

## 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?*

Some commentators have struck an alarmist tone, pointing to the risks posed by terrorism, natural disasters and civil unrest. While these examples underscore the potential severity of the issue, they fail to acknowledge the more common risks associated with every day business travel. 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. A TRMP will not only help protect employees from a range of travel risks, but will also demonstrate that an employer has turned its mind to the issue of protecting employees during business travel.

### What Are The Sources Of An Employer's Liability?

#### *The Criminal Code*

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

That said, 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**

Separate and distinct from *Criminal Code* liability are an employer's obligations under provincial occupational health and safety legislation. In Ontario, the *Occupational Health and Safety Act* ("OHS") 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 employees 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*, which require a 'marked departure' from the reasonable employer, and morally blameworthy conduct, 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. OHSA obligations are typically enforced through fines, to a maximum of \$25,000 per offence for individuals and \$500,000 per offence for corporations. In extreme circumstances, individuals can be sentenced to up to 12 months in prison.

### **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 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, 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. Many countries have specific legislation addressing an employer's duty to protect its employees, including for example, the United Kingdom's *Corporate Manslaughter and Corporate Homicide Act* (the "*U.K. Act*"). Under the *U.K. Act*, 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.

### **Avoiding Liability –Travel Risk Management Policy**

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

#### **1. 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 - which can be of tremendous utility - are only engaged *after* an incident occurs. An effective TRMP should be *proactive* in managing the risks posed by business travel, and include the following components:

- **Information Package/Briefing:** Employees should be provided with an information package or briefing *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 Ontario or 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](http://www.ccohs.ca)); the Government of Canada Travel Advisories directory ([www.travel.gc.ca/travelling/advisories](http://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, particularly in the case of an unexpected emergency. 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 these devices will have service wherever the employee is travelling. If not, consider a contingency communication plan.

#### 1. 2. **An Interdisciplinary TRMP Team**

There is a temptation within organizations 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 in the organization. For example, department managers may be responsible for check-in protocols, IT to ensure the necessary mobile technology is available, and finance to ensure sufficient funding is in place, etc. An employer should therefore identify the key players in its TRMP and ensure they have the skill and ability to carry out the TRMP.

#### 1. 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 on-going basis. An employee should sign an acknowledgment confirming his/her understanding of the policy prior to departure, including an acknowledgement 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 both real and tangible. Fortunately this risk can be managed with the strategic use of a TRMP tailored to the particular 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. If your business is currently operating without a TRMP, consider speaking to one of the employment and labour lawyers at Sherrard Kuzz LLP; they can help you design and implement a TRMP that's right for your workplace.

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