Employer Duty of Care in Asia Pacific Jurisdictions

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Contents

Introduction 04

What Can Employers Do? 05

The Consequences of Employers Poorly Managing Their Duty of Care 06

Asia Pacific Legal Landscape 08

How Can Insurance Help Employers? 14

Duty of care is often more than a moral obligation - it is usually a legal requirement

Introduction

While legislation varies from country to country across the Asia Pacific region, businesses small and large, have an obligation to look after their employees and mitigate the risks their employees face while at work, traveling for business, or whilst on secondment.

An employer's duty of care obligations typically place the onus on businesses to demonstrate they have sufficient policies, procedures and monitoring in place to minimize any potential risk to their employees.

In today's global economy, as businesses expand across borders, employers are now faced with duty of care obligations that extend beyond their immediate workplace, requiring them to actively understand risk implications when sending employees overseas on business and having the right tools and support in place to minimize these risks.

The implications for employers may be far-reaching

Employer duty of care obligations can cover a broad range of activities, including, but not limited to ensuring a safe working environment with appropriate policies, procedures and monitoring in place to mitigate any risks employees may face at work, or when they are traveling on business within their home country or abroad.

In response to these risks, employers are increasingly ensuring that their employees are provided with suitable information, training and support. These policies and procedures are reviewed through regular risk assessments and audits to ensure they are adhered to and effective.

Failing to implement and diligently manage duty of care responsibilities can have significant financial and reputational implications for a business, as the case studies shown later demonstrate. In addition to any legal implications, the impact can be far reaching - resulting in, lower productivity, increased absenteeism, poor morale and, ultimately, lost talent.

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What Can Employers Do?

What constitutes best practice in the area of employer duty of care will vary from one business to another. Here are general examples of how employers may effectively manage their responsibilities. This is a non-exhaustive list which provides examples of different approaches.

In the workplace

- Ensuring a safe working environment. For example, having a Health and Safety policy in place that is regularly reviewed to ensure it is followed and relevant to the risks employees face.
- Clearly communicating the importance of complying with company policies in employment contracts and regularly reinforcing these through regular training and reassessment.
- Providing a pleasant working environment with areas for rest and relaxation and ensuring that employees are not working excessive hours, in compliance with local legislation.
- Protecting staff from bullying, harassment or discrimination from staff or third parties and providing them with appropriate channels of communication to raise concerns.
- Supporting the health and safety of employees by providing them with tools (such as accessible resources and training) to help protect them against the dangers they face in the work place.
- An employer's duty of care may even extend to employee health and well-being programs to promote healthier lifestyles, such as improving their diet, exercising more, reducing alcohol intake and supporting quit smoking campaigns.

Whilst traveling for business

- Ensuring the risks of traveling on business to remote or more risky destinations are appropriately assessed in advance, with measures put in place to minimize the potential risks.
- Providing traveling employees with appropriate tools and support to prepare them for risks they may face and help them stay safe with quick and easy access to the right support while away. For example, pre-travel risk awareness training, quick and easy access to emergency medical and security assistance, and live information and alerts.

During their secondment

- Conduct pre-posting briefings for the secondees and their dependants so they are aware of safety, cultural and medical aspects of their location of secondment.
- Provide support, in particular, a checklist of relevant contact details.

With effort, comes reward

Businesses that embrace their duty of care responsibilities and take a more holistic approach to employee health and well-being not only attract top talent - which is an increasing necessity for top businesses - they can also improve employee well-being, goodwill and loyalty. This in turn measurably boosts productivity that can be balanced against the costs of ensuring the health, safety and well-being of a business' most important asset - its people. Over time, businesses are also able to enhance their company image as they become employers of choice.

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The Consequences of Employers Poorly Managing Their Duty of Care

Here are some examples of employers who were found to have breached their duty of care obligations in different jurisdictions.

Australia

Kerle v BM Alliance Coal Operations Pty Limited [2016] QSC 304

In 2016, the Supreme Court of Queensland found that a duty of care akin to that of an employer was owed by 3 parties to an employee: a mine operator, a labor hire agency and a host employer. Each of these parties were held liable for injuries sustained by a worker when he was involved in a car accident after driving home from work following 4 consecutive 12-hour night shifts.

The judge outlined certain factors that may establish a duty of care owed by a party to the worker. For example, whether the risk of injury is created by the person towards a worker. Also relevant is the link between the act and the requirements of the job the worker was doing. In this instance, the plaintiff was driving and working 12-hour consecutive shifts in response to the demands of his employment, with long distance commuting inevitable.

Finally, whether risk is largely controlled by the persons or entities in charge of the work systems and place of employment. A party that can control the risk of the workplace may be found to owe a duty of care to persons working in that workplace.

China

Company found in breach of Workplace Safety Law [2014]

A few years ago, a company in Hangzhou was reported to have been fined RMB 30,000 for failing to affix precautionary signs to warn employees of dangerous workplace conditions. It therefore appears that, in China, the relevant authorities are now scrutinizing safety at the workplace carefully.

In the circumstances, it is prudent for employers to consider preventive measures at the workplace, as the regulators have shown that they are ready to impose fines even in cases where no accident has occurred.

Hong Kong SAR

Li Hoi Shuen v Man Ming Engineering Trading Co Ltd- [2006] 1 HKCFI 53

In Hong Kong SAR, an employer provided an employee and two of his colleagues accommodation while they were working in mainland China. The employee was then murdered by his two colleagues, who shared the accommodation with him.

The court found that it was the employer's duty to provide safe accommodation to its employees - this duty was higher where it was necessary for the employee to work abroad. On this basis, the court ordered the employer to compensate the family of the deceased employee.

Singapore

Employer breaching duty of care pays SGD$250,000 to former employee [2010]

In 2010, the Singapore Court of Appeal ordered a stevedoring company to pay SGD$250,000 to a former employee as damages for breach of the company's duty to take reasonable care for his safety.

The employee was seriously injured after falling 10 meters from a ladder that detached from the hull of a ship. He then commenced common law proceedings against his employer.

The Court of Appeal confirmed that employers have a duty of care to their employees even in certain cases where their employees are working on premises not belonging to the employer.

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Asia Pacific Legal Landscape

Asia Pacific countries and territories have enacted legislation on workplace health and safety. In terms of extending the duty of care to employees traveling overseas, some countries and territories have provisions for this, some are vague or silent, and some rely on common law to address any gap.

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Australia

The model Work Health & Safety (WHS) laws stipulate that employers should take reasonably practicable steps to minimize the risk of injury or harm to their employees. Once implanted into law, a breach of the duties owed to workers under the WHS laws can lead to criminal prosecutions and penalties, which businesses and individuals should bear in mind.

Whether the duties owed to workers under the WHS laws apply, and whether they extend to workers traveling abroad, depends on the particular circumstances of each case. There have been some instances where a duty of care has been found to extend to circumstances where elements of an offence are partly or wholly committed overseas.

The WHS laws set out detailed requirements for employers, which differ from industry to industry, to take all reasonably practicable steps to keep their workforce safe, whether mobile or otherwise. This can include providing a safe working environment, emergency plans and first aid support, as well as information and training to reduce the risks associated with work.

Comcare, a health and safety regulator in Australia, notes that when considering sending workers overseas, organizations need to identify and assess the threats and establish appropriate risk mitigation strategies.

China

The Labor Law, Labor Contract Law, and Workplace Safety Law of the People's Republic of China protect an employee's right while at work.

The Labor Law stipulates, amongst other things, that the employer shall establish a system for workplace safety and sanitation to prevent accidents and reduce occupational hazards.

The Labor Contract Law further expands an employer's duty of care: when an employer hires an employee, the employer should inform the employee of the work conditions, possible occupational hazards, and other information relating to his job.

The Workplace Safety Law provides safeguards at an employee's workplace in China. An employer who has violated these laws may be subject to criminal and civil liability.

For Chinese employees traveling outside China on business trips, the Ministry of Commerce, the Ministry of Foreign Affairs and the National Development and Reform Commission have issued Provisions on the Safety Management of Overseas Chinese-funded Enterprises, Institutions and Personnel ("**Provisions**"). The Provisions operate under the principle that the party who requires the assignment shall be responsible for the safety of the party undertaking the assignment.

Under the Provisions, an employer may be obliged to provide safety education and emergency training for assigned employees before they leave the country. Employees who have not undergone training may not be assigned abroad. Additionally, the Provisions also provide guidance to employers with operations abroad to ensure adequate safety protection measures and emergency response plans are instituted. As such, at the height of the Arab Spring, Chinese employers with operations in the affected countries had the necessary processes in place to evacuate their Chinese personnel.

Hong Kong SAR

In Hong Kong SAR, employer duty of care obligations are generally found in the Occupational Safety and Health Ordinance (Cap. 509) (**OSHO**) and addressed by common law.

Under Section 6(1) of the OSHO, "*every employer must, so far as reasonably practicable, ensure the safety and health at work of all the employer's employees*". In this regard, a person is "*at work*" only when they are actually at a workplace. Further, the OSHO has a broad definition of "*workplace*". Any place where an employee works is considered a workplace, with certain exceptions, including but not limited to:

1. in an aircraft or vessel located in a public place;
2. when a vehicle that is designed or used for the carriage of people, animals or goods is located in a public place, the seat or position normally occupied by the driver of the vehicle;
3. domestic premises at which the only employees are domestic servants; and
4. a place at which only self-employed persons work.

In principle, the OSHO can be applied to incidents overseas.

Section 5(1) of the Employees' Compensation Ordinance (Cap. 282) (ECO) states that an employer should compensate employees who suffer "*personal injury by accident arising out of and in the course of the employment*", with certain exceptions. These exceptions are stated at Section 5(2) and 5(3) of the ECO. It should be noted that the ECO has extra-territorial application.

At common law, the employer-employee duty of care is founded on an employment relationship, and requires the employer to take reasonable care in ensuring the employee has a safe place of work.

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Indonesia

In Indonesia, it is the responsibility of employers to provide a safe working environment and appropriate safeguards for their employees. The Indonesian Labor Law (**ILL**), Fifth Paragraph, addresses the issue of occupational safety and health protection.

The ILL stipulates a minimum standard for protection and welfare of employees, such as requirements in respect of wages, working hours, leave days (including maternity leave and care), right to conduct religious activities, non-discrimination, and other work conditions. The Labor Law also mandates that a workplace with ten or more employees must have internal company regulations that govern, amongst other things, the rights and obligations of the employer and employees.

It is also mandatory for an employer to enroll its employees as members of the Indonesian Social Security Administrator, which provides cover for (1) health security, (2) work accident security, (3) elderly security, (4) pension security, and (5) death security. An employer who wishes to place or second an employee abroad must ensure that the employee is sufficiently covered by insurance or social security.

Korea

In Korea, there are several pieces of legislation indicating duty of care obligations are legal requirements that employers must pay heed to.

The Labor Standards Act is Korea's main law regulating minimum standards for a wide range of work conditions, and applies to employees working in Korea and abroad. It mandates that a workplace with ten or more employees must prepare Rules of Employment to govern, amongst other things, the calculation of wages, the timing and method of payment, hours of work, paid leave, training, maternity care, workplace health and safety, disciplinary procedure and other work conditions.

The Minister of Health and Welfare administers the mandated national health insurance program prescribed by the National Health Insurance Act, the purpose of which is to promote social security by providing citizens with insurance benefits for the diagnosis and medical treatment of diseases and injury.

The Industrial Safety and Health Act is specifically applicable to the health and safety aspects of all businesses and workplaces, except those exempt by presidential decree. It is supported by the compulsory Workmen's Accident Compensation Insurance Act.

The Act on the Promotion of Worker Participation and Cooperation (**APWPC**) specifically provides that every business or workplace with 30 or more regular employees shall allow its employees an opportunity for due process to escalate their grievances for resolution. The APWPC intends to help promote peace in the workplace through mutual participation and cooperation by workers and employers.

Finally, the Equal Employment Opportunity and Work-Family Balance Assistance Act provides necessary legal measures in relation to the prevention of sexual harassment at work.

Malaysia

The Occupational Safety and Health Act 1994 (**OSHA**) imposes a statutory duty on employers to ensure, so far as practicable, the safety, health and welfare at work of all its employees.

The OSHA defines "*place of work*" to mean premises where persons work or premises used for the storage of plant or substance. The OSHA has provided a broad definition for "*premises*" which includes (amongst others) any land, building (or part thereof), vehicle, vessel, aircraft, offshore installation or movable structure. As a result, an employee's place of work may potentially extend far beyond the four walls of his office. The employer is also under a duty to ensure a safe work environment when the employee is traveling for work.

At common law, employers owe a duty of care to their employees to provide a safe workplace. The employer must be aware of the nature and probability of the risks involved for the nature of work and weigh it against the suitability and cost of mitigating these risks.

The Employees' Social Security Act 1969 (**SOCSO**) is another relevant legislation which provides certain contingencies to employees who are injured during the course of their employment. The SOCSO contains provisions on benefit claims such as invalidity pension, disablement benefit, dependant's benefit, funeral benefits and survivors' pension.

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New Zealand

The Employment Relations Act 2000 (**ERA**) prescribes that both employer and employee have a duty of good faith to the other. There are penalties under the ERA for failing to comply with the duty of good faith.

In addition to the duties that arise under the ERA, the Health and Safety at Work Act 2015 (**HSWA**) provides a framework to secure the health and safety of workers in workplaces. The HSWA introduces the concept of a "*person conducting a business or undertaking*" ("**PCBU**"). The PCBU has the primary duty of care and must ensure, so far as is reasonably practicable, the health and safety of their workers. An officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation.

The workers themselves also have a duty of care in respect of their own safety and that of others.

Philippines

The health, safety and social welfare benefits for employees in the Philippines are found in Book IV of Presidential Decree No. 442, as amended, otherwise known as the Labor Code of the Philippines. On August 17, 2018, the Occupational Safety and Health Standards Law (Republic Act No. 11058) was signed into law. This new law requires that the Labor Secretary issues appropriate standards of occupational safety and health based on the number of employees, nature of the organization, and the risk or hazard involved.

Further, the Philippines also has a Social Security Act, which compensates workers or employees in the event that they suffer work-related injury or illness.

Singapore

In Singapore, duty of care is derived from common law and legislation. At common law, the employment relationship imposes a duty of care on the employer towards its employees, which includes a reasonable duty of care owed to an employee who performs functions to fulfill his work obligations.

With regard to legislation, the Employment Act regulates employment and welfare related issues, while the Workplace Safety and Health Act addresses taking reasonably practicable steps to ensure the safety and health issues of employees. This duty may cover situations where the employee is required to travel on work, is seconded overseas or is working in premises not belonging to the employer.

Abroad, the foreign jurisdiction on safety and health may sometimes be beyond the control of a Singapore employer, and there can be limited information on safety or health risks. However, an employer is expected to take all reasonably practicable measures to, as far as possible, control the risks involved, or prepare or warn their employees of such risks.

Under the Work Injury Compensation Act, an employee may be eligible for compensation where he suffers from a work injury or illness arising from an accident that happened during his working hours or while on official duties. This could be interpreted to include accidents during work commutes and travel, and perhaps even where the employee is on an overseas work assignment.

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Taiwan

The Labor Insurance Act relates to workers' livelihood and promotes social security for a broad spectrum of workers in Taiwan. Amongst other things, the Labor Insurance Act provides for ordinary and accident insurance coverage for employees, and prescribes penalties for employers who are found to have failed to insure their employees.

The other piece of legislation that is relevant to an employer's duty of care in Taiwan is the Occupational Safety and Health Act, which has the objective of protecting the health and safety of workers, and preventing occupational accidents. Employers are also required to provide their workers with necessary safety equipment or undertake measures to prevent occupational accidents.

The Occupational Safety and Health Act is supported by the Labor Inspection Act, which enables authorities to check workplaces to ensure compliance.

Thailand

Employers have a duty to maintain a safe working environment and to comply with standards established by ministerial regulations, under the Occupational Safety, Health and Environment Act (2011) (**OSHEA**). These duties include implementing preventative measures and training employees. An employer's duties under OSHEA would appear to apply in relation to employees traveling overseas on business.

An employer may be liable for injuries suffered by an employee as set out in the Workmen's Compensation Act (1994).

Vietnam

The Law on Occupational Safety and Health adopted on 25 June 2015 (**LOSH**) applies to Vietnamese workers in Vietnam. It also covers those assigned to work abroad, as well as foreign employees working in Vietnam.

The LOSH spells out the duties of an employer in providing a safe working environment with processes, plans and training in place for the protection of workers. Compensation for workers affected by occupational accidents and diseases - such as those caused by hazardous working conditions - are also covered by the LOSH.

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While insurance cannot assist an employer to fulfill its duty of care to its employees, it may in certain cases help reduce financial risk exposure and avoid or reduce reputational damage if and when a workplace incident occurs. With employers facing increasing pressure to cover their employees in the workplace, those with a global and mobile workforce have relied on Chubb for an insurance solution for their employees both at their usual workplace and whilst traveling.

Here's how Chubb can assist:

Group Personal Accident Insurance

In today's race for talent, an insurance plan that covers an employee in the event of accidental death or total and permanent disability is often an attractive enticement for employees as part of an employee benefits program.

Chubb has an established track record in providing Group Personal Accident (**GPA**) insurance solutions to companies and organizations of all sizes, large or small. Designed for employers across various industries, Chubb's GPA insurance provides protection to their employees working in many types of occupations. Our GPA insurance plans provide personal accident insurance coverage against accidental death or injury, subject to certain terms and conditions in each region.

Employees' Work Injury Compensation Insurance

Compensation to an injured or deceased employee due to workplace accidents often forms part of an employer's operating costs. Chubb Work Guard (only available in select countries and territories excluding Australia) utilizes Chubb's risk engineering capabilities to help reduce the risk of injuries to employees in the workplace. Chubb works with the relevant stakeholders to implement health and safety strategies with the view to reducing potential liability at law.

In addition to employees' compensation coverage, Chubb Work Guard's flexible and responsive claims approach also provides solutions to ensure that injured employees receive needed and appropriate care.

Chubb Work Guard is complemented by two value added services - Safety Management Consultation and Healthcare Management Services. The former provides assistance to employers in the development and implementation of health and safety practices in the workplace, in accordance with relevant occupational safety and health legislation.

Chubb's Healthcare Management Services provide rehabilitation services for employees, when required, by utilizing specialist skills of our trusted service providers to achieve desired rehabilitation outcomes.

Chubb Work Guard is only available in selected locations.

Group Business Travel Insurance

Business travel is part of the day-to-day job for a growing cohort of employees, from senior company executives to junior sales staff, across a broad range of companies.

Chubb understands the travel risks faced by business travelers and the challenges for employers if their employees fall sick or are injured while overseas. We deliver robust, compliant insurance plans combined with high quality round-the-clock assistance services for business travelers wherever they are. This comprehensive approach enables employees to travel with confidence, knowing that help is just a phone call away.

Chubb Travel Smart®, a mobile application for business travelers to access real-time security alerts, helps to keep your mobile workforce safe by alerting them of known security risks. The application also enables business travelers to travel safer and smarter by raising their safety awareness through online pre-travel training.

With Chubb Business Travel Insurance, business travelers have access to a wide range of services and cover. From evacuation from a country with inadequate medical facilities to one with a center of medical excellence, to replacement of a stolen passport, Chubb Business Travel Insurance responds to regular issues faced by travelers today. It also provides coverage for common risks such as flight delays, lost luggage, loss of deposits and cancellation costs, amongst others, subject to terms and conditions in each jurisdiction.

Our objective is to help support business travelers with as little disruption as possible, and to deliver business continuity for their companies.

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About Chubb

Chubb is the world's largest publicly traded property and casualty insurance company. With operations in 54 countries and territories, Chubb provides commercial and personal property and casualty insurance, personal accident and supplemental health insurance, reinsurance and life insurance to a diverse group of clients. The company is distinguished by its extensive product and service offerings, broad distribution capabilities, exceptional financial strength, underwriting excellence, superior claims handling expertise and local operations globally. Parent company Chubb Limited is listed on the New York Stock Exchange (NYSE: CB) and is a component of the S&P 500 index. Chubb maintains executive offices in Zurich, New York, London and other locations, and employs approximately 31,000 people worldwide. Additional information can be found at: www.new.chubb.com.

Chubb's franchise in Asia Pacific comprises an extensive network of operations serving Australia, China, Hong Kong SAR, Indonesia, Korea, Macau SAR, Malaysia, New Zealand, Philippines, Singapore, Taiwan, Thailand and Vietnam.

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