

## Client Alert

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## Employees in Harm's Way: Practical Considerations for the Multinational Employer

Whether it is the earthquakes and tsunami in Japan, with the attendant leak of radioactivity from a nearby nuclear reactor, or civil unrest and upheaval in Egypt, Libya, Bahrain, Yemen and other countries, recent events are grim reminders of how violent and uncertain the world can be. The world's governments are not alone in their efforts to react and respond to these crises. Many multinational employers also are scrambling to respond to the health and safety concerns of their employees in affected locations and understand their legal obligations and potential liabilities.

In a crisis, the global employer must react quickly to news of terrorism, war, industrial accidents and natural disasters to protect its staff. In planning for and responding to a crisis, the multinational employer must address three key considerations: (1) how to maintain a safe workplace; (2) how to keep employees engaged in the running of the business, even if they are not working at their primary work location; and (3) how to minimize exposure to potential liabilities that may result.

### I. Maintaining Employee Safety

#### A. Legal Obligations

A multinational employer's first concern during a crisis inevitably is to protect its employees. The legal obligations to do so arise primarily in local country laws on employee health and safety.

Under the laws of most jurisdictions, employers are under a duty to safeguard the health and welfare of their employees and to provide a safe place to work for employees, whether they work in their home country, undertake business travel, or are posted overseas. A failure to do so can give rise to civil and even criminal liability for the employer (and, in some cases, for its company directors and managers). Additionally, the International Labour Organization (ILO) has approximately seventy Conventions that cover occupational health and has published a detailed set of Guidelines for implementing these Conventions.

In short, occupational health and safety regulations, workers' compensation laws and the ILO Guidelines are good starting points for employers to understand their duty of care. For expatriates, the employer also may need to consider the health and safety laws of both the home country (which may apply extraterritorially, particularly in the case of short term trips) and the host country, where the assignment or business trip is undertaken. Even if the home country legislation does not apply extraterritorially, the employer still may owe a duty of care under the common law of the home country. What is actually required will depend on the risks involved and what is feasible in the context.

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## B. Safety Benefits for Expatriates

Most companies sending employees to locations with heightened risk offer specific allowances or enhanced pay to reflect the greater risks to which the employee is exposed and sometimes to compensate for extreme living conditions. When the risk level of an assignment increases due to changed circumstances in-country, employers may wish to increase temporarily these allowances or compensate in other ways, such as providing expatriates with additional travel benefits, vacation days and/or the ability to work from home or another location (all of which could be taxable income to the employee and thus increase the employer's tax reimbursement costs). In some instances, it may be appropriate for the employer to provide secure accommodation and, in more extreme situations, to hire bodyguards and/or private contractors to provide security or to deploy special vehicles.

A related issue is whether employees in dangerous locations such as Iraq or Afghanistan can or should be armed. Employers generally should not permit employees to possess weapons in the workplace. While workers may believe firearms will offer protection, allowing them at work likely will raise greater safety and liability concerns.

## C. Evacuation and Relocation

If a crisis situation develops, the employer may need to consider evacuating employees to a safer location. Even before a situation requires it, some employees may request relocation to another jurisdiction away from the danger. To deal effectively with these issues, multinationals should have crisis management plans and policies in place. Points to consider include:

- Identify who should be involved in making decisions to stop further travel to a country or region and decisions to repatriate/evacuate staff.
- Identify a dedicated crisis management team, including experts from across all relevant disciplines, to take control of any emergency situation.
- List sources of advice available to draw on (e.g., security and intelligence experts, government advisers, airlines and travel agents).
- For expatriates, ensure managers in the home country know who to contact at the first sign of a crisis or a call for help from employees overseas.
- Identify who the employee will contact both in-country and the home office and how (e.g., mobile and satellite phones). Some companies have adopted emergency messaging systems which send notifications to employees and enable the employer to account for staff quickly.
- Update regularly contact information for employees so that in a crisis, contact details are current.
- Prepare alternative methods of communication if email, Internet and telephone access break down.
- Identify sources of help for employees locally, including consular/embassy and medical assistance.
- Ask all employees for next of kin details.
- Identify a person who will liaise with family in a crisis.
- Plan how to provide planes for transportation, security, money, legal assistance, or medical help as quickly as possible. These issues can be

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challenging and require significant advance planning. In the event of a disaster, borders may be closed, mass transit may be shut down, airlines may be grounded and access to medical care limited.

- Determine what other employers operate in the region, and is there scope for cooperation and pooling of resources and costs.
- Train employees on crisis procedures before they leave for or are hired in a known high risk location.
- Anticipate communication with home country staff concerned about the welfare of their colleagues. They may need to be reassured, but also encouraged not to undertake unnecessary communications during a crisis.

Employers may decide to close their businesses if it would be too difficult to continue working in the current circumstances. One question that frequently arises is whether an employer must pay employees if the office is closed. In Japan, for example, there is no legal obligation to pay staff for periods when they cannot work due to a closure if the closure is caused by a natural disaster. However, if the closure is not due to a natural disaster, the employer is required to pay employees an allowance equal to 60% of their average wages.

If the employer decides to evacuate, it is possible that some employees will refuse to leave. In this situation, the employer should first discuss the reasons for the evacuation with the employee and explore the reasons for the employee's refusal. In extreme situations, the employer may decide to discipline or even dismiss an employee who refuses to leave a dangerous situation without good reason.

If an employee demands to be relocated, the employer will need to assess whether this is really necessary based on the information available at the time. If current security, medical and/or governmental advice supports the employee's position, it will be difficult to refuse the request. If the advice is that evacuation is unnecessary, the employer should discuss the employee's fears and consider what can be done to address them. It may be possible to discipline an employee who overreacts to a situation and refuses to comply with a reasonable instruction to stay. In practice, however, if the employer is unable to allay the employee's fears, it generally would be sensible to relocate the employee and either allow him to work remotely or replace him with someone else. The implications for the employee's long term employment then will generally depend on the applicable law, but the employer may be entitled to terminate his employment if the decision to evacuate means that his work can no longer be performed.

Relocation overseas also is an option, but generally will only be possible where employees and their families have valid passports and can obtain visas within a short time frame. In some jurisdictions, there may be an expedited process for employees and their families who are evacuating because of a crisis.

## II. Keeping Employees Engaged

Providing flexibility in a crisis situation may be the difference between maintaining operations and halting business altogether. In addition to safety benefits and relocation and evacuation planning, an employer may find it necessary or desirable to change certain terms and conditions of employment to fit the situation. Before implementing any changes, however, employers should be aware of the laws and regulations of the applicable jurisdiction, including any duty to consult with unions, work councils or other employee representative bodies, and government agencies.

For more information on immigration issues, click [here](#) to view topics and register for our webinar series - "Immigration Compliance in 2011: What HR Needs to Know Now."

## A. Employee Requests to Work at Home

Some employers already have well-established policies and tools that enable employees to work from home. Providing employees with this kind of flexibility not only engenders good will, but also can be extremely useful in a crisis by helping to minimize travel to unsafe regions and by allowing employees to conduct business (almost) as usual. Employees allowed to work at home should be given guidance on matters such as protection of confidential information, IT security, and the safety of their work area.

## B. Leave and Time Off Policies

If employees are unable to report to their normal workplace, the employer should consider making alternative arrangements such as arranging for employees to work remotely from a different location. If this is not possible, it may be necessary to provide a temporary leave of absence. Employers should determine whether the employee is entitled to continue receiving full pay while on a leave during a crisis. The answer typically will depend on any contractual agreement and the reason for non-attendance -- is it for example because the workplace is unsafe, the employee's refusal to attend, or due to the employee's own or a family member's illness or injury.

Sometimes governments may issue guidance on these issues. For example, the Japanese Ministry of Health, Labor and Welfare issued a circular of Q&As regarding employment issues in connection with the Tohoku Earth Quake. The circular instructs companies to consult with employees and to minimize any disadvantage to employees as much as possible.

## C. Business Travel

Given the highly mobile nature of many employees, multinationals should adopt employee travel advisory policies and update them regularly. Travel advisory policies generally should include the following:

- a statement that employees should take precautions when traveling for work.
- sources of information for employees traveling for work, such as: various government websites and contacts (e.g., U.S. State Department, TSA, etc.); travel agency contacts; company-sponsored insurance providers, etc.
- suggestions for telecommuting and relaxation of travel policy, as appropriate.

Employers should regularly review official government guidance on international travel and ask employees to cancel, postpone, or re-route necessary travel to or via known places of danger if travel to the locale is unsafe.

If an employee refuses to travel to a country affected by a crisis, it may be unreasonable to discipline or terminate the employee. Relevant factors to consider would include the most up-to-date medical and/or safety information, the importance of the travel, and whether video-conferencing or other technology could be used to facilitate face-to-face meetings. If a meeting in person is required, employers should consider arranging for attendees to meet in a safer location. Employers should consider the legal requirements in the applicable jurisdiction as well as the nature of the employee's refusal(s) and its effect on the company before making any employment decision based on an employee's refusal to travel.

## D. Employee Refusals to Perform Work

Employers also may have to address the situation where employees refuse to come to work or perform certain tasks based on safety concerns. As an initial matter, employers should have a communications plan to educate employees and pre-empt irrational fear and panic. Discipline or termination may be an option depending on the circumstances of the employee's refusal and the applicable jurisdiction's laws and regulations. Employers considering disciplinary action also should take care to follow company policies and procedures relating to employee absences and discipline (including warning the employee of the consequences of his refusal) and to ensure employees are treated in a consistent manner. As with all employment decisions, consistency is important to avoid potential discrimination claims.

## III. Practical Tips for Planning and Responding to a Crisis

Most large companies have contingency plans to deal with emergencies such as loss of electricity, utilities, or transportation access to their facility. In cases involving a natural or man-made disaster or political upheaval, the employer may be faced with problems that literally stretch across the business spectrum. Utilities may shut down or reduce operations, the workforce may be unable or unwilling to enter a facility, and local or national government actions may greatly restrict business options to maintain operations. To prepare, employers should consider the following key issues:

**Pinpoint the essentials.** If it has not done so already, the employer should identify the key positions and functions essential to sustain business continuity and develop plans to enable these functions and personnel to continue working, possibly through remote operations. Employers also should identify and, if necessary, cross-train back-up personnel to ensure critical functions are not compromised.

**Communicate.** The employer should have contact information for its key suppliers, utilities, and local and national governments so that it can both advise them of steps it is taking to mitigate the effects of the crisis, as well as make requests for assistance, if necessary. Advance planning and communications also can reduce the risk of disruptions to the supply chain. Contact information also should be updated to reflect possible work-at-home scenarios. Frequent communications with employees and their families also is critical. Keeping in contact with official or governmental bodies such as the U.S. State Department or the British Foreign and Commonwealth Office (FCO) will be essential to ensure the latest updates are available and to ensure employees are aware of any national contingency plans.

**Protect information.** Employers should ensure the regular back-up and storage of data and consider whether data should be replicated to another office, a disaster recovery site or stored in a secure offsite location. The risk of unintentional disclosure of confidential information also is greater when employees work from home. Employers should manage remote access and use appropriate security measures such as encryption.

**Review legal obligations.** Know in advance what the employer can and cannot do with respect to employees, suppliers and customers in the event of a cutback or shutdown of operations. Make sure there is a current, effective emergency preparedness communications plan and people prepared to implement it.

For more information, please contact the authors or your Baker & McKenzie lawyer.

**Review insurance coverage.** Having insurance in place is critical to multinationals whose overseas employees face a variety of potential risks from kidnapping to a natural disaster such as a tsunami or earthquake. Employers should regularly review insurance policies to confirm the policies provide the right types and levels of coverage for crisis situations and are responsive to any changes in the business. Coverage and service levels can vary dramatically, and employers need to ensure the losses they are seeking to guard against (e.g., terrorism, war) are covered. Likewise, employers should determine whether policies in fact cover the individuals they want covered, including independent contractors or local nationals.

Employers also should consider whether various types of insurance are prudent, including:

- Life and disability insurance (make sure coverage is valid in the assignment country)
- Asset protection policies
- Kidnap and ransom insurance
- War risk insurance (may be needed in countries designated as war zones)
- Professional indemnity insurance
- Business interruption insurance
- Repatriation insurance
- Burglary and other household goods and effects insurance

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In conclusion, because of the unpredictable nature of many crises and, particularly, the unpredictable nature of government response, companies must maintain preparedness and flexibility throughout an emergency. Understanding the legal obligations in the jurisdictions where a company operates is imperative to respond to emergencies. This means proactively taking appropriate steps within legal boundaries to keep the workforce healthy and productive and to sustain key operations so that recovery time is minimal. To the extent possible, the employer should publicize its efforts to its workforce and its business customers and contributors. A well-conceived crisis management plan and constant communication between employers and their workforces are essential to minimize disruption and maximize the chances for a full and complete recovery.

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