

The Malaysia Employer's Duty of Care on Workplace Safety and Health when Employees Travel

The purpose of this write up is to provide a brief overview of an employer's obligation of health and safety towards its employees under the laws of Malaysia. In Malaysia, the principal legislation that deals with employment health and safety is the Occupation Safety and Health Act 1994 (OSHA). Such obligations exist side by side with an employer's common law duty to provide a safe system of work at the workplace. Aside from the OSHA, other laws such as the Employees' Social Security Act 1969 (SOCSO) provides for employees compensation in the event of an employment injury.

I. Occupational Safety and Health Act 1994 (OSHA)

A. An Overview of the Duty of Care

The primary purpose of the OSHA is to provide for legal framework for securing the safety, health and welfare of employees at the workplace and for protecting others against risks to safety or health at the workplace. At the forefront, OSHA imposes a statutory duty upon all employers to ensure, so far as practicable, the safety, health and welfare at work of all the employees. Such duty extends to the following specific duties:-

- (a) Duty to provide and maintain plans, facilities and systems of work that are safe and without risks to health;
- (b) Making arrangements for ensuring the safety and absence of risk to health in connection with the use, operation, storage and transport of plant and substances;
- (c) Providing of training and supervision to ensure the safety and health at work;
- (d) Formulate safety and health policies;
- (e) Maintaining any place of work which is within the control of the employer or self-employed persons and providing a safe access and exit from it.

The parameters of such duties are subject to phrase "*so far as is practicable*".

To supplement OSHA and provide further guidance to employers, several regulations have been passed to cover the following areas:-

- a. Classification and labelling of hazardous substances;
- b. Notification of accident, dangerous occurrences, occupational poisoning and disease;
- c. Use and standards of exposure to hazardous chemicals;
- d. Safety and health officers;
- e. Safety and health committee;
- f. Control of industrial major accident hazards; and
- g. Employer's general policy statements.

Furthermore, a number of Code of Practices were approved by the Department of Health and Safety under OSHA which covers safe working in confined spaces, the prevention and management of HIV/AIDS at work, indoor air quality and the prevention and elimination of drug, alcohol and substance abuse at the workplace. Employers must be mindful that the duty is on them to prove that they had taken sufficient compliance steps that are practicable under the OSHA.

B. Persons Owing a Duty of Care

While the phrase 'every employer and every self-employed person' is used with regards to persons who owe their employees a duty of care, the Act also extends that duty to occupiers of a work place towards persons *other* than his employees. Manufacturers, suppliers, designers etc. of plants or substances to be used at work similarly owe a duty to ensure the plants are designed and constructed in a manner that is safe for proper use. Independent contractors are imposed the same duties as employers or self-employed persons.

C. Penalties and Sanctions

A failure to comply with the OSHA obligation attracts a legal penalty, whereby an employer, upon conviction in court would be liable for a fine not exceeding RM50,000.00 or an imprisonment term not exceeding two years or both.

II. The Employer's Statutory Duty Towards Travelling Employees under OSHA

OSHA adopts a broad definition of when an employee is deemed to be at work. Under OSHA, an employee is so deemed for the duration that he is at his place of work. OSHA further provides that an employee's workplace is '*premises where persons work or premises used for the storage of plant or substance*'. '*Premises*' here include any '*offshore installation*' and any '*movable structure*'. In view of these broad terms, an employee's work place may very well extend beyond the four walls of an office cubicle or workstation in a factory. By extension, it would follow that the duties to provide a system of work would still arise even when the employee is abroad so long as it is for work purposes. The whereabouts of his workplace are inconsequential, as long as the travel is necessitated by employment. This notion is strengthened when one considers that the very objective of the OSHA is to protect and secure the safety and welfare of *persons at work* and also *persons at a place of work*. A place of work can vary according to the job description of an employee, especially if he is assigned overseas.

Furthermore, one particular duty that is imposed on employers in respect of its employees travelling overseas for work is the requirement to provide information, instruction, training and supervision to ensure an employee's safety and health. This simply means that employers must prepare or advise travelling employees with relevant information and training for places abroad they are to travel to. It will be a matter of good practice for employers to brief or make aware to the employees the potential risks they may encounter at the foreign places of work. As such, the employer should himself be aware of the risks and the dangers of the work destination and take measures to eliminate or minimise them. Employers must also have regard for any diseases, political unrests, disasters, danger, laws or practices in the country that may prove to be detrimental to the safety or health of an employee. In addition, an employer cannot compel an employee without his or her concurrence to be transferred to a location which will pose danger to his security, life or health.

Turning to the issue of practicability, the OSHA uses the phrase '*so far as is reasonably practicable*' with regards to ensuring the safety, health and welfare of employees. OSHA adopts a broader definition by using the words '*so far as is practicable*'. Having said that, although the Act seem to have adopted a broader definition, the issue of practicability ultimately is dictated by what is reasonably expected of an employer taking into account the severity of the risk, knowledge of the risk, ways to eliminate or minimise it and the costs of doing so. An employer is not expected to take unproportioned or unrealistic measures to remove all risks.

III. The Employer's Common Law Duty of Care when Employees Travel

At Common law, employers owe a duty of care to their employees to provide a safe system of work. Reasonable care must be taken so as not to expose employees to danger. The duty that is imposed on an employer is not one where 'one size fits all' i.e. the duty varies according to each individual circumstance. An employer cannot claim he was ignorant of the dangers in a workplace. It must be noted that while an employer may entrust this duty to another person, he will be liable vicariously for that person's lack of care. At common law, an employer's obligation is three-fold, namely to provide:-

- a. A competent staff of employees for safety;
- b. Adequate safety material; and
- c. A proper system of work and effective supervision.

In the instance of a worker travelling overseas frequently, the employer must be aware of the nature and probability of the risks involved and weigh it against the suitability and cost of mitigating these risks. There would be external factors beyond the control of the employer but he should do all that is practicable to protect travelling workers like providing relevant information of the particular country, travel policies etc.

IV. Compensation for Employment Injury

Apart from OSHA 1994, another relevant legislation to consider is the Employees' Social Security Act 1969 (SOCSO). SOCSO provides for social security for employment injury contingencies in favour of employees under its scope. It provides for the right to claim for benefits such as invalidity pension, disablement benefit, dependant's benefit, funeral benefit and survivors' pension. SOCSO operates under the 'no-fault' principle. To make a claim under SOCSO for compensation, all the employee needs to do is establish that he had incurred an employment injury in the course of employment. There is no need to establish fault on either side. An accident arising in the course of an employee's employment shall be presumed to have arisen out of that employment. Similarly, an accident that occurs when the employee travels to or from his place of work is deemed to be in the course of employment. By extension, this would also apply when the employee travels overseas for work because no distinction was made with regards to workers travelling to work locally or to a foreign country.

V. Conclusion

With increasing international business growth, it is only natural that employees are mobilized to different parts of the world. What follows is the widening of the duty of care that is owed by employers. However, an employee who travels for work must fall within the ambit of one of the legislations that relate to workplace health and safety. The specifics of each case must be looked at in order to determine if a duty of care is owed to the travelling employee. Hence, to reduce the risk of civil and criminal penalties under the applicable legislations as stated above, Malaysia employers should take practical steps to ensure the safety of their employees who travel.

The legal information provided in this write up has been prepared by Shearn Delamore & Co. It only provides a brief summary for the legal position relating to workplace safety and health laws in Malaysia, with an elaboration on the potential risks that employers should be mindful in relation to their employees who travel on work. This write up is not legal advice and cannot be viewed as a substitute to obtaining proper legal or other professional advice.