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 **Employers'
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Nishith Desai Associates
LEGAL AND TAX COUNSELING WORLDWIDE



Employer's Duty of Care when employees are deputed overseas - India Perspective

Overview

The Indian industry has been experiencing a growth spurt in the last decade, causing an expansion of its operations worldwide. This has resulted in increased deployment of business travelers across the globe especially in dynamic business locations such as: USA, the African region and trade-hubs in the Middle East.

The global workforce is exposed to risks of medical threats, security hazards, infectious diseases, terrorist attacks and natural disasters. In order to cope with such risks, Indian organizations sending their employees overseas require neutral and prompt risk assessment, advice, and constant assistance before, during and after such travel.

This situation implies that companies based in India have a Duty of Care to protect their employees, both locally and overseas. This is because the execution of a work-related activity regardless of the workplace constantly involves health and safety risks.

Additionally, complex travel-related risks arise when employees are deputed abroad. In fact, reports suggest that individuals traveling on business mostly cope with significant stress, road traffic accidents, and chronic existing medical conditions such as cardiovascular issues and diabetes.

The main purpose of this document is to provide a guideline for Indian employers regarding their Duty of Care in relation to safety at the workplace when their employees are operating overseas and emphasize that higher location-related risks demand higher level of Duty of Care. Further, this document also highlights the responsibilities that arise under the Indian legislation and case law, which include duties of prevention, protection, mitigation and practicable measures of compliance.

The level of the employer's Duty of Care is proportional to the employee's personal and occupational conditions. Factors like gender, age and fitness, along with occupational factors such as work environment, type of work, skills and experience of the employee are taken into consideration to assess foreseeable work-related risk and the corresponding duty of care in order to eliminate, minimize and control risk.

Taking the risks associated with business travel into consideration, medical checkups prior to travel, dis-bursing information about risky locations and whereabouts of the assignee, are some key practices to prevent accidents to happen while working abroad.

In light of the above, organizations perceive a return on prevention, through compliance of applicable regulations and adopting best practices with respect to employee health and safety. Ultimately, this also influences a company's corporate social responsibility, sustainability, competitiveness and reputation.

Key Occupational Health and Safety Legislations

Indian law on occupational health and safety originate from the Constitution of India, the supreme law of the land. The Directive Principles of the Constitution, stated to be fundamental in the governance of the country, are required to be applied by the legislatures in framing laws. These Directive Principles, while not enforceable, envisage, inter alia, securing the health and strength of employees and just and humane conditions of work. India follows the federal system of governance and the law making powers are shared between legislatures at the Union and State level. India does not have a comprehensive legislation addressing occupational health and safety and an employer's duty of care. Indian laws on occupational health and safety, acknowledging the diverse challenges faced by different sectors, are mostly industry specific. Some of the important laws that contain employee health & safety provisions include:

1. Mines Act, 1952
2. Factories Act, 1948
3. Indian Boilers Act, 1923
4. Dock Workers Act, 1986
5. Plantation Labour Act, 1951
6. Building and Other Construction Workers Act, 1996
7. Dangerous Machines (Regulation) Act, 1983
8. Insecticides Act, 1968
9. State specific legislations applicable to shops and establishments
10. Beedi and Cigar Workers' (Conditions of Employment) Act, 1966
11. Municipal Solid Waste (Management and Handling) Rules, 2000
12. Petroleum Act, 1934
13. Manufacture, Storage & Import of Hazardous Chemicals Rules, 1989

14. Electricity Act, 2003
15. Explosives Act, 1884
16. Contract Labour (Regulation and Abolition) Act, 1970
17. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013
18. Employees' State Insurance Act, 1948
19. Employers' Liability Act, 1938
20. Employees' Compensation Act, 1923

These laws envisage health and safety requirements that an employer needs to ensure and adhere to while an employee is employed with the establishment to which the legislation is applicable.

Some best practices adopted by employers with respect to health and safety include:

- Periodically training employees on health and safety, keeping in mind industry standards and requirements.
- Being equipped with medical facilities, ambulances and first aid boxes
- Implementing emergency action plans.
- Reporting of occupational incidents.

Duty of Care towards Employees posted abroad

Employees' Compensation Act, 1923

While there are a plethora of legislations governing occupational health and safety, the applicability of most statutes is limited to the territory of India. The Employees' Compensation Act, 1923 ("EC Act") makes the employer liable to pay compensation to the employee if he/she suffers personal injury or certain occupational diseases by accident 'arising out of or in the course of employment'. The EC Act, unlike most other Indian legislations, has a limited extra-territorial jurisdiction and protects an employee employed by an Indian company, but sent abroad for work.

It may be pertinent to note that the extra-territorial jurisdiction of the EC Act is limited to employees of an Indian company (to which the EC Act applies) traveling or working overseas as part of his employer's requirement. It is also important to note that the courts in India have analysed the concept of 'notional extension of employer's premises' in great detail while dealing with matters relat-

ing to the EC Act. They have observed that for an employer to be liable to pay compensation under the EC Act, it is essential that the following three conditions are fulfilled:

- (a) the accident/injury must arise 'out of and in the course of employment',
- (b) there must be causal connection between the injury and the accident and the work done in the course of the employment,
- (c) the employee should be able to prove that the accident happened while he was performing duties as an employee.

Various aspects of the duties of an employee that require an employee to move out of his/her conventional workplace tend to extend the employer's liability to an 'extended workplace'. Hence, if the employee sustains injury or contracts occupational diseases during the course of employment, while deputed to a place of work outside India, the employer may be held liable to compensate the employee as per the provisions of the EC Act. Further, courts have emphasized that the EC Act is a welfare legislation aimed to soothe the agony of a workman or his dependents who become incapacitated or dead on account of the injuries sustained during the course of the employment.

Employees' State Insurance Act, 1948

The Employees' State Insurance Act, 1948 ("ESI Act") provides for certain benefits to eligible employees in case of sickness, maternity and employment injury and provisions for related matters. The employer and the employee are required to contribute certain percentage of each eligible employee's salary to the Employee State Insurance Corporation (set up under the ESI Act) by way of insurance premium. The contribution requirements for each employee get triggered based on the salary earned by the employee. Under the provisions of the ESI Act, the employee reaps several benefits including those akin to a typical health insurance scheme. The definition of 'employment injury' in the ESI Act includes personal injury caused by accident or occupational diseases contracted by an employee in the course of employment though outside the territorial limits of India. To that extent, employees of an Indian company stationed abroad would, if eligible, be entitled to seek benefits under the ESI Act.

Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

In 2013, the Indian government enacted the much-awaited Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (“**Anti-Harassment Act**”). The Anti-Harassment Act envisages certain obligations of the employer which, amongst others, includes the important obligation of duty of care. The employer is required to ensure that a safe and secure working environment is maintained at the workplace. In the Anti-Harassment Act, the definition of workplace includes any place which the employee visits ‘during the course of employment’. Accordingly, a place of work outside India is also covered. The Anti-Harassment Act puts the responsibility on the employer to ensure safety and security of its employees even when they are stationed abroad. It is important to note that the Anti-Harassment Act is not a gender neutral law and only female employees can claim protection or relief under the law.

Employers’ Liability Act, 1938

The Employers’ Liability Act, 1938 (“**EL Act**”) has been enacted to limit employers from raising the defense of common employment in respect of injuries sustained by certain categories of employees. The defense of common employment is used by employers in a situation where injury is caused to an employee by another employee during the course of employment. The EL Act stipulates that a suit instituted by a workman (or by any eligible person in case of such workman’s death) for damages in respect of a personal injury caused, under certain circumstances, by the employer or any person in the services of the employer, shall not fail by reason only of the fact that the employee was at the time of the injury an employee of, or in the service of, or engaged in the work of, the employer. The circumstances envisaged under the EL Act are:

- (a) Omission of the employer to maintain in good and safe condition any way, works, machinery or plant connected with or used in the trade or business, or by reason of any similar omission on the part of any employee who has been entrusted by the employer with the duty of ensuring that such way, works, machinery or plant are in good and safe condition;
- (b) negligence of any employee who has any superintendence entrusted to him/her, whilst in the exercise of such superintendence;

- (c) negligence of any employee to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where the injury resulted from his having so conformed; or
- (d) the act or omission of any employee done or made in the normal performance of the duties of such person; in obedience to any rule or bye-law of the employer (not being a rule or bye-law which is required by or under any law for the time being in force to be approved) by any authority and which has been so approved) in obedience to particular instructions given by any other person to whom the employer has delegated authority in that behalf.

Case Law

Case	Decision
The deceased was an employee of a foreign company (in Indonesia) which had business connection with an Indian company. The employee died due to a factory accident while working in the company’s premises in Indonesia. Thakur Bherwani v. T.N.A. Krishnan (C.M.A. No. 307 of 2002, July 4, 2008)	The breaching of Duty of Care is evident, as there was negligence from the employer when failing to protect the employee put at risk. Although the Indian company was not found liable because it was determined that the Indonesian company was the recruiter, the court emphasizes on the liability of Indian companies when employees sent abroad come across with injuries and accident due to a work-related activity.
The deceased, while on duty, met with an accident outside the employer’s premises. The accident led to his death. Case Number: In Re Siddappa (2004ACJ1639, March 12, 2004)	The employer was held liable to pay compensation since the accident arose in the course of employment, though outside the employer’s premises.
A female employee was sexually harassed by a male colleague outside the office premises. Saurabh Kumar Mallick vs. The Comptroller & Auditor General of India and Another (WP(C) No.8649 of 2007)	Sexual harassment at the workplace also includes such an act committed outside the physical office premises.

Conclusion

With rapid economic and industrial growth, the concept of an Indian workplace has undergone a dramatic shift. More and more employees are being required to travel on work assignments and are susceptible to the risks associated with such travel potentially affecting Indian employees operating abroad – in some cases together with their dependents. Additionally, travel risks are exacerbated as a result of higher travel frequency making assignees especially vulnerable to physiological disorders, infection diseases and security hazards.

In response to the threats highlighted above, employers must ensure that practicable and reasonable Duty of Care measures, based on organizational structures and applicable law, are implemented. This would not only go a long way in preventing any foreseeable injuries/damages on the assignee, but also mitigate civil and criminal liability and implications of failure of a costly assignment.

The development and implementation of risk mitigation programs is an effective way of preventing litigations, expensive compensation claims and damage to a company's reputation. Further, these measures prove to yield a return on prevention when benefits outweigh operational costs.

Given the scenario above, it is advisable for employers to develop the following practices, before, during and after requiring an employee to travel overseas:

- Analyze and prevent industry-specific hazards;
- Implement preventative strategies and policies to identify and assess hazards prior to a travel;
- Provide assignees access to pre-travel medical and security advice;
- Provide assignees with required medical supplies – medication and equipment;
- Carry out medical check-ups to verify that employees are fit to travel;
- Conduct training programs on location specific and traveler-profile information;
- Assess local health hazards and medical infra-

structure for a particular project site or location;

- Implement pandemic preparedness programs;
- Constantly communicate and track the whereabouts of assignees to update them about any hazardous development; and
- Develop effective emergency plans to respond to crises.

The practices recommended above help companies to comply with their Duty of Care responsibilities through the implementation of policies and strategies depending on the company's objectives and applicable Indian law. Moreover, companies get a return on prevention when avoiding, as much as possible, direct costs (e.g. evacuation, repatriation and post incident medical costs), indirect costs (e.g. salary costs, administrative costs, and productivity losses) and human costs of a failed international assignment.

Investment in employee engagement and talent retention is one of the highest; especially for Indian companies whose global workforce largely consists of qualified professionals, carefully selected and trained for international assignments. In consequence, the failure of an international assignment may affect future career of employees and performance of a company in terms of productivity and business continuity.

It is important to be cognizant of the fact that certain risks may be continually threatening the health and safety of business travelers. Nonetheless, there are effective solutions of prevention and mitigation; however, it is most essential to adopt a prudent approach towards risk management. The focus of the approach should be precautionary vis a vis reactionary. Hence, if an Indian company is to expand its global operations, it will need to go beyond the coverage of insurance and focus on prevention, preparation and proactive intervention.

Equally important is to include Duty of Care responsibilities in a company's Corporate Social Responsibility (CSR) policies. Employers should keep



themselves aware of the impact on health, safety and well-being of their employees and surrounding communities. In the context of international assignments, it takes critical relevance when companies are operating in remote locations where tackling endemic and risky diseases like malaria require active cooperation between organizations and communities for example, through the implementation of pandemic preparedness programs.

In conclusion, any company registered and operating in India has a legal Duty of Care towards its workforce at a national and also international level. For that reason, non-conventional travel-related risks demand non-conventional measures of prevention. Being away from home in a different country, including unfamiliar and remote locations, could expose individuals to natural, cultural, legal,

and financial risks and a state of insecurity, for both employer and employee.

Finally, being aware of the Indian regulations and best practices pertaining to Duty of Care is the right way for employers to keep their global workforce safe. In turn, this leads to a reduction in the number of major medical and security incidents, incurring less lengthy in-patient stays, business disruptions and complex evacuations which ultimately create favorable and secure conditions to expand business operations worldwide.