

Employee Travel Risk Management

Are you ready for takeoff?



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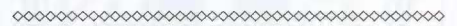
We all know an employer owes to its employees a general duty of care to take reasonable steps to keep them safe *in the workplace*. But, what is an employer's duty and how is it fulfilled when an employee is required to leave the confines of his or her workspace and travel – be it down the street, across the country, or around the world?

The truth is, whether on a trip to North Korea or across town, there is risk associated with travel that cannot be ignored by employers. So, how can an employer identify and minimize the risks associated with business travel? The answer, we think, is by designing, implementing, and consistently applying a **travel risk management policy (TRMP)** tailored to the particular workplace.

Sources of Employer Liability

Criminal Code

Since 2004 (Bill C-45), an organization and its senior officers can



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be held criminally liable for their acts or omissions as they relate to occupational health and safety. Section 217.1 of the *Criminal Code of Canada* (*Criminal Code*) provides:

Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

The potential consequences of conviction under the *Criminal Code* are extreme, including life imprisonment for individuals and unlimited fines for corporations. As well, the Ontario Court of Appeal has accepted the concept of “corporate capital punishment” by endorsing fines that could, in appropriate circumstances, force an offending company into bankruptcy. Fortunately, the *Criminal Code* only applies to conduct representing a *marked and substantial* departure from that of a reasonably

prudent employer. Charges are therefore reserved for morally blameworthy conduct that amounts to a wanton and reckless disregard for the lives and safety of employees.

Occupational health and safety legislation

In Ontario, the *Occupational Health and Safety Act* (OHSA) defines workplace as “any land, premises, location or thing at, upon, in or near which a worker works.” In other words, as a worker travels, so too does the workplace, as well as the employer's duty to keep that workplace safe and free of violence, harassment, or bullying.

In a recent decision of the Ontario Court of Justice, an employee who was required to travel to various locations in Ontario was killed when he interacted with a piece of equipment known by his employer to be faulty. Justice Bourque, in making a finding against the employer, reiterated that an employer has a duty to not send an employee into a dangerous situation:

I can think of no reason why, in the context of the aims and objectives of the [OHSA], that an

employer, with full knowledge (as was here) of an inherently dangerous and continuing situation ... should not as part of his duty under this legislation, refuse to send his workers into such a situation.¹

In contrast to offences under the *Criminal Code*, under the OHSA the intentions of the employer are not relevant, and the threshold for a violation is much lower; an employer will be found to have violated the OHSA if it fails to meet a “reasonable employer” standard. The corollary is that an employer can escape OHSA liability through a “due diligence” defence – by demonstrating it took “all reasonable precautions” to protect the employee.

Civil action

Similar to the other provinces, in Ontario an employee injured in the workplace may be entitled to compensation from the Workplace Safety and Insurance Board (WSIB), in which case the employee is barred from bringing a legal action against the employer. This includes an employee injured while on business travel outside the province and internationally

1. *R. v. Reliable Wood Shavings Inc.*, 2013 ONCJ 518 at para 94.

for up to six months (or as extended by the WSIB). If an employee is injured in the course of business travel at a time when its employer is *not* registered and in good standing with the WSIB and is *not* carrying on business in a compulsorily covered industry, the employee may bring a civil action against his or her employer.

Foreign law

An employee travelling internationally is subject to the laws of the land in which the employee is travelling. For example, the United Kingdom's *Corporate Manslaughter and Corporate Homicide Act* (U.K. Act), provides that an employer may be held criminally and financially liable for a failure to provide for the security and safety of its travelling employee. Given the prominence of London as a business centre and transportation hub for air travel throughout Europe and much of the world, the U.K. Act is potentially applicable to a vast number of employers.

Application to Elected Officials

The duty of care owed by a municipality to its travelling elected officials is markedly lower than to its employees. A member of council acting in their elected capacity is not an agent or employee of the municipality in the legal sense. Having said that, if an elected official is regularly appointed and paid by a municipality to discharge certain duties, that individual may become a servant or agent of the municipality as it relates to that specific task, potentially giving rise to the legal risks outlined above.

For the purposes of WSIB coverage, elected officials are deemed executive officers and do not receive automatic coverage. Since municipalities are a Schedule 2 employer under the *Workplace Safety and Insurance Act*, these officials are at liberty to apply to the WSIB for "optional coverage." Decisions made with respect to optional coverage may impact an elected official's

rights of action in the civil courts and should be made in consultation with an independent lawyer.

Avoiding Liability with a TRMP

Now that we've identified the potential sources of liability, what can an employer do to manage this risk? One important step is the implementation of a comprehensive workplace Travel Risk Management Policy, tailored to the specific workplace. An effective TRMP should address at least three core principles:

1. Proactive assessment of risk

A common mistake employers can make is believing their group insurance plan or Employee Assistance Program sufficiently addresses their business travel needs. However, these programs are only engaged *after* an incident occurs.

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operation of their water and sewage works. In addition to the traditional defence of statutory authority, most provinces adopted a defence of statutory immunity. This means that municipalities can rarely be successfully sued in nuisance because of a backup in a storm or sanitary sewer.

However, these statutory immunity provisions are not iron clad, and courts tend to look for ways around them. In particular, statutory immunities do not help where a municipality has been negligent. Courts are much quicker to find municipalities negligent than they are to impose similar liability on senior governments.

To succeed in a claim of negligence against a municipality, a plaintiff must prove:

- ▶ the municipality owed that plaintiff a duty of care;
- ▶ the municipality breached that duty of care, by failing to meet the requisite standard of care;
- ▶ the breach caused damage to the plaintiff; and
- ▶ the damage was reasonably foreseeable, i.e., not “too remote.”

So, what happens if:

- ▶ a municipality knows that particular parts of its infrastructure are so inadequate, or so inadequately maintained, that they make specific private properties particularly vulnerable to damage from severe weather;
- ▶ the municipality could readily reduce the risk, e.g., by changing how it maintains or operates its existing infrastructure;
- ▶ the municipality does nothing; and
- ▶ the damage happens?

The steady growth of scientific evidence about the increasing risk of extreme weather, and the increasing frequency of such weather, should make it easier for plaintiffs to prove that their damage was “reasonably foreseeable.” It should also increase the standard of care.

In these circumstances, the owners and occupants of the specific private properties that are known to be particularly vulnerable could have a strong claim against the municipality for negligence. *MW*

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An effective TRMP should be *pro-active* in managing the risks posed by business travel, and include the following components:

Information package/briefing – Employees should be provided with an information package *before* they depart, including a detailed itinerary; contingency plan in the case of emergency; and information regarding specific risks applicable to the destination or travel route. For employees travelling within Canada, relevant information may include: the location and contact information of approved lodging locations; updated weather reports and road conditions; and any unique features of the area, particularly if the employee will be travelling through remote regions without dependable mobile service.

International travel gives rise to additional considerations, including: the current political and weather climate, the location and contact information of “friendly” consulates and embassies; a summary of unusual or noteworthy local laws or cultural/regional norms; and information relevant to obtaining timely medical attention in the case of an emergency. (Some useful resources include: the Canadian Centre for Occupational Health and Safety <www.ccohs.ca>; the Government of Canada Travel Advisories directory <www.travel.gc.ca/travelling/advisories>; and the Government of Canada embassy and consulate directory <<http://travel.gc.ca/assistance/embassies>>.)

Check-in protocol/employee tracking – Regardless of where an employee may be travelling, it is important the employer know their location at all times. Depending on the situation, the appropriate protocol could be as simple as sending an email upon arrival, up to and including GPS tracking on employees and equipment.

Technology assessment – Consider what technology or other safety equipment is necessary. Smartphones

and tablets are not merely convenient business tools – they can be crucial safety devices. At a minimum, there should be confirmation that these devices will have service wherever the employee is travelling. If not, consider a contingency communication plan.

2. An interdisciplinary TRMP team

There is a temptation to view travel risk management as a human resources issue. While your HR department will be heavily involved, a comprehensive TRMP may require active participation from various players or departments, including, for example, managers (who may be responsible for check-in protocols), IT (to ensure mobile technology is available), and finance (to ensure sufficient funding is in place), etc.

3. A written policy applied and enforced consistently

As in the case of any workplace policy, to be of maximum benefit a TRMP should be written, clearly communicated, and consistently enforced. It should also include a feedback component, so that it can be improved on an ongoing basis. An employee should sign an acknowledgment confirming his or her understanding of the policy prior to departure, including that a violation of the policy may result in discipline, up to and including termination.

Final Thoughts

Risk to employees associated with workplace travel is real and tangible. Fortunately, it can be managed with the strategic use of a TRMP tailored to the workplace. A TRMP will not only help to protect employees from a range of travel risks, but also serve as an invaluable tool if your organization is ever called upon to demonstrate that appropriate, protective steps were taken. *MW*

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