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TRAVEL RISK MANAGEMENT STANDARD

ISO 31030

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ISO 31030 Travel Risk Management

Legal implications and risks for organisations

Objectives

ISO 31030 was published in September 2021 to complement the general ISO 31000 Risk Management Standard. The ISO standard is the first truly global benchmark for travel risk management and provides a framework of good practice.

This paper aims to assist corporations understand ISO 31030's potential implications for an employer's travel security obligations and liabilities in the context of existing United States law. Understanding ISO 31030 will help corporations to consider the extent to which they are meeting their duty of care[1] to their employees and others in the context of travel.

Nothing within this paper should be treated as legal advice, which will always vary depending on the specific situation.

Executive Summary

We will explore some of the U.S. civil, regulatory, and criminal legal implications that may affect a corporation when an employee or other person suffers harm, injury or death connected to work related travel. It is critical for all businesses to understand the responsibilities they owe to their employees and others, the options that could be available to an employee or other person, and any potential regulatory risk.

Ideally, businesses that require their employees to travel regularly should also have proportionate, periodically reviewed, and monitored compliance policies and procedures in place to help to mitigate the risk of such an incident, and to assist them in responding to any incidents that do take place.

Compliance with the ISO standard could have a variety of potential evidential implications in civil and criminal proceedings. Companies that send employees to places in the U.S. outside of their home location or to foreign destinations will want to ensure travel security risk management policies are reviewed and enforced in accordance with ISO 31030.

For example, the ISO recommends the following regarding accommodation selection: "where an individual or on-site assessment is considered appropriate, an organization should use competent internal or external assessors."[2] Since the ISO 31030 is an industry standard developed by experienced international experts, adherence to this provision could be beneficial in demonstrating that a business has assessed and managed overseas accommodation risks to the highest possible benchmark.

[1] The ISO identifies various duty of care requirements for different employers. For instance: direct workers, supply chain workers, interns and guests of the organization, families and other traveling with the primary traveler, and students.

[2] ISO 31031, paragraph 7.4.5, page 20.

Summary of the Key Provisions in the ISO

ISO 31030 is geared towards providing organizations and its members of management, with the tools to identify, assess and manage travel risks for work-related travel. This approach has been defined as "Travel Risk Management" ("TRM"), i.e. "coordinated activities to direct and control an organization with regard to travel risk."[3] ISO 31030 provides a structured and comprehensive approach to formulating a TRM program and TRM policies with defined objectives.

ISO 31030 also builds on the ISO 31000, which offers a broader framework and process for managing all forms of risk,[4] as well as ISO 45001, which specifies standards for an occupational health and safety management. This standard applies to a wide range of organizations and businesses.

Employer's Civil Liability and ISO 31030

The ISO 31030 refers to the need for an employer to be cognizant of its duty of care to its employees. It defines "duty of care" as a "moral responsibility or legal obligation of an organisation to protect the traveller from hazards and threats."[5] The notes to this entry state that a duty of care can arise from "negligence, contract, and statute."[6]

Employers in the U.S. owe a duty of care under the negligence theory of tort law to take reasonable care of employees' health, safety, and security during the course of their employment.[7] Duties may also arise from employment contracts if the employer and employee expressly or impliedly agreed to such duties. Duties of care may also arise from specific laws, such as workers' compensation laws. For example, federal labor law under the Occupational Safety and Health Administration Act of 1970 ("OSHA") states that employers "shall furnish to each of [their] employees employment... . which are free from recognized hazards that are causing or are likely to cause death or serious injury... ."[8] OSHA has provided clarification for the recording and reporting requirements associated

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[3] ISO 31031, paragraph 3.20, page 4.
[4] See ISO 3100
[5] ISO 31031, paragraph 3.4, page 2.
[6] Id.
[7] See, e.g., *Davis v. Simon Prop. Grp., Inc.*, 107 N.Y.S.3d 341, 347 (2d Dep't 2019).
[8] 29 U.S.C. § 654.

with injury and illness for work-related travel. In a standard interpretation issued on October 20, 2014, concerning whether a condition of employment is travel work-related, transportation or housing accommodations are "conditions of employment" if employees are required by the employer to use them or if employees are "compelled by the practical realities of the employment situation to use them." Injuries or illness that arise from a condition of employment must be recorded pursuant to OSHA's recordkeeping regulation 29 C.F.R. Part 1904.

Employer's duties will vary on a state-by-state basis. But, in general, if an employee suffers loss while working abroad, the employer may be liable if:

a. The employer owed the employee a duty of care.
b. The employer had breached that duty of care.
c. There is a but for and proximate causal link between the employer's breach and the employee's loss.
d. Actual damages from the loss.[9]

Who Owes the Duty of Care?

Corporate Employer

An employer owes nondelegable duties to their employees with respect to safety.[10] This means that when an employee is travelling on business, to the extent the employer owes a duty of care, it cannot be delegated to a third party. While it may be reasonable for an employer to contract with a travel management company, the employer will not be excused for the travel management company's failures if those failures were foreseeable.[11]

An employer will be responsible for harm that arises in the course of the employee's employment during travel. This may include "reasonable activities" such as commuting[12] or even bathing[13] if the employee must complete the activity in a space or location the employee is not familiar with to fulfil his or her job responsibilities.

A company is a legal person, distinct from its directors and shareholders.[14] As a result, liability for breaches of duty to the company's employees generally rests with the company. However, the possibility of liability against directors or parents cannot be precluded.

Directors

A corporate director or officer primarily owes duties to the corporation including fiduciary duties of loyalty and care.[15] A duty of loyalty requires a director to act in good faith for the best interests of the corporation.[16] A duty of care requires a director to inform themselves of all reasonably available information prior to making a business decision.[17]

Directors of a company do not, by reason of their official position, incur personal liability for the corporation's torts unless they participate in the tort or authorized or direct that the tort be done.[18] In certain instances, liability may also be imposed on a director if he knew about the tortious conduct and allowed it to occur.[19]

[9] See generally *Flores v. McKay Oil Corp.*, 144 N.M. 782, 787-88 (2008) (describing when an employer is liable to an employee who is traveling on behalf of the employer).
[10] *Halsey v. Townsend Corp. of Ind.*, 20 F.4th 1222, 1230 (8th Cir. 2021).
[11] See *Matter of Markoholz v. Gen. Elec. Co.*, 13 N.Y.2d 163, 167 (1963) (finding that use of a travel agency did not absolve the company of liability when employee died in an airplane crash).
[12] See *Matter of Wright v. Nelson Tree Serv.*, 122 N.Y.S.3d 170, 172 (3d Dep't 2020).
[13] See *Capizzi v. S. Dist. Reporters*, Inc., 61 N.Y.2d 50, 54-55 (1984).
[14] See *Kenkel v. Parker*, 362 P.3d 1145, 1148 (Okla. 2015).
[15] *Metro Storage Inter. LLC v. Harron*, 2022 WL 1404359, at *19 (Del. Ch. May 4, 2022).
[16] Id.
[17] Id. at 21.
[18] *NTD Architects v. Baker*, 950 F. Supp. 2d 1151, 1159 (S.D. Cal. 2013).
[19] Id.

However, officers or directors will not be liable for business decisions made "(1) in good faith; (2) where the director or officer us not interested in the subject of the business judgment; (3) is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances; and (4) rationally believes that the business judgment in question is in the best interests of the corporation."[20] Directors and officers may raise a "business judgment rule" defense for company expenditures related to employee travel—this defense sets a high threshold and is difficult to overcome.[21]

Parent Companies

In general, a parent company is not responsible for the working conditions of the subsidiary's employees merely based on the parent-subsidiary relationship.[22]

However, if a parent company exercises control over the subsidiary's activities, it may then owe an independent duty of care towards employees of the subsidiary. The key question is one of proximity: whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees. Certain circumstances could impose legal responsibility on a parent for the health and safety of the subsidiary's employees.

A parent may be liable for unsafe conditions experienced by a traveling employee if it acts affirmatively to undertake the provision of a safe working environment at the subsidiary.[23] This undertaking may be express through contract between the parent and subsidiary or may be implicit through conduct of the parent.[24] Put differently, whether a parent company bears any responsibility is a fact sensitive inquiry.

What is Reasonable Care?

Although determining whether an employer acted with reasonable care is an inquiry that may differ in the United States on a state-by-state basis, courts usually consider the appropriate standard of care by hearing evidence, including expert evidence, regarding

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[20] *Viener v. Jacobs*, 834 A.2d 546, 557 (Pa. Super. Ct. 2003).
[21] See *In re Sportco Holdings, Inc.*, 2021 WL 4823513 at *3, *6 (D. Del. Bankr. Oct. 14, 2021).
[22] See *Halsey*, 20 F.4th at 1230.
[23] See *Muniz v. Nat. Can Corp.*, 737 F.2d 145, 148 (1st Cir. 1984).
[23] See *Muniz v. Nat. Can Corp.*, 737 F.2d 145, 148 (1st Cir. 1984).
[24] See id.

the reasonable standard of care. An employer's adherence to recognized professional standards or industry accepted standards will tend to suggest that the employer behaved reasonably. Further, if there is no local standard, the courts may use generally accepted professional standard to fill the void.

At the federal level, employers may also be required to comply with OSHA regulations on emergency action plans codified under 29 C.F.R. § 1910.38. These regulations require written action plans for evacuating employees during an emergency. Generally, this refers to a fire in the domestic workplace, but it may be applicable to traveling employees especially those who are required to visit countries with dangerous conditions.

Most employer liability for harm to employees during travel will be evaluated under each state's worker's compensation laws. However, employees may also bring claims of for violations of OSHA's general duty clause, 29 U.S.C. § 654, described above. Liability may be imposed for violation of OSHA's general duty clause and its specific standards issued thereunder.[25] For example, failing to comply with OSHA's recordkeeping requirements for work related injuries and illnesses, including for traveling employees, may result in citations and fines.[26]

In addition to specific standards, OSHA provides context for what it considers appropriate care in specific industries or scenarios through its Technical Information Bulletins. On February 4, 2012, OSHA published a Bulletin titled "Safety and Health During International Travel"[27] which was meant to inform employers of safety measures that could be taken to ensure employee safety while traveling.

These safety measures mentioned in the Bulletin will be location and country specific with a primary focus on disease prevention. Employees should receive preventative medication for contagious diseases, such as hepatitis A, malaria, and typhoid, present in the local community. Employers should advise and train employees to practice safe cooking and cleaning protocols to avoid food and waterborne diseases, stay up to date on recommended vaccines, pack helpful items, and understand local resources where they can get additional assistance and information. Employers should further recommend that employees drink only bottled water (or bring water purification systems) and avoid higher risk activities like eating food from street vendors, handling wild animals, and swimming in non-chlorinated water.

The Bulletin recommends that employers identify employees who may be traveling and refer them to qualified health professionals and to implement preventative measures with appropriate lead time. While compliance with this bulletin will not guarantee that an employer will be held not liable for harm that occurs to traveling employees, taking these steps will be evidence that reasonable care has been taken.

Risk Assessments

As a general rule, the ISO provides that corporate travel should be considered as part of a corporation's overall risk assessment process. This process should include risk identification, risk analysis, and risk evaluation. "Travel risk assessments should cover both security threats and safety and health hazards."[28]

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[25] See, e.g., *Thomas g. Gallagher, Inc. v. Occupational Safety and Health Rev. Comm'n*, 877 F.3d 1, 3-4 (1st Cir. 2017).
[26] Cf. *Volks Constructors v. Sec'y of Lab.*, 675 F.3d 752, 753 (D.C. Cir. 2012).
[27] U.S. Dep't of Labor OSHA Technical Information Bulletin, Safety and Health During International Travel (Feb. 4, 2012).
[28] ISO 31031, paragraph 6.1, page 12-13.

Employers may have a duty to carry out risk assessments and to mitigate risks that may be foreseeable when an employee is traveling. For example, in *CBS Inc. v. Lab. and Indus. Rev. Com'n*, 570 N.W.2d 446 (Wis. Ct. App. 1997), an employee was hired as a runner to cover the Winter Olympic games in Lillehammer, Norway. The employee had a day off and decided to go downhill skiing for which the employer provided him with transportation and free ski lift passes. The employee fell while skiing and injured his knee. The Court held that a traveling employee may engage in any reasonable form of recreation, incidental to living, where the employee is required to travel. Skiing in Norway was a reasonable form of recreation and the employer's argument that it could not assess the risk was rejected, particularly where it had enabled the employee to engage in the conduct.

Employers may also be expected to train employees to assess risks while traveling. Evidence that an employee has been properly trained to identify and analyze both common and industry specific risks may be used to evaluate whether an employer is responsible for an employee's harm.[29]

The ISO 31030 also recommends that risk assessments that result in a conclusion of high or extremely high risk at the destination of travel, such as countries where there are active military conflicts, may require additional security measures including "more detailed travel route assessment, meet and greet service, additional security assistance, safe accommodation selection [and] plans to manage any unexpected changes to itineraries."[30]

[29] See *Mora v. Valdivia*, 595 S.W.3d 713, 737 (Tex. App. 2019).
[30] ISO 31031, paragraph 7.4.8, page 22.

Causation

Liability for breach of an employer's duty of care requires that the breach be the cause in fact and the proximate cause of the harm that is suffered. A proximate cause is one that is foreseeable.[31] Cause in fact requires that the negligent act or omission was at least a substantial factor in bringing about the harm.[32] Foreseeability requires the employer, knowing what the employer knew or should have known, would anticipate the harm suffered.[33] If the harm that resulted was not caused in fact by the breach of the duty of care or was not foreseeable, it is unlikely that the employer will be held liable.

Some courts have interpreted causation broadly in the travel context. For example, in *Castillo v. Caprock Pipe & Supply, Inc.*, 285 P.3d 1072, 1077 (N.M. Ct. App. 2012), causation was established if harm was the direct result of any "unusual circumstances" due to the employment-related travel, including rare disease contracted due to travel to foreign countries.

In *Ramsey v. S. Indus. Constructors Inc*., 630 S.E.2d 681, 690-91 (N.C. Ct. App. 2006), employee plaintiff was assaulted while staying at a motel while traveling for work – he was robbed while getting ice from an ice machine. The Court discussed the extent of proximate cause namely that the injury suffered by the employee must be due to the nature of the employment. For traveling employees, the "hazards of the journey are the risks of the employment." Here, the court reasoned that being assaulted and robbed is a foreseeable risk from a stay at an inexpensive motel in unfamiliar surroundings.

Courts have also found liability for injury from travel even if an employee has an underlying medical or other condition. In *Phillips v. A&H Const. Co., Inc.*, 134 S.W.3d 145, 148-49 (Tenn. 2004), an employee was injured while driving a car to a job site away from home after losing consciousness due to an idiopathic medical issue. The court held that an idiopathic condition is compensable if an employment hazard, in this case travel, causes or exacerbates the issue.

As the *Ramsey* case demonstrates, employers can reduce foreseeable risks by selecting appropriate accommodations. The ISO recommends that the assessment and selection of accommodation be included as part of an organization's travel risk management policy. In the context of business travel, an employer should be aware that the standards of accommodation vary from country to country. Employers should take care to select accommodations that do not present any health and safety risks. A risk assessment of the accommodation based on an employee's individual circumstances may be appropriate.

Defenses & Scope of Employment

A court is more likely to find that an employer fulfilled its duty of care if the employer puts into place procedures and strategies to mitigate all reasonably foreseeable risks that an employee might encounter while travelling. For example, the unreported jury trial of *Enlow et al. v. Union Texas* completed on December 21, 1999, survivors of employees murdered while traveling to Pakistan sued the employer for violating its duty of care by, in their view, unnecessarily sending employees to Pakistan during a time of strife and anti-U.S. sentiment. The jury found that the employer did not breach its duty of care

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[31] See, e.g., *Austin v. Membreno Lopez*, 632 S.W.3d 200, 220 (Tex. Ct. App. 2021).
[32] Id.
[33] See *Munn v. Hotchkiss Sch.*, 795 F.3d 324, 329 (2d Cir. 2015) (interpreting Connecticut law).

because, among other things, the employer took several precautionary safety steps including the hiring of a private risk management firm.[34] Other precautionary steps that an employer might take include arranging appropriate transportation,[35] imposing restrictions on number of travellers or destination of travel,[36] medical checks,[37] and employee training.[38] Several other measures are listed in section 7 of the ISO 31030 at page 16.

In certain states, worker's compensation laws or an employer's duty of care may be interpreted more narrowly. In the case of *McSwain v. Indus. Commercial Sales & Serv.*, LLC, 841 S.E.2d 345 (N.C. Ct. App. 2020), an employee was traveling and was injured while washing laundry at a hotel. The Court held that the employee was not owned worker's compensation because washing laundry is not always necessary for an off duty, traveling employee and did not necessarily advance the employer's business. If advancement of an employer's interest is necessary for a worker's compensation claim, an employer might inquire as to whether the activity that resulted in the worker's injury was directly or indirectly advancing the employer's interest.

In *Eastern Airlines v. Rigdon*, 543 So.2d 822 (Fla. Dist. Ct. App. 1989), a flight attendant was injured while skiing on a layover in Portland, Oregon. The employee travelled 58 miles to get the ski lodge. The Court held that while employees might be compensated for injuries that arise from needs of personal comfort while traveling, downhill skiing was not an activity incidental to the employee's employment, and the employee was not entitled to workman's compensation. Whether the recreation is sufficiently incidental to the travel appears to be determinative.

The contrasting results in the *Eastern Airlines* and *CBS Inc*. cases demonstrate the importance of understanding the appliable worker's compensation statute and how they have been interpreted in the applicable jurisdiction. Many worker's compensation statutes only permit recovery for injuries sustained by employees within the scope of employment. Certain statutes, like in the *CBS Inc.* case, contain a "general presumption of employment for the entire duration of the employee's trip."[39] Other statutes, like the one in *Eastern Airlines*, have interpreted "scope of employment" to include "normal creature comforts and reasonably comprehended necessities" for traveling employees such as recreation near the employee's accommodation.[40] However, "scope of employment" may not include "substantial" deviations from work such as traveling more than 50 miles to ski.[41]

Potential Relevance to Criminal Law Liability

The United States Department of Justice ("DOJ") has outlined in its Justice Manual several principles for the federal prosecution of business organizations.[42]

If the DOJ pursues criminal liability against a corporation, it will generally do so under the doctrine of *respondeat superior*. Here, a corporation may be held criminally liable for illegal acts committed by its directors, officers, employees, and agents. Generally, *respondeat superior* liability requires that the corporation's agent was acting within the scope of his duties and that the action was intended to benefit the corporation, at least in part.[43]

[34] Dr. Lisbeth Claus, *Duty of Care of Employers for Protecting International Assignees, their Dependents, and International Business Travelers*, at 19, International SOS.
[35] Cf. *Black v. William Insulation Co., Inc.*, 141 P.3d 123, 130 (Wyo. 2006).
[36] ISO 31030, paragraph 7.2.2, page 17.
[37] ISO 31030, paragraph 7.4.9.1, page 22.
[38] ISO 31030, paragraph 7.4.2, page 19.
[39] *CBS Inc.*, 570 N.W.2d at 448.
[40] See *Eastern Airlines,* 543 So.3d at 823.
[41] Id. at 824.
[42] See generally U.S. Dep't Just., Justice Manual at § 9-28.000 - Principles of Federal Prosecution of Business Organizations.
[43] See *United States v. Block,* 2018 WL 722854, at *2 (S.D.N.Y. 2018).

The DOJ lists several factors[44] that prosecutors should consider when deciding whether to criminal pursue a corporate target:

a. The nature and seriousness of the offense.
b. The pervasiveness of wrongdoing within the corporation.
c. The corporation's history of similar misconduct.
d. The corporation's willingness to cooperate with governmental authorities and agents.
e. The adequacy and effectiveness of the corporation's compliance program at the time of the offense.
f. The corporation's timely and voluntary disclosure of wrongdoing.
g. The corporation's remedial actions.
h. Collateral consequences including to shareholders, pension holders, employees, and others.
i. The adequacy of remedies such as civil or regulatory enforcement actions.
j. The adequacy of the prosecution of individuals responsible for the corporate misconduct.
k. The interest of the victims.

The DOJ has stressed that prosecution of individuals may be appropriate since individuals are the ones that carry out the initiatives of corporations.

However, unlike other countries, the United States does not have a federal corporate manslaughter statute. Homicide charges against corporations are rare and a successful prosecution of a corporation for homicide is rarer still.[45] However, renewed interest in criminal prosecution of corporations for deaths from their activities, including proposed statutes, may change the legal landscape.[46]

To limit possible criminal corporate liability for employees traveling abroad, employees should be trained to understand the criminal laws of the location where they are traveling and to take adequate precautions not to break those laws. Finally, employees should be trained to limit any negative externalities that might occur from their business activities while traveling.

The ISO 31030 Standard in U.S. Legal Decisions

References to ISO Standards in U.S. Law are rare but have recently started to appear with higher frequency. Notably in the worker wrongful death case *In re Street Crane Collapse Litigation*, 62 N.Y.S.3d 11 (1st Dep't 2017), defendants attempted to defend themselves in part by testifying that one of their vendors had an ISO certification. In *Sordy v. City of N.Y.*, 756 N.Y.S.2d 266 (N.Y. Sup. Ct. 2012), defendants cited to an engineering report showing conformance with ISO standards as evidence that they complied with their duty of care. Compliance with ISO 31030 standard could thus be invoked by an employer to defend against liability under civil and/or criminal law by demonstrating that all necessary precautions were taken.

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[44] See Justice Manual at § 9-28.300.
[45] James W. Harlow, Corporate Criminal Liability for Homicide: A Statutory Framework, 61 Duke L.J. 123, 125 (2011).
[46] See id. at 153-54.

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