



# Duty of Care Owed by Irish Companies to Their Overseas Employees: A legal Perspective



## Introduction

At a time of increased fluidity in business movements, the development of global markets in various established and developing industries, and the growth of the concept of “international workers”, it is critical for organisations to be aware of and understand the obligations they have in relation to their workers health and safety.

A recent report on “Modern Mobility” by PwC predicts that the number of people going on global assignments will increase by 50% by 2020, with nine in ten organisations saying they are looking to increase the amount of globally mobile people over the next two years.<sup>1</sup>

The ability of organisations to manage their global talent and to adapt to the concept of a borderless workforce will be crucial in the coming years. In seeking to expand abroad, or conquer new markets, businesses may be required to send staff to jurisdictions which impose a particular duty of care on employees, or perhaps even to ‘high-risk’ areas.

Employers must ask – what responsibility do we have in respect of workers who are overseas in the course of their employment? Employers must understand and comply with the duty of care in relation to such workers and undertake practical steps in line with the legal framework to limit their potential liability.

This note focuses on the health and safety obligations owed to employees under Irish law, which is relevant for:

- Irish employers sending workers overseas (if the relevant contract of employment is governed by Irish law); and
- international employers establishing operations in Ireland.

## Legal Framework

In Ireland, the legislation on health and safety in the workplace places very specific obligations on employers. In addition to statutory obligations, an employer owes a common law duty of care to employees by virtue of the contract of employment between the parties and the inherent relationship of “trust and confidence” between employer and employee.

It is important to note that both an employee’s physical and mental wellbeing are contemplated under the Irish legal framework. Issues surrounding mental wellbeing in the context of bullying and/or harassment in the workplace are detailed further below.

## Statutory Provisions

The Safety, Health and Welfare at Work Act 2005 (the “2005 Act”) is the main piece of health and safety legislation in Ireland. This sets out the general duties that employers, self-employed persons and people in control of premises have towards their employees and others who may be affected by work activities. The 2005 Act also places a general duty on employees with regard to their own health and safety, but generally speaking, the obligations under the 2005 Act are more stringently applied to and enforced against employers.

An employer's general duties are set out in section 8 of the 2005 Act which provides that employers must do what is reasonably practicable to ensure the health and welfare at work of its employees. "Reasonably practicable" in the context of the 2005 Act means that "an employer has exercised all due care by putting in place the necessary protective and preventative measures, having identified the hazards and assessed the risks to safety and health at the place of work".<sup>2</sup>

Specific obligations include:

- Designing, providing and maintaining a safe place of work that has safe access and egress, and using plant and equipment that is safe and without risk to health;
- Managing and conducting all work activities so as to ensure the safety, health and welfare of people at work;
- Planning, organising, performing, maintaining and, where appropriate, revising systems of work that are safe and without risk to health;
- Providing information, instruction, training and supervision regarding safety and health to employees, which must be in a form, manner, and language that they are likely to understand;
- Providing appropriate protective equipment and clothing to the employees (and at no cost to the employees);
- Providing and maintaining welfare facilities for employees at the workplace;
- Appointing one or more competent persons to specifically advise the employer on compliance with health and safety laws;
- Carrying out risk assessments;
- Preventing risks to other people at the place of work; and
- Ensuring that reportable accidents and dangerous occurrences are reported to the Health and Safety Authority (HSA).<sup>3</sup>

Section 8 of the 2005 Act does not specify where the work has to take place, therefore the employer's obligation continues notwithstanding that the employee may be working in a different workplace to that which is owned or controlled by the employer, or which is listed as the work location in the contract of employment. Given the broad definition of "place of work" in the 2005 Act, there is a strong argument to be made that an employer in Ireland who is governed by the provisions of the 2005 Act must ensure that his employees who are required to travel abroad on the job are also adequately protected with safe and healthy work practices.

### Common Law

Employers have a duty of care to their employees under common law. The modern concept of the duty of care owed by an employer to an employee was established in the case of *Wilson and Clyde Coal Company Ltd v English*<sup>4</sup> in which it was held that an employer owes a "duty of care" to its employees which is personal to the employer and not capable of delegation. This duty includes (i) the provision of a safe place of work, (ii) a safe system of work, (iii) competent staff, and (iv) proper equipment.

The duty however is not an absolute one – an employer will discharge its duty of care to its employees if it does "what a reasonable and prudent employer would have done in the circumstances".<sup>5</sup>

In order to give rise to liability on the part of the employer for breaching the duty of care owed to an employee, there must be causation between the employer's actions, or omissions as the case may be, and the injury which occurred to the employee, also the injury, or the risk of such injury, must be "reasonably

foreseeable" by the employer taking into consideration the individual circumstances of the employee and the nature of the job (i.e. if an employee is particularly skilled/experienced, the employer may be held to a lesser standard of care for such an employee).<sup>6</sup>

In addition to ensuring compliance with the 2005 Act and the common law obligations in Ireland, it is important to note that the legislation in the country of destination for an employee being assigned outside of Ireland may also prescribe requirements regarding occupational health and safety. This may be the case particularly in circumstances where an employee is sent overseas for a longer assignment rather than a shorter business trip. Although the legal framework in the EU sets certain similar requirements for member states, the health and safety laws across member states are not uniform and can differ significantly across jurisdictions. Outside of the EU, the differences in law can be and typically are even greater. Furthermore, the approach to enforcement in different countries may differ from that in Ireland. It is therefore advisable for an employer to seek local legal advice before sending employees to work outside of Ireland.

This is compounded by the EU Posted Workers Directive (96/71/EC) (the "Directive"), which applies generally to the assignment of a worker from one member state to another member state within the EU. The Directive outlines a "core set" of terms and conditions of employment which must be guaranteed to workers posted to a member state as if they were national workers of that member state, including health and safety at work. The Directive was transposed into Irish law by s20 of the Protection of Employees (Part Time Work Act) 2001.<sup>7</sup>

### Logistics

#### Third Party Premises

As noted above, an employer may be held liable to an employee for injuries sustained arising from an unsafe place of work regardless of whether that place of work is under the employer's direct control. This is particularly relevant in the context of employers requesting employees to attend locations other than their usual place of work.

In *Thomas McMahon v Irish Biscuits Ltd and Power Supermarkets T/A Quinnsworth*<sup>8</sup>, the plaintiff, a sales representative with Irish Biscuits, suffered personal injuries following a fall during the course of checking the Irish Biscuits stock in a Quinnsworth supermarket. On the day of his fall, the plaintiff had asked a Quinnsworth employee to move pallets which were blocking the shelves but the employee failed to move the pallets. Mr McMahon climbed the shelves and ultimately fell, suffering back injuries. Irish Biscuits argued that in the absence of complaints, it was under no obligation to carry out risk assessments. The High Court held that the employer had a duty to ensure that the facilities provided to employees, including by its customers, did not threaten the employees' safety. This duty was held to extend to monitoring the facilities its employees used while on its customer's premises and ensuring that such premises provide a safe working environment.

This is an important consideration for employers sending employees to work at client/third party locations and/or on secondment. While the client/third party organisation will owe health and safety obligations to secondees, etc, such obligations will be in addition to, rather than in substitution for, the obligations owed by the employer to its employees under section 8 of the 2005 Act.

## Travel

The definition of place of work in the 2005 Act includes vehicles, and employers may therefore be liable for accidents involving employees while they are operating vehicles in the course of their employment or for purposes ancillary to work involving vehicles.

Statistics published by the Health and Safety Authority of Ireland (HSA) show that of 55 workplace fatalities in 2015, 21 involved vehicles.<sup>9</sup>

Whereas the question of whether a duty exists to ensure an employee's safety while in transit to work has not been the direct subject of scrutiny by the Irish Courts/authorities, English case law is considered persuasive authority in Ireland (due to Ireland and England both being common law legal systems and also the history of the Irish judicial system).

In *Durnford v Western Atlas International Inc*<sup>10</sup>, the employee of an exploration company successfully claimed damages against his employer when he suffered an acute prolapse of an inter-vertebral disc due to an inadequate minibus that had been supplied for a long journey to Nigeria to the third party premises where he was to work. The judge found that there was a foreseeable risk of injury to a person of ordinary physical robustness as a result of the minibus journey and there was no evidence of any enquiries made by the employer regarding alternative transport. The decision was upheld by the Court of Appeal. This serves as an illustration of the liability of an employer for breach of its duty of care in relation to transport abroad.

Where an employee is assigned to work outside of Ireland, the duty of care may include a duty to ensure the employee's safety while travelling to the new place of work. Therefore when sending employees abroad, it is not just the place of work that needs to be considered, but also the employee's ability to safely reach and access the place of work.

## Bullying and harassment in the workplace

Under section 8 of the 2005 Act an employer is required to "prevent any improper conduct or behaviour likely to put the safety, health and welfare of employees at risk". This encompasses behaviour which could be considered as amounting to bullying and/or harassment.

There is a similar obligation to prevent harassment under the Employment Equality Acts 1998-2015, and to prevent bullying under the HSA Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work.<sup>11</sup>

Employers are therefore advised to have in place established procedures for dealing with complaints of bullying and/or harassment such as a Dignity at Work Policy.

## Regulation

### Health and Safety Authority

The (HSA) is responsible for enforcing health and safety at work in Ireland. It provides information to employers, employees and self-employed people on workplace health and safety.

According to the HSA Annual Summary of Statistics for 2014, 56 fatal and 7,431 non-fatal workplace accidents were reported to the HSA in 2014. This was an increase of 9 fatal and 833 non-fatal accidents from 2013.<sup>12</sup>

The HSA has published guidelines on the following issues to assist employers with their obligations:

- Manual Handling of Loads
- Display Screen Equipment
- Work at Height
- Safety signs at places of work
- Protection of young persons
- First Aid
- Night work and shift work
- Pregnant, post-natal and breastfeeding employees

Whereas these guidelines are not set down in statute, they are considered best practice and regard would be given to them in any complaint hearing/proceedings involving the subject matter which is provided for in the guidelines.

Workers assigned to work outside of Ireland (with contracts governed by Irish law) and workers of other EU member states on long-term assignment to Ireland may be subject to regulation under the Irish health and safety regime and these guidelines will be relevant in such circumstances.

## Further Employee-Specific Regulation

### 1. Pregnant Employees

The Maternity Protection Acts 1994-2004 provide that all employers carry out risk assessments taking particular account of pregnant employees.

Employers are obliged to:

- reduce risks to pregnancy where practicable;
- change work arrangements if necessary or offer suitable alternative employment. If that is not possible, provide paid leave for the pregnant employee for as long as is necessary;
- provide suitable facilities where rests may be taken during the day and where breastfeeding may take place; and
- take steps to protect the employee's health and safety and that of her child.

### 2. Young Persons

An employer must carry out a separate risk assessment prior to hiring an employee under 18 years of age. If certain risks are present, including risks that cannot be recognised or avoided the young person should not be employed. If the work: is overly physical; may psychologically affect them; exposes them to any agent, such as toxins, carcinogens or radiation; places them at undue risk of accidents because of their inexperience; or exposes them to risk of extreme heat, cold, noise or vibration, the young person should not be employed.

## Further Industry-Specific Regulation

Employers should be aware that additional legislative provisions may apply depending on the particular industry in which the employer operates, for example, construction, healthcare, quarrying, fishing, catering and hospitality, etc.

A full list of occupational health and safety legislation, dangerous substances legislation and associated codes of practice, can be found on the HSA website.<sup>13</sup>

In addition the HSA has issued a number of codes of practice which may be of relevance when assessing an employer's obligations regarding outdoor workers (HSA Code of Practice for Working on Roads, Code of Practice for Roof Work, etc).

## Liability and enforcement

Workplace accidents may expose employers to the risk of litigation and reputational damage. In serious cases, the employer may also be exposed to the risk of criminal prosecution.

The HSA is responsible for inspecting and enforcing health and safety obligations, and identifying issues with health and safety compliance. On finding there is an issue with health and safety compliance, HSA inspectors may serve notice(s) on the relevant organisation requiring that certain issues be remedied within a particular timeframe.

The HSA inspector may also apply to the High Court for an order prohibiting or restricting the use of a place of work.<sup>14</sup>

Courts may also impose fines or prison sentences (or both), depending on the seriousness of the offence. The HSA also has the right to publish the names and addresses of those subjected to a prohibition notice, High Court order or a penalty following a court conviction.<sup>15</sup>

Under the 2005 Act, directors and senior managers carry particular responsibilities if it can be shown that an offence committed by their undertaking was attributable to neglect, connivance, consent or authority on their part.<sup>16</sup>

The duty has also been extended to others with responsibility for safety in particular workplaces, such as the project engineer on a road alignment project and the site manager on a construction site.<sup>17</sup>

Outside of the 2005 Act, an employee could take proceedings against their employer alleging they have suffered a personal injury as a result of their employment and their working conditions/ workplace hazards, etc. It is important to note that such a cause of action could be alleged in respect of working in Ireland, working overseas, or in transit, depending on the circumstances. The obligations of employers under the 2005 Act, and indeed the common law duty of care, are not restricted in their application to Ireland, and the health and safety of employees has to therefore be considered in the context of overseas travel also.

Finally a whistleblower report alleging wrongdoing on the part of an organisation based on the health and safety of an individual being, or likely to be endangered, may be considered a “protected disclosure” within the meaning of the Protected Disclosures Act 2014, meaning that an individual who makes such a disclosure will have certain statutory protections in respect of their actions.

## Discharging the Duty of Care: Practical tips

### Risk Assessments & Safety Statements

Pursuant to the 2005 Act, employers are required to carry out a risk assessment for the workplace and a safety statement should be drawn up based on this. Workers should be given access to the statement and employers must review it on a regular basis.

In the absence of carrying out basic risk assessments, and drawing up a safety statement, in circumstances where a worker alleges that they were not provided with a safe place of work and had suffered an injury, it is likely that an employer would face criticism and potentially be held liable for the workers injury.

Furthermore, where health and safety systems are in place, these systems should be tested in order to ensure that they remain fit for purpose. Tests should also be adopted to fit local requirements, for example, employers may need to carry out earthquake emergency response/evacuation training, or organise for same to be provided, to workers in areas where earthquakes are more likely to occur.

### Consultation with workers

Employers must consult with workers in relation to safety, health and welfare at work. The employer must provide the worker with the results of the risk assessment and consult with them on the preparation of the safety statement.

It may be helpful, depending on the circumstances, to provide workers with access to a 24-hour helpline, which may be able to provide support for medical or security questions or facilitate the provision of emergency assistance at a time when a worker's usual points of contact would not be available. It may also be helpful to provide workers with access to information or assistance offered by the Department of Foreign Affairs.

Workers who have returned from working outside of Ireland should also be consulted with for practical feedback and evaluation of their experiences working overseas and any potential recommendations from a health and safety perspective.

### Ensure adequate training is provided

Employers should prepare and educate their workers about the locations they will be working from, both in respect of local conditions and cultural norms. Where training is provided, it is best practice that training records be maintained, and training programmes should be refreshed as appropriate to record changes in law and/or the practical realities of working in a particular location. Employers may also consider offering their workers first aid training, especially if they may be working in remote locations which are away from medical centres. If employees are travelling to high risk locations, additional types of training – such as security briefings and hostile environment awareness training – may need to be considered.

Employers should ensure that workers receive training in risk prevention. In particular, briefings should focus on the measures required to ensure their health, safety and security and what to do in the event of sickness, a security incident or an emergency.

Finally, employers should also ensure that all relevant, industry-specific training is completed by workers.

### Travel Risk Policy and Crisis Management Procedure

In order for an employer to effectively deal with emergency situations (natural disasters, crime, accidents, etc), there must be clear strategies, policies and systems in place to help mitigate the risks faced by the workers.

Workers should be provided with a comprehensive travel risk policy detailing their employer's incident response strategies. The policy should be specifically tailored to meet the potential risks faced by the worker in the particular country or area in which they are working.

In addition, travel itineraries for travelling workers should be prepared and consideration should be given to tracking and monitoring workers such that in the event of a crisis, employers

can locate, communicate with and provide assistance to their workers .

Finally, workers should be briefed as to the steps which should be taken following an accident and be aware of who to call and how to behave in the event of an emergency. For example, workers should be aware that they may need to contact the company's assistance provider if they suffer an injury or are faced with a security incident while abroad.

### **The Travel Risk Management toolbox**

This toolbox provides an essential checklist that suggests health and security measures to take by organisations to fulfill their responsibilities and implement a travel risk and emergency management system.

Today, more and more organisations are operating globally. Overseas postings are a growing reality for a number of companies and these companies retain legal and social responsibility for their employees and dependants while they are abroad.

The Travel Risk Management Toolbox is a practical checklist that suggests health and travel security measures to implement along the travel cycle for travellers and international assignees<sup>1</sup>:

- pre-travel, what to implement from a preparation, information and compliance perspective
- during travel, how to deal with travel-related issues and ensure compliance
- post-travel, what to review and improve in the travel risk and emergency management system.

Health and travel security measures have to be defined according to the level of risk at a destination. These measures must be proportionate and defined according to the risk environment, exposure and the type of work performed. They must be endorsed by senior management of the organisation and communicated to workers appropriately.

For helpful, practical tips to discharge the duty of care in international assignments, please see the International SOS Foundation Travel Risk Management Toolbox below.

### *WITH THE SUPPORT OF THE INTERNATIONAL ORGANISATION OF EMPLOYERS*

*The IOE was created in 1920 to advocate in the tripartite International Labour Organisation (ILO) on behalf of the global employer and business community. Today, from its headquarters in Geneva, the IOE continues to defend and promote these same interests across a wide range of UN agencies, international organisations, intergovernmental processes and the media.*

*1. Centre for Research into the Management of Expatriation (CReME), Gwendolyn Cuizon, Expatriates in International assignments, 2009*



## TRAVEL CYCLE FOR TRAVELLERS AND INTERNATIONAL ASSIGNEES

### LEGAL AND SOCIAL RESPONSIBILITIES OF THE ORGANISATION

	Pre-travel	During travel	Post-travel	
<b>1. Health and safety policy</b>	<b>Define:</b> <ul style="list-style-type: none"> <li>Why? Mission statement</li> <li>Who? Organisation and responsibilities</li> <li>How? Arrangements</li> </ul>	<b>Implement:</b> <ul style="list-style-type: none"> <li>The mechanisms to deal with travel-related issues</li> <li>The mechanisms to ensure compliance</li> </ul>	<b>Review:</b> <ul style="list-style-type: none"> <li>Periodically</li> <li>Modify as necessary</li> </ul>	
<b>2. Risk assessment for identified risks and hazards</b>	<ul style="list-style-type: none"> <li>Dynamic risk assessment of threats and hazards</li> <li>Selection, implementation and/or adjustment of appropriate mitigation measures to reduce risk to an acceptable level</li> </ul>			
<b>3. Organisation, planning and implementation</b>	<b>a. Information and advice</b>	<ul style="list-style-type: none"> <li>Pre-travel access to medical and security information</li> <li>Destination guide information</li> <li>Destination specific medical and security alerts</li> </ul>	<ul style="list-style-type: none"> <li>24/7 access to medical and security information while travelling</li> <li>Referrals to medical and security support outside of home country</li> </ul>	<ul style="list-style-type: none"> <li>Access to medical advice if illness is developed post-travel</li> <li>Access to post-trauma advice after an security-related issue</li> </ul>
	<b>b. Competence and training</b>	<ul style="list-style-type: none"> <li>Briefing of health, safety and security arrangements</li> <li>Destination-specific training</li> <li>First aid training</li> </ul>		
	<b>c. Fitness to travel, incl. travel health consultation</b>	<ul style="list-style-type: none"> <li>Pre-travel medical examination where appropriate</li> <li>Travel health consultation for up-to-date vaccinations</li> </ul>	<ul style="list-style-type: none"> <li>Periodical examination, where appropriate</li> <li>Health surveillance, where appropriate</li> <li>Wellness/health promotion</li> </ul>	<ul style="list-style-type: none"> <li>Post-assignment examination</li> <li>Return to work from affected areas process</li> </ul>
	<b>d. Travel health and security kits and supplies</b>	<ul style="list-style-type: none"> <li>Provide travel medical kit (first aid, Malaria, etc.)</li> <li>Provide travel security kit</li> <li>Stock of necessary prescription medication (esp. long-term)</li> </ul>		<ul style="list-style-type: none"> <li>Monitoring and refilling of travel health and security kits after utilisation</li> </ul>
	<b>e. Medical or security emergency management</b>	<ul style="list-style-type: none"> <li>Prepare emergency action plans to manage a medical or security emergency or crisis</li> <li>Provide training on emergency plans</li> </ul>		<ul style="list-style-type: none"> <li>Post-assignment medical and psychological support</li> </ul>
	<b>f. Tracking and communicating</b>	<ul style="list-style-type: none"> <li>Pre-travel access to medical and security information</li> <li>Destination guide information</li> <li>Compliance to travel policy and to the traveller's destination</li> </ul>	<ul style="list-style-type: none"> <li>Implement tools, processes and procedures to track location of relevant workers and communicate with them</li> <li>Tracking system and process to support crisis management</li> </ul>	<ul style="list-style-type: none"> <li>Mechanism to allow ideas and suggestions from workers (two-way communication)</li> </ul>
<b>4. Evaluation</b>	<ul style="list-style-type: none"> <li>Reporting and evaluating of key performance indicators</li> <li>Internal and external auditing</li> <li>Alignment with enterprise risk management (reporting on claims, opportunity to finance prevention actions through captive funds)</li> <li>Integration in the general compliance strategy</li> </ul>			
<b>5. Action for improvement</b>	<ul style="list-style-type: none"> <li>Corrective actions implemented where appropriate</li> </ul>			

### Footnotes

- <sup>1</sup> <https://www.pwc.ie/media-centre/assets/publications/2015-pwc-ireland-gem-moving-people-with-purpose.pdf>
- <sup>2</sup> S 2 (6) Safety, Health and Welfare at Work Act 2005
- <sup>3</sup> The HSA is a national statutory body established in 1989 with responsibility for ensuring that workers are protected from work related injury and ill-health through enforcement of occupational health and safety law, promotion of accident prevention and provision of information and advice across all sectors.
- <sup>4</sup> [1937] UKHL 2
- <sup>5</sup> Bradley v CIE [1976] IR 217
- <sup>6</sup> Dalton v Frendo, unreported Supreme Court 15 December 1977
- <sup>A7</sup> subsequent Directive on posted workers - Directive (2014/67/EU) on the enforcement of Directive 96/71/EC was transposed into Irish law by the European Union (Posting of Workers) Regulations 2016
- <sup>8</sup> [2002] IEHC 15
- <sup>9</sup> [http://www.hsa.ie/eng/News\\_Events\\_Media/News/Press\\_Releases/55\\_People\\_killed\\_in\\_work-related\\_accidents\\_in\\_2015.html](http://www.hsa.ie/eng/News_Events_Media/News/Press_Releases/55_People_killed_in_work-related_accidents_in_2015.html)
- <sup>10</sup> [2003] EWCA Civ 306
- <sup>11</sup> [http://www.hsa.ie/eng/Publications\\_and\\_Forms/Publications/Occupational\\_Health/CoP\\_Bullying.pdf](http://www.hsa.ie/eng/Publications_and_Forms/Publications/Occupational_Health/CoP_Bullying.pdf)
- <sup>12</sup> HSA Annual Summary of Injury, Illness and Fatality Statistics, HSA, 30 June 2015, available at: [http://www.hsa.ie/eng/Publications\\_and\\_Forms/Publications/Corporate/Statistics\\_Report\\_2014.html](http://www.hsa.ie/eng/Publications_and_Forms/Publications/Corporate/Statistics_Report_2014.html)
- <sup>13</sup> [http://www.hsa.ie/eng/Your\\_Industry/](http://www.hsa.ie/eng/Your_Industry/)
- <sup>14</sup> Sections 68 and 71 of the 2005 Act
- <sup>15</sup> Section 85(2) of the 2005 Act
- <sup>16</sup> Section 8 of the 2005 Act
- <sup>17</sup> <http://www.arthurcox.com/publications/health-safety-duties-personal-liability-fault/>



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International SOS  
**Foundation**

The International SOS Foundation seeks to improve the welfare of people working abroad through the study, understanding and mitigation of potential risks.

The Foundation was started in 2011 with a grant from International SOS, the world's leading medical and travel security services company. It is a fully independent, non-profit organisation working globally.

For more information on the "duty of care" and work of the foundation, please go to [www.internationalsosfoundation.com](http://www.internationalsosfoundation.com)  
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