as they arrive safely at their destination and arrange for a point person for them to check in with on a regular basis.
- 7. Ensure the employee uses approved forms of transport to and from the overseas destination and for internal transport throughout the assignment.
- 8. Monitor situations as they unfold, keeping the business informed in the event that decisions need to be made about staff in particular locations.
- 9. Where a destination exceeds a pre-determined risk threshold assess whether more support might be required. This may include face-to-face security training, meet and greet services upon arrival, or a security escort throughout the trip.

Protection

- 1. Ensure employees have access to the employer's Overseas Travel Health and Safety Policy that outlines what employees should do in the event of an incident, for example, who to call and how to behave so that they know how to respond to incidents in line with the employer's Overseas Travel Health and Safety Policy and/or corporate crisis management plan. This is likely to be informed by internal human resource policies, as well as insurance or assistance policies that are in place. For example, an employee injured whilst overseas may need to call the cover provider nominated on the employer's travel insurance policy.
- 2. Have an internal response strategy in place dealing with how to respond and who to communicate with when an incident occurs.

These recommendations are not intended to be exhaustive, but rather to act as a springboard for dialogue among Hong Kong employers, employee representatives, and the Labour Department with a view to enhancing Hong Kong employers' awareness of their duty of care for employees working overseas and the development of best practices.

Code of Practice of Safety Management for Employees Required to Travel Overseas

Finally, the Labour Department is urged to consider issuing a code of practice of safety management for employees required to travel overseas to take account of the changing labour market conditions affecting employers and employees in Hong Kong, and to encourage Hong Kong employers to implement tailored policies and procedures designed to protect the health and safety of Hong Kong employees required to travel and work overseas.



引言

This white paper has been translated into Chinese. If there is any inconsistency or ambiguity between the English version and the Chinese version, the English version shall prevail.

此中文版白皮書為英文版本譯本，如中、英文兩個版本有任何抵觸或不相符之處，應以英文版本為準。

香港大學法律學院比較法及公法研究中心
Farzana Aslam¹

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本白皮書簡介對香港僱員出外公幹與海外工作時所面對健康與安全風險性質的研究，以及香港僱主用以管理與應對此等風險的人力資源政策與程序。本白皮書第一部分藉參考成文法與普通法賦予僱主的法律責任，以及企業社會責任原則所產生的更廣泛義務，探討常駐香港僱主在僱員健康與安全謹慎責任上行使治外法權的範圍。本白皮書第二部分簡介有關研究成果，然後以香港僱主認識與制定最佳實踐的建議作總結，期望改善僱員出外公幹與海外工作所需的健康與安全管理。

香港定位為亞太區主要金融中心與商業樞紐，全球化影響帶來越來越多跨國商機，常駐香港公司越來越需要派駐僱員到海外參與業務相關活動，使現代工作地點對僱員工作地點要求產生巨大變化。不少公司期望與要求僱員可以流動、靈活調用，隨時準備接到臨時通知即趕赴公幹，以尋求各種商機，或處理海外業務、人事問題或危機；另一些僱員則需更長時間派駐或借調至外國司法管轄區接受培訓、知識交流或職業發展。

雖然不少僱員歡迎海外公幹與派駐工作，僱員出外公幹與海外工作時可能面對多種風險，風險範圍更超乎香港工作地點適用的健康與安全管理系統。例如，僱員在醫療基建薄弱的國家工作期間，感染疾病或流行病的話可能面對更大的風險；長期派駐至海外工作的僱員身處偏遠或陌生環境，或感到極度孤獨，可能面對患上抑鬱症等心理風險。隨著政治、社會或經濟不穩定地區開放邊界，並躍升為新興市場，涉及人身安全與保安的風險跟較易識別的

健康相關風險並存；無論是哥倫比亞廣播公司駐外記者 Lara Logan 在埃及騷亂中被暴徒性侵犯，還是 Google 區域營銷主管 WaelGhonim 被埃及暴徒捕獲後囚禁10日，這些案例切實反映在管治薄弱與政治不穩國家工作所面對的固有保安風險。近期更受關注的是，保安風險不單出現於普遍被認為高風險的地區，更於悉尼、巴黎與布魯塞爾等看似低風險的城市湧現；三地均不約而同發生恐怖襲擊，導致平民傷亡。當發生安全事故時僱員並非參與工作相關活動，除非他們已獲保險承保，否則無法對所承受的任何損失或傷害作出明顯補救。在任何情況下，絕大部分旅遊保單概不承擔僱員因個人受到傷害導致無法工作一段時間或無法復工，從而提出有關收入損失的申索，使僱員直接要求僱主作出補救的可能性大增。本白皮書旨在找出僱員與僱主在環境不斷變化下所面對的風險，並提供切實可行的建議以減輕這些風險。

¹ 香港大學法律學院比較法及公法研究中心首席講師及副總監。

有關僱主對僱員在香港工作履行法律謹慎責任，規定工作地點健康與安全標準的健康與安全法例以及普通法所產生的謹慎責任已引申僱主的相關法律義務。²僱員可就僱主違反法定謹慎責任或普通法謹慎責任提出民事訴訟，申索違反法定謹慎責任所導致的損失。這些損失可以包括任何醫療成本或自付費用、對任何生理或心理傷害所帶來痛苦與折磨的補償，以及僱員因所受損害導致無法工作一段時間或賺取薪酬能力下降所產生的過去與未來收入損失。僱員若工作時因意外造成傷害或患上某些職業性疾病，有權從強制性無過錯保險方案中獲得補償。根據雙重補償原則，僱員從無過錯保險方案獲取補償並不妨礙提出民事申索。

(一) 普通法謹慎責任

在普通法上，僱主對僱員履行謹慎責任建基於雙方存在僱傭關係。謹慎責任是積極責任，要求僱主採取積極行動以確保工作人員安全。謹慎責任是單一責任，但它通常被稱為四重責任：提供稱職的同工、安全的工作地點、安全的作業裝置與工具及有效監督的適當工作系統；這種責任不是絕對責任，而是要求僱主採取合理謹慎責任以提供安全的工作地點。合理謹慎責任是個人、「不可轉委」責任，即使工作地點位於海外，僱主亦不能以轉委個人責任予僱員或僱員被派駐的另一間公司作為抗辯理由。

Lee Wai Man v Wah Leung Finance Ltd [2004]1 HKLRD 1023

該僱員受僱擔任項目經理，負責管理在上海興建一幢大廈；在一次視察工地時，該僱員被一陣突如其來的風吹到為安裝水管而建的開封洞口，從九樓墮樓身亡。僱主以工地位於上海與僱主常駐香港、無法合理地保證工地環境安全為理由拒絕承擔責任。法庭判定被告因未有採取任何步驟檢查工地，並有責任確保上海發展商或負責工地的主承建商已採用安全的工作系統，所以違反不可轉委責任，未有向去世僱員履行合理謹慎責任。法庭認為，由於發展商與僱主均是一家香港上市公司牽頭的公司集團旗下附屬公司，僱主有能力對工地採用的安全程序有更大話事權與控制權。鑑於僱主把不可轉委責任轉委予第三方，僱主不得不承擔第三方未有確保僱員合理地安全的後果。

² 有關僱主對僱員在香港工作履行法律謹慎責任的綜合闡述，見Employment Law and Practice in Hong Kong (Sweet & Maxwell Asia, R. Glofcheski與F. Aslam編，2016年第二版) 第九至十一章R. Glofcheski文章。

在類似的裁決中，一間工地外承建商的合同承諾僱主為其工作人員在承建商工地上提供安全的工作地點，僱主被判定不足以履行謹慎責任。

Ng Koon Ki v Hilti (Hong Kong) Ltd [2004] 2 HKLRD 634

該僱員是建築工地內負責進行地錨測試的技術人員。法庭認為這項工作屬於「要求技術人員前往存在固有危險的建築工地，並於同樣存在固有危險的建築物外部進行高空工作。」有證據表明該僱員曾參加為期一日的安全課程，但法庭認為課程涵蓋的內容與僱員參與課程只屬敷衍了事，其主要目的是獲准進入工地，而不是透過安全訓練適當增進對參與這類工作的相關安全知識。法庭認為，僱主在這情況下應該自行視察工地，以確保工作平台安全。

「安全工作系統的首要義務必然與工人的直接僱主有關。如僱主派遣其工人到其他工作地點承辦僱主已簽署合同的工作，僱主必須設有適當的系統視察工作地點，以確保其僱員處於安全的工作環境；僱主必須為其僱員設有適當的訓練系統，以確保他們知道自己處於不安全的工作環境；僱員必須已收到指示，若工作環境並不安全，他們應拒絕承辦工作，直至工作環境變得安全為此。Hilti沒有採取上述任何措施，它唯一採取的步驟是為工地合同制訂合同條款，承諾提供安全的工作平台。」 – 辛達誠法官³

僱主有責任履行所有合理謹慎責任，以確保僱員在海外工作的安全可作延伸，要求僱員前往存在疾病風險的地區公幹前已接收醫療建議與採取預防措施。

Palfrey v Ark Offshore Ltd [2001] All ER 304

該僱員到西非為第三方營運的石油鑽井平台工作，後來患上瘧疾死亡。公幹涉及在島嶼上過夜，而該僱員被島上的蚊子咬傷。僱主被發現未能確保僱員向醫生求診或取得其他醫療建議以接種相關疫苗，違反履行謹慎責任。

³ [2004] 2 HKLRD 634第32段。

謹慎責任還包括進行風險評估的不可轉委要求，以評估僱員身處海外的運載安排建議是否合適。2015年英國出現了兩宗疏忽申索，說明謹慎責任如何適用於此等情況。

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Dusek v StormHarbour Securities LLP [2015] EWHC 37 (QB)

高等法院認為，僱主對僱員履行合理謹慎責任以確保僱員受僱工作時毋須承受不必要的風險，需要乘坐包租直升機出外公幹。儘管僱主沒有包租航機，它知道該航班因要通過偏遠、荒涼、交通不便與崎嶇的秘魯安第斯山脈地區，涉及明顯的潛在危險，但未有查詢直升機公司的安全記錄或包租直升機的秘魯公司曾否乘坐該直升機公司的航班，亦未有進行風險評估或任何關於航班安全的調查，所以僱主仍然違反履行謹慎責任。法庭認為，僱主對僱員履行合理謹慎責任以確保僱員涉及危險下得到保障；在這個案例下，僱主需要「最少就航程的安全性作出某種形式的查詢，並進行某種形式的風險評估」。僱主未有為僱員採取相關程序導致違反履行謹慎責任，並判定為直升機墜毀導致機上所有乘客喪生的死因。法庭認為，僱主輕易找到替代包租直升機的安全選擇，若僱主已查詢航班是否安全，可下令僱員不得乘搭。

宣判後，去世僱員的妻子發表以下聲明：

「StormHarbour無視我丈夫的安全，使他賠上性命……我可以告訴自己的兒女：今天的裁決定將有望改變其他僱主以商務航程前往世界各偏遠地區的方式；即使世上只是少一位妻子、兒女或父母承受過去兩年半以來我們不得不捱過的傷痛，這種傷痛已經帶來積極的改變。」⁴

Cassley v GMP Securities Europe LLP [2015] EWHC 722

一名僱員受僱工作時因乘坐私人包機於喀麥隆與剛果共和國之間墜毀喪生。飛機墜毀主因認為機師操作失誤，僱主在飛行前不可能識別這個問題或作出任何行動。法庭認為，僱主違反合理履行合理謹慎責任以確保僱員受僱工作時可合理地安全出外公幹。除其他事項外，僱主可通過詢問承運公司有關航機、航線的資料、承運公司如何有能力保證擬定航班的安全、航機是否領有營運牌照、航機的保險條款、航機有否獲得推薦，以及承運公司曾否滿意使用該航機，從而有能力確保航程屬合理地安全。儘管法庭認為僱主確有違反履行謹慎責任，違反履行謹慎責任並非導致僱員喪生的理由，因此申索失敗。

僱主謹慎責任擴展至採取合理措施保障僱員免受同事迫害與騷擾⁵，並保障僱員在執行任務時免受刑事攻擊或傷害⁶。若某類型工作較另一類危險，僱主要履行更繁重的謹慎責任。以海外工作或出外公幹而言，特別是身處或前往不及香港安全的地區工作，法庭認為僱主需要採取更大程度的謹慎責任。同樣地，由於僱主不能消除風險，這種責任不是絕對責任，而僱主的責任是採取合理預防措施盡可能減低風險。

⁴ 彭博通訊社於2015年1月19日報導死者妻子的電郵聲明：
<http://www.bloomberg.com/news/articles/2015-01-19/stormharbour-liable-for-banker-s-death-in-chopper-crash>

⁵ *Cheung Chak Fui v Sun Hing Organization Plastic Management Ltd* (unrep., HCPI 91/2008, [2011] HKEC 1299。

⁶ *Wong Wai Ming v Hospital Authority* [2000] 3 HKLRD 612 (原訟法庭) 及 [2001] 3 HKLRD 209, CA。

Li Hoi Shuen v Man Ming Engineering Trading Co Ltd– [2006] 1 HKCFI 53

一位在中國大陸工作的僱員獲僱主提供住宿，該僱員被兩位跟他同住的下屬工作人員殺害。法庭認為，僱主是有責任提供安全的住宿；當僱主要求僱員在香港以外地區工作，被判定需履行更繁重的謹慎責任。

「這在中國大陸一類以犯罪活動猖獗見稱的地方甚為明顯，在小城市尤其顯著，因為僱員既不熟悉當地情況，又不了解當地的治安水平，使外國人成為犯罪活動中理想的肆虐目標。另一方面，僱主位於中國跟中國大陸做生意，更熟悉當地情況，並有足夠資源以確保其僱員的安全。僱主必須確定僱員需在自己不熟悉與人身安全受到威脅的地方工作時，供僱員使用的住宿屬合理地安全。僱主為僱員在大陸工作所履行的謹慎責任較僱員在香港工作更繁重。」⁷ – 杜淮峰暫委法官

在 *Li Hoi Shuen* 案中，法庭認為鑑於下屬工作人員是「外省工人」，來自「大陸窮困偏遠地區，當地人的道德與社會價值觀可能有所不同」，暴力是「非常真實」的風險。法庭認為可通過以最低成本實行的措施避免暴力風險甚具啟發性：僱主可能已指示僱員不應住在倉庫或禁止兩名下屬在倉庫居住，或在僱員佔用倉庫部分安裝門鎖與隔板。

(二)《職業安全及健康條例》（香港法例第509章）

《職業安全及健康條例》第6條第(1)款規定「每名僱主均須在合理地切實可行範圍內，確保其所有在工作中的僱員的安全及健康。」⁸任何人士僅於實際身上處工作地點才算「上班」；《職業安全及健康條例》對「工作地點」有廣泛定義，摒除某些例外，其詮釋指「有僱員工作的任何地方」。

法定謹慎責任延伸至提供或維持工作的作業裝置及工作系統；對使用、處理、貯存或運載的作業裝置或物質作出安排，以確保相關行為安全及不會危害健康；提供所需的資料、指導、訓練與監督，以確保僱員在工作中的安全與健康；維持工作地點情況屬安全及不會危害健康；以及為僱員提供或維持安全及不會危害健康的工作環境。《職業安全及健康條例》訂立的規例賦予僱主提供預防意外、防火措施、控制工作環境、工作地點衛生、急救與人工處理作業的義務；這些責任均不是絕對責任，而是採

取合理地切實可行措施以確保僱員的健康與安全。

「在合理地切實可行範圍內」的表達方式超出合理謹慎的範圍，並建議考慮意外發生時的已知風險，以及因應這些風險考慮合理地切實可行的措施，以確保健康與安全。

不遵守法定謹慎責任屬刑事罪行，僱主一經定罪，可處罰款。任何僱主「蓄意、明知或罔顧後果地」不遵守法定謹慎責任同樣面臨監禁最長六個月。任何董事、秘書、經理及其他人員如同意干犯或因疏忽而干犯有關罪行，可按《職業安全及健康條例》檢控。

雖然《職業安全及健康條例》沒有行使治外法權，即使僱員在海外造成傷害或發生意外，若於香港未有履行謹慎責任導致發生意外（例如無法提供所需的資料、指導、訓練與監督，以確保僱員在工作中的安全與健康），理論上香港僱主可能因違反《職業安全及健康條例》而被起訴⁹。雖然《職業安全及健康條例》主要賦予刑事責任，僱主可能因違反有關規定導致違反法定責任，引起民事申索。¹⁰《證據條例》第62條規定任何人士干犯刑事罪行，將於民事訴訟上被推定干犯有關罪行。因此，當干犯罪行包含的不法行為包括構成申索民事責任所需的相同元素，原告能證明其民事申索成立，毋須進一步援引證據。¹¹

⁷ [2006] 1 HKC 349 第41段。

⁸ 《工廠及工業經營條例》（香港法例第59章）第6A條將類似的責任賦予在工業界別的「東主」身上，「東主」指當其時管理或控制在該工作地點進行的業務的人。

⁹ 同樣原則適用於《工廠及工業經營條例》檢控。

¹⁰ 與《職業安全及健康條例》相反，違反《工廠及工業經營條例》第6A條不賦予民事訴訟的權利。

¹¹ *Lee Hang Kuen v Chan Hong* (unrep., HCPI 548/2002, [2006] HKEC 312)。

(三)《僱員補償條例》(香港法例第282章)

《僱員補償條例》規定僱員可獲取無過錯補償權利；換言之，獲取補償權利建基於存在僱傭關係，僱員毋須證明疏忽或過失對僱主有關。《僱員補償條例》第5條第(1)款要求僱主補償予「在受僱工作期間因工遭遇意外以致身體受傷」的僱員。《僱員補償條例》具有治外法權，不僅適用於僱員在工作地點受到傷害，也適用於僱員於香港以外受到

傷害。¹²此外，《僱員補償條例》第5條第(4)款(g)項規定，如僱員遭遇意外時，僱員正在僱主明訂或默示許可下，為了其受僱從事的工作的目的並在與此工作有關下，在香港與任何香港以外的地方之間，或在任何香港以外的地方與任何其他地方之間，乘用任何交通工具，則僱員遭遇的意外，須當作是在受僱工作期間因工遭遇的意外。

Hsu Shu Chiao v Lung Cheong Toys Ltd. (unrep., CACV 754/2001), [2002] HKEC 188

一名僱員需要到中國廣東工作，其僱主為他提供從東莞工作地點前往深圳的交通工具，使他能輾轉乘坐交通工具返回香港。事發當日，該僱員需要工作至深夜，並錯過了安排的交通工具；僱員根據與僱主協議乘坐的士，結果涉及交通意外中喪生。主審法官認為，意外並非由受僱工作與過程中引起；由於他乘坐交通工具與工作無關，所以不算在受僱工作時發生意外。

上訴時，上訴法庭依據《僱員補償條例》第5條第(4)款(g)項判定申索人勝訴。高等法庭上訴法庭張澤祐法官指出，該僱員在香港以外地方工作，意外發生時已得到僱主許可，於受僱工作期間在香港以外地方乘坐交通工具前往另一個香港以外地方：

「...過去，不少交通意外案件的裁決均是僱員在本地環境下工作往返，法院並沒有關注涉及跨境工作的情况...目前很多香港居民都是這樣往返工作。在判定此案時，無可避免地考慮到這個全新社會趨勢下的現代僱傭關係，以及實際考慮到某人在香港道路上受傷可能獲第三者強制保險承保，但在其他司法管轄區未必肯定獲得同等保障...」¹³ — 高等法庭上訴法庭張澤祐法官

¹² 《僱員補償條例》第30B條。

¹³ [2002] HKEC 188 第26段。

Chan Ho Yuen v Multi Circuit Board (China) Limited [2011] 5 HKC 565

兩名僱員涉及廣深高速公路上的道路交通意外，一人喪生，另一人受重傷。當時兩名僱員赴會僱主於深圳工廠舉行的週年晚宴，儘管僱員並非必須出席晚宴，僱主期望僱員出席。晚宴後，兩名僱員決定不乘搭僱主提供的交通工具返回香港；相反，他們告知僱主將與另一位同事李先生前往卡拉OK酒吧，並乘坐李先生的私家車返回香港。區域法院裁定，由於意外造成的僱員傷亡並非發生於受僱工作期間，僱主毋須承擔責任。可是，當案件上訴時，上訴法庭認為僱主默許同意僱員乘坐李先生的私家車返回香港，而前往卡拉OK酒吧（2.5小時）僅屬臨時中斷返回香港的行程；事實上這宗意外發生於返回香港的路途上，因此在按照《僱員補償條例》索償上，可視為處於受僱工作期間。

值得注意的是，區院法庭指出可納入「受僱工作期間」範圍的活動性質，甚具啟發性：

「...法庭應考慮到跨境工作的全新社會趨勢下，那些情況可納入受僱工作期間，那些情況不可納入...在其他地區，銷售僱員在卡拉OK店甚至夜總會招待僱主的客戶可能是公司文化，而他們只能在這類社交聚會上商討業務問題。當這是切實可行並對僱員的工作有利，僱員別無選擇下需要參加這類社交聚會。此外，僱主有可能僅要求僱員採用任何最方便的公共交通工具，僱主並不關注有關交通工具的安全；在這種情況下，我同意法庭應從寬解釋屬於與不屬於受僱工作期間附帶的情況，以保障僱員。」¹⁴

– 陸啟康法官

香港法院採取廣義做法

從法律觀點來看，僱主需明確實行對僱員在海外工作或出外公幹的健康與安全謹慎責任。在澳洲等其他司法管轄區，法庭已把謹慎責任擴展至包括僱員休閒時從事非工作活動時所受傷害。香港法庭似乎越來越願意承認謹慎責任已從海外發生的風險或傷害，延伸至「工作地點」以外或其他工作活動以外的風險或傷害，這個範圍會否擴大至包括休閒活動實在難以預料。隨著越來越多香港僱員需要出外公幹，法庭很可能持續以廣義形式詮釋僱主謹慎責任，以確保僱員參與工作有關的旅程時，就算蒙受損失或傷害亦得到充分保障。這項詮釋的理由在於相對海外公幹或派駐至海外工作，僱員本來可以安全留在家中，亦不會涉及遇上風險。2013年2月，九名香港居民在埃及熱氣球墜毀悲劇中喪生，正好說明這個問題的本質。此案中所有死者均以旅客身份旅遊；可是，若任何一位死者以僱員身份參與由僱主舉辦的熱氣球休閒活動，僱主謹慎責任是否

已擴展到這類休閒活動，以及僱主是否有責任確保所採用的熱氣球營運商令僱員處於合理地安全的環境，實在值得商榷。

在內亂、恐怖威脅與自然災害情況下應否採取一定程度的廣義做法也不算明確。僱主的法律義務是在合理地切實可行的範圍內確保健康與安全，惟在每宗案件上均值得質疑。雖然在僱主應如何應對恐怖威脅與自然災害的層面上，法律並沒有具體要求僱主不論風險，需依舊向僱員履行謹慎責任，若基於違反履行謹慎責任而提出民事申索，很可能視乎在此類事件中視為可預見發生的事件範圍而定。因此，了解派駐僱員到海外工作可能面對的風險性質與可能性是僱主履行謹慎責任的第一步，這需要僱主進行風險評估。風險評估是僱主不可轉委謹慎責任的重要部分¹⁵，僱主進行風險評估時必須考慮僱員需要前往的地點、交通工具形式與路線，以至僱員個人特徵與任何僱主知道或已意識到僱員易受影響的弱點；這表示僱主應考慮僱員身處某一地點可

¹⁴ [2010] HKDC 208 第119段。

¹⁵ 見 *Uren v Corporate Leisure (UK) Ltd & Ministry of Defence* [2011] EWCA Civ 66。Smith 大法官指出：「僱主普通法責任不能委託予僱員是陳腐的法律：見 *Wilson's and Clyde Coal Co v English* [1959] A.C. 60。在我看來，進行風險評估的責任與僱主普通法責任的關係如此密切；如果可以委託進行風險評估的責任，這就了不起了，但一般安全責任並非如此。在我看來，法官判定風險評估責任不可轉委，實屬正確。」（第71段）

能面對的風險，包括僱員對海外目的地與文化的認知、個人特徵（如性別、年齡、宗教、種族或民族）、經驗與跨文化能力（如城市生活經驗、國際經驗與語言能力）與情緒情商（即自我意識、自我管理、社會意識與關係管理）。若僱員從未在香港以外居住或工作與到處遊歷，他（她）身處像尼日利亞拉各斯等更危險城市環境的處境，較曾在類似地點工作或公幹僱員危險。

企業社會責任

在僱主對需要出外公幹與海外工作的僱員履行法律義務外，不少僱主承認因安排僱員身處面對危害風險的處境而履行社會與道德義務。確保僱員出外公幹與海外工作的健康與安全不僅做法恰當，亦是有助僱主取得與維持其社會經營牌照的企業必要事項。

僱主確保僱員出外公幹與海外工作的健康與安全，可能對其商譽與品牌、僱員士氣、參與、激勵、留職及業務延續性產生直接影響，也可能減省可避免開支成本如撤離費用，以及藉避免或減輕對業務的破壞提高生產力。這項做法漸受投資者與其他持分者所認同，他們期望企業採用符合國際公認標準的衛生與安全措施，旨在促進僱員的福祉。自2012年起，香港上市公司已要求匯報影響僱員的健康與安全標準。2016年，香港交易所推出《環境、社會及管治報告指引》，把以往自願匯報要求改為「不遵守就解釋」的匯報義務¹⁶。當僱主有大量僱員需要出外公幹，該報告要求上市公司需披露所採取確保僱員健康與安全的措施。

從風險角度而言，值得注意的是獲派駐國際任務的僱員一般可選擇提出申索的地方，亦可能因應更有利申索的相關法律條件，選擇在發生意外或造成傷害的國家或公司總部所在地提出申索。因此，謹慎責任應解釋為符合最高國際標準的企業社會責任原則，而不是純粹嚴格遵從香港本地法律，因為有關法律的謹慎責任義務標準可能低於其他司法管轄區的同等法律。

¹⁶ 可到以下網址索取香港交易所推出《環境、社會及管治報告指引》副本：
http://en-rules.hkex.com.hk/net_file_store/new_rulebooks/hk/HKEX4476_3841_VER10.pdf

研究查明常駐香港僱員於海外公幹或工作時所面對風險的性質及用以應對的人力資源政策與程序

第二部分

24

(一) 研究方法

研究作者進行了九場半結構式訪談，訪問了多位負責監督所屬機構僱員健康與安全的高級管理人員，旨在達致兩大目的，既能建立常駐香港僱員於海外公幹或工作時曾經面對的風險類別，又能了解香港僱主如何因應全球公幹與國際派駐工作增加以管理人力資源。所有訪談參與者均常駐香港，並在各自的職責上累積著豐富經驗。在國際SOS 基金會協助

下，研究作者徵求了多位香港國際SOS 現有客戶參與訪談，以便取得樣本。這些樣本絕非旨在代表香港整體僱主，樣本選擇亦根據參與者很可能曾經處理僱員於海外公幹或工作時遭受健康與安全風險事件為基礎，從而分享具實用價值的經驗與建議。

參與訪談的僱主企業與受訪人員簡介詳列於下表1。

表 1 參與訪談的僱主企業與受訪人員簡介

僱主企業	業務類型	受訪者職位	上市企業	大約僱員人數
1	國際性酒店東主與管理	企業人力資源、服務與行政總監	上市	4,400/28,900 (包括所有附屬企業)
2	能源供應商	集團保安總監	上市	7,360
3	建築與礦業	功能支援經理 (事故調查、預約合同、項目開展與保安)	上市	16,461
4	建築與工程	助理人力資源經理 (香港薪酬)	上市	7,223
5	工程及裝置設計與管理	集團人力資源經理	上市	4,500
6	國際性酒店集團	集團人力資源總監	上市	8,000
7	國際學校	課程輔助活動主管	非上市	220
8	資訊與通訊科技	風險管理與合規主管	上市	23,300
9	國際學校	財務與商業管理總監	非上市	300

是次研究基於多項原因選用訪談作調查手段。首先，僱員於海外負責相關指派工作時遇到意外或傷害的事故性質和處理方法屬敏感話題，管理人員很可能在填寫問卷時一直不願洩露跟僱員相關的敏感資料或數據，特別是事故發生於工作環境內；因此，是次研究在不記名條件下進行電話訪談。其次，半結構式訪談容許跟進提問應對風險的挑戰與解決方案，所得資料可用於制定最佳實踐建議的依據，亦是這次研究期望得到的結果。

是次訪談要求每位參與者描述其機構目前採取的政策與程序，對需要前往海外公幹或工作的僱員履行謹慎責任，並提供過去五年僱員所面對風險的生活實例。每次完成訪談後，研究作者把搜集所得的僱員所面對風險性質，以及僱主因應此等風險所採取或很可能採取的解決方案或策略，跟下一位受訪者討論加以驗證。研究作者然後審核受訪者訪談記錄，以找出兩組數據：(一) 需到海外公幹與工作僱員所面對的風險性質，及(二) 用以管理與應對風險的人力資源政策與程序。

(二) 研究結果

訪談揭示僱員到海外進行工作相關公幹時所遇到各式各樣的健康與安全相關風險，表2載列這些風險性質的摘要。最常見兩種工作地點以外遭受意外傷

害的情況計有酒店住宿或公共場所，以及僱員身處成為恐怖襲擊目標的地點。

表 2 研究結果摘要：參與者僱主旗下僱員所面對的風險

過去五年僱員面對的風險性質	參與者企業發生事故頻率 ¹⁷
炸彈恐襲	4
因工作地點以外意外受傷	4
因病去世	2
快速綁架/搶劫	2
涉及暴力的內亂	2
寨卡病毒	1
中東呼吸綜合症病毒	1
女性僱員受性騷擾	1
因重病需要撤離	1
暴力襲擊受傷	1
乘坐僱主提供車輛出外公幹時受傷	1
身處海外時因感染疾病致病	1
食物中毒致病	1
地震	1

¹⁷ 數字顯示發生事故的頻率，而非每次事故涉及的僱員數目。

研究查明常駐香港僱員於海外公幹或工作時所面對風險的性質及用以應對的人力資源政策與程序

僱主提及的應對事故方式均涉及既有政策與程序內的措施，使僱主質疑這些措施題能否及時而有效地應對每種情況。表3載列受訪者提及的政策與程序。訪談中提及的事故一概未有導致日後出現訴訟

或爭議。參與者描述的政策與程序揭示僱主普遍著重通過適當的風險評估程序了解風險，採取預防措施。

表 3 研究結果摘要：僱主謹慎責任政策與程序

預防措施（按參與訪談的僱主企業最常使用程度排列）
採用海外公幹適用的綜合旅遊保險
向信譽良好的航空公司預訂機票
使用經認可的酒店與地面交通工具
提供聯絡號碼與聯絡24小時緊急援助熱線的程序
使用行程追蹤手機應用程式
簡報僱員在特定地點的風險
前往高風險目的地公幹時需要高級管理人員簽署確認
確保所有僱員使用的汽車或巴士均由持牌人員駕駛，並配有安全帶
列出旅遊網站支援與相關應急聯絡號碼
選用預先審核的旅行社
選用單一供應商統籌每次公幹行程所有物流與預訂安排
檢視海外目的地的法律與法規
提供取得醫療支援與諮詢資料的渠道（例如距離最近的信譽良好醫院）
向僱員提供風險評估圖表
確保僱員已接種相關疫苗
在香港設立內部援助熱線
安排團體公幹時，確保部分僱員曾接受急救訓練
每週聯絡以確認僱員健康狀況
提供專用汽車與司機
確保通曉當地語言的人士聯同僱員出外公幹或陪同在側
監察工地工作人員的健康狀況
安排團體公幹時，對目的地與住宿展開偵察行程
應對措施
檢查行程追蹤手機應用程式，確保僱員並非身處高風險地點
聯絡海外經營業務單位，確認所有僱員均知悉當地情況
使用行程追蹤手機應用程式，為身處高風險地點的僱員發送訊息
暫停前往高風險目的地公幹
發出手機短訊警報
撤離

結論

對於參與訪談的僱主企業旗下僱員所遇到的風險性質，值得注意的是顯著出現安全相關風險的程度。無論是受訪者提及的事故數目及對此等風險的關注程度，均是顯而易見。

所有參與訪談的僱主企業對僱主謹慎責任均顯得高度關注。儘管僱主已訂立相關的健康與安全政策與程序，僱主的策略僅致力限制僱員身處海外時所遇到健康與安全相關風險的範圍，使有關健康與安全政策與程序的範圍與性質存在顯著差異。

所有參與訪談的僱主企業均採用綜合旅遊保險，以承擔僱員身處海外遇上醫療與安全相關緊急情況時的開支。可是，並非所有參與訪談的僱主企業已在旅遊保險以外訂立專門的政策與程序。最重要的是，僱主領導進行的海外公幹風險評估有限，往往是臨時進行。

雖然旅遊保險能提供寶貴資源應對緊急情況，旅遊保險本身不足以履行僱主謹慎責任，特別是僱員所遇到的屬可預見風險性質。在大多數情況下，旅遊保險將不承擔自付費用以外其他任何損失，所以僱員承受的任何傷害或因他/她受到傷害導致無法工作一段時間所造成的收入損失均不獲賠償。旅遊保險的本質是金融風險管理工具，並非履行僱主謹慎責任；雖然旅遊保險通常附有應對服務，但旅遊保險商的主要責任是承擔開支，在應對緊急情況或協助企業符合謹慎責任而言一般不付上法律責任。過度依賴旅遊保險反使它經常被用以代替徹底的風險評估，為僱主與僱員帶來顯著風險。

建議

由於全球市場的工作轉變瞬息萬變，僱員越來越需要前往香港以外、存在人身健康與安全風險的地區公幹。香港僱主需要承擔盡可能減少僱員遇到任何程度風險的法律與道德義務；為保障香港工作人員而設的健康與安全風險評估、計劃或措施甚少讓僱主向指派至海外工作的僱員充分履行不可轉委的謹慎責任。僱主需要注意健康與安全風險的局部波動及性質與範圍，以採取適當應對措施確保僱員知悉存在的風險，並使僱主與僱員能採取行動，保障自己免受此等風險影響。不少僱主可採取的措施均是成本低廉且容易實施，最需要的是僱主的承諾，確保為僱員海外公幹與指派工訂立適當的健康與安全政策與程序。

以下提出的建議參照在參與研究僱主間已經訂立的政策與程序，惟沒有單一參與僱主目前已採取所有載列的措施。雖然參與訪談的僱主均是資源充足的大型機構，不少確保僱員海外公幹時可得到最大程度安全與保障的措施均是低成本、切實可行的措施，不論僱主規模或資源均可採用。

研究作者利用這些建議構成三大支柱風險管理模型：政策、預防與保障。

三大支柱風險管理模型：政策、預防與保障

政策

1. 規劃、制定、統籌與實施特定健康與安全政策（海外公幹健康與安全政策），就海外公幹與指派工作列明僱主的責任、派駐海外僱員的責任、事先風險評估的要求、考慮具體實踐項目的指引、進一步資料的來源與公幹前清單。
2. 定期量度、審計與審核海外公幹健康與安全政策與程序。

預防

1. 確保所有工作相關公幹均接受正式風險評估。勞工處《安全管理工作守則》¹⁸把「風險評估」定義為估量風險的程度及決定風險是否可容忍的全面程序，並包括確定危險存在及確立其特性的程序。
2. 風險評估應列出僱員於承辦工作地點與活動所找到的顯著危險、用以減低風險的控制與程序、需要的任何具體行動與評估殘留風險。風險評估應包括僱員指派予特定工作的風險內容。
3. 向僱員提供公幹前需要進行醫療/牙科檢查、人身安全（採取常規防範措施以確保食品安全、飲用水安全、個人保安與金錢防範）、安全使用公共交通工具與的士，或海外駕駛車、服飾、宗教與文化注意事項等資料。
4. 評估指派僱員公幹前應否需要加強培訓或支援。
5. 從不同渠道如當地政府、外交部與國際性衛生機構（如世界衛生組織）收集僱員即將到訪國家的最新指引與資料，包括當前保安問題、文化與宗教敏感度及當地大使館聯絡方式，並提供有關指引與資料予僱員；及/或確保僱員可取得最新的國家旅行風險工具。
6. 要求僱員於安全抵達目的地後盡快跟香港的職員聯絡，並為僱員安排定期聯絡人。
7. 確保僱員使用經認可的交通工具往返海外地點，並在整個指派任務中使用內部交通工具。
8. 在僱員展開公幹後監察情況，在需要決定對特定地點的僱員作出其他安排時，公司亦掌握情況。
9. 當某一地點超越預設風險門檻，評估會否需要更多支援。這可能包括面對面保安培訓、到埗迎接服務或公幹全程安排保安護航。

保障

1. 確保僱員可以查閱僱主的海外公幹健康與安全政策，列明僱員遇上事故時的應對做法，例如致電聯絡的人員與如何對答，讓對方知道如何按照僱主的海外公幹健康與安全政策及/或企業危機管理計劃應對事故。這很可能需要知悉已訂立的內部人力資源政策及保險或援助政策的內容，例如僱員在海外公幹受傷時，可能需要聯絡僱主旅遊保單指定保險服務供應商。
2. 為發生事故時如何應對與人員聯絡事宜制定內部應對策略。

這些建議並非面面俱全，而是作為香港僱主、僱員代表與勞工處之間的對話跳板，以便提升香港僱主向海外工作僱員履行謹慎責任與制定最佳實踐的意識。

需往海外公幹僱員安全管理工作守則

最後，勞工處應考慮到香港僱主與僱員的勞工市場情況不斷變化，向需往海外公幹僱員發出安全管理工作守則，並鼓勵香港僱主為需出外公幹與海外工作的香港僱員實施度身訂造的政策與程序，以保障僱員的健康與安全。

2016年5月

¹⁸ 可到以下網址索取《安全管理工作守則》副本：<http://www.labour.gov.hk/eng/public/os/manage.pdf>

