

Duty of Care: Are You Covered?

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SUMMARY

Duty of Care is gaining traction both as a guiding principle among senior executives and as a legal obligation for which organizations must prepare. Among organizational leaders, there is a growing awareness that enhanced risk management practices can translate into a competitive advantage in today's global operating environment. At the same time, international legal trends continue to shift the burden of mitigating risks squarely onto organizations, with Duty of Care becoming a central concept in assessing an organization's obligations towards employees and others. Today, Duty of Care acts as a powerful principle in determining corporate responsibility in the United States, Europe and elsewhere. Faced with mounting regulation and the need to support earnings, many organizational leaders are proactively adopting Duty of Care practices to ensure compliance as well as focus internal risk management planning.

UNDERSTANDING DUTY OF CARE

Definitions of Duty of Care vary across borders and jurisdictions. Most generally, Duty of Care refers to a responsibility to "act toward others and the public with vigilance, caution and prudence."¹ As pertains to corporations, Duty of Care often refers to the responsibility of board members and officers to exercise appropriate prudence when acting on behalf of the company. Thus, the U.S. Department of Health and Human Services states in a recent report, "The traditional and well-recognized duty of care refers to the obligation of corporate directors to exercise the proper amount of care in their decision-making process. State corporation laws, as well as the common law, typically interpret the duty of care in an almost identical manner, whether the organization is non-profit or for-profit...In addition, in recent years, the duty of care has taken on a richer meaning, requiring directors to actively inquire into aspects of corporate operations where appropriate – the 'reasonable inquiry' standard."²

In a number of countries, Duty of Care relates directly to occupational safety and health laws. Broadly speaking, such laws define an employer's obligation to do everything practicable to provide a work environment that is free from hazards. In the U.K., for example, employers have a Duty of Care to employees which includes providing a safe workplace, preventing risks to health, establishing emergency plans, and providing health supervision as needed.³ In the U.S., these obligations typically fall under the purview of the Occupational Safety & Health Administration.⁴ Given that Duty of Care obligations can impose legal liabilities, it may be prudent for officers to assess the extent to which these obligations apply to business travelers, expatriates, and others carrying out work on behalf of the company abroad. Some elements that may require consideration when assessing Duty of Care to employees both at home and abroad could include:

- Providing a safe working environment (including hotels, airlines, rental cars, etc.)
- Providing information and instruction on potential hazards and threats
- Providing supervision to ensure worker safety
- Monitoring the health and safety of employees
- Employing qualified persons to provide health and safety advice
- Monitoring conditions at all locations under your control and management
- Maintaining appropriate employee records to allow for proper implementation

Thus, Duty of Care is becoming an increasingly important consideration for those involved with Travel Risk Management and Operational Risk Management. Determining precisely which persons or entities have a Duty of Care; what constitutes a discharge of this duty; and what the legal liabilities are with regard to Duty of Care, requires a careful assessment of an organization's operations by appropriate experts.

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INTERNATIONAL TRENDS IN DUTY OF CARE

THE U.K. CORPORATE MANSLAUGHTER ACT

In the U.K., the Corporate Manslaughter and Corporate Homicide Act of 2007 provides a vivid example of the broader international trend toward holding organizations more responsible for Duty of Care obligations. The Corporate Manslaughter Act significantly increases Duty of Care responsibilities for all companies operating in the U.K. Legislation in the form of the Health and Safety at Work Act of 1974 (“HSWA”) had previously addressed corporate liability for negligence resulting in injury or death, defining key issues such as “general duties of employers to their employees” and “breach of a duty.” More importantly, HSWA required that before a company could be convicted of manslaughter, a “directing mind” of the organization (a senior executive who could be said to “embody the company in his actions and decisions”) also had to be guilty of the offence. This requirement is known as the identification principle. The Corporate Manslaughter Act moves away from the identification principle, instead shifting responsibility to the corporation as a whole and thereby increasing the scope for prosecution. The Act enables prosecution of an organization for failures in management systems and practices. This provides a far-reaching tool for prosecuting corporate failures to protect their people.

Any work-related death that occurs in the U.K. is now considered for prosecution, regardless of whether the employer is registered in the U.K. Since individual senior managers are no longer required for criminal charges, penalties under the Act rest squarely upon the corporation. Courts may fine convicted organizations without limit and may require them to publicize their failings and how they intend to avoid similar future negligence. The first successful prosecution under this statute came in August 2011, when it was used to convict Cotswold Geotechnical Ltd. in the death of an employee. The highly publicized case resulted in a GBP 385,000 (roughly USD 590,000) fine for the company of eight employees. In a move envisioned in the initial drafting of the law, the Act was extended to cover deaths in custody in September 2011. This change has clear implications for police and other security-related organizations. It also opens up potential prosecution of organizations that provide health and other care services.

THE MODEL WORKPLACE HEALTH AND SAFETY ACT IN AUSTRALIA

Already enacted in five of Australia’s nine states and territories, the new Model Workplace Health and Safety (WHS) Laws - which replace existing Occupational Health and Safety (OHS) laws - are intended to harmonize work health and safety laws, reduce regulatory burdens, and create seamless national standards. One of the most significant changes made under the Model WHS Laws affects the functional definition of “worker” when determining an employer’s responsibilities. Model WHS Laws consider a worker to be anyone who carries out work in any capacity for an employer. This includes employees, contractors or subcontractors, employees of a contractor or subcontractor, temporary “labour hire” employees assigned to work in the business, outworkers, apprentices or trainees, student interns, and volunteers. Organizations conducting business in Australia must be aware of these extensions because of the potential ramifications on their liabilities and insurance needs.

Model WHS Laws also place a new emphasis on the creation and maintenance of an employer’s health and safety environment. The laws designate any agent of a business who has influence on specific activities and behaviors that determine the success or failure of health and safety initiatives to be a WHS officer. This includes a director or secretary of a corporation; a person contributing to business, financial, or operational policies; managers of a property of corporation; administrators of a corporation; and liquidators of a corporation. Such officers must exercise due diligence to take reasonable steps supporting a health and safety culture, increasing accountability, allocating resources, and developing appropriate policies. If an officer fails to exercise his due diligence requirements, he can be held personally liable.

In many places, Model WHS Laws describe such due diligence using the term “reasonably practicable.” In this context, the term refers to actions or behaviors which are - at a particular time - reasonably able to be done to ensure health and safety. These must take into account the likelihood of the hazard or risk in question to occur; the degree of harm that might result from the hazard or risk; what the officer in question knows, or ought reasonably to know, about the hazard and about ways to eliminate or minimize the risk; the availability and suitability of ways to eliminate or minimize the risk; and the cost associated with available ways of eliminating or minimizing the risk - specifically whether the cost is grossly disproportionate to the risk.

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Objectively, an officer must consider what can be done to ensure health and safety and whether it is reasonable to do so in the specific circumstances in question; what can be done should be done, unless it is reasonable in the circumstances to do less. Determinations of what is reasonably practicable are to be made objectively, not by reference to the officer's ability to pay. One officer cannot expose workers to a lower level of protection simply because s/he is in a lesser financial position than another officer. If a particular officer cannot afford to implement a control that is not so disproportionate to the risk that it is clearly unreasonable, that officer should not engage in the activity that gives rise to that hazard or risk.

COMPLIANCE IN A CHANGING LANDSCAPE

New laws in the U.K. and Australia are representative of an international trend toward more aggressive application of Duty of Care concepts. For many organizations around the globe, such laws have acted as a call to review policies and practices currently in place — and to identify areas for change and improvement moving forward — to ensure that they are meeting their obligations to their employees. Below are three basic steps that all organizations should take to ensure that they are up-to-date with their Duty of Care obligations.



FIRST: LEARN ABOUT DUTY OF CARE IN YOUR OPERATING ENVIRONMENT

Organizations should be proactive in researching Duty of Care issues applicable to their operations and geographic regions of interest. For example, corporate attorneys may consider examining the U.K. Corporate Manslaughter Act in an effort to understand its implications. As rulings under the Act are handed down, the interpretation of its obligations will become clearer. Information on the Act is also readily available to the public. The U.K. Ministry of Justice has a number of guides as well as an RSS feed dedicated to the topic available on its Web site. A number of media outlets have also published information about the Act.

Monitoring trends will allow for a clearer understanding of Duty of Care standards as they apply to your organization, both in terms of legal obligations and industry best practices. This is particularly important for organizations operating in developing markets, where legal protections are uneven at the same time that standards are rapidly evolving.

SECOND: ASSESS YOUR CURRENT SYSTEMS FOR MANAGING DUTY OF CARE

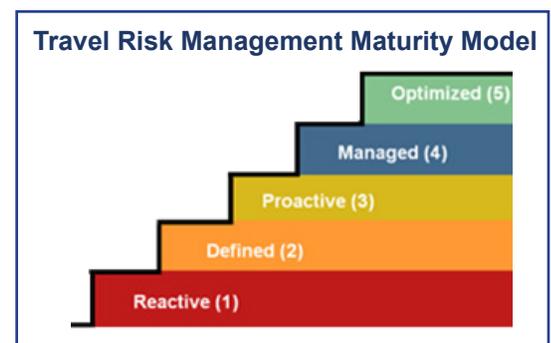
An organization's Duty of Care extends to employees on business travel and expatriate assignments; these work conditions generally put such employees at higher risk of harm than employees working in a single office environment. For corporate travel, security, HR, risk and legal professionals responsible for a company's Duty of Care to traveling employees and expatriates, a review of the company's travel risk management program is an essential part of a comprehensive Duty of Care assessment.

When assessing Duty of Care obligations, organizations should consider the following travel risk management elements:

- **Insurance.** At a minimum, every employer should be insured for travel-related risks. This insurance protects the company from significant economic impact due to an incident. Whether self-insured or purchasing insurance through a carrier, employers typically need to quantify their travel programs to measure risk. For example, they should know how many employees travel; how often; whether they go to high-risk destinations; if so, where they go; use of vehicles, etc. These data generally drive insurance premium costs and should help define corporate travel policies and practices.
- **Corporate Travel Policies.** Written, communicated to employees and available for review, a corporate travel policy should define who can travel, how to book trips and the approval process. A sound corporate travel policy highlights risk-related restrictions and requirements such as consequences for out-of-policy business travel; training required for travel to high-risk destinations; tools to monitor and communicate changing threats to domestic and international travelers; ground transport policies and vendors; and a list of the company's preferred airlines.

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- **Travel Management Company (TMC).** Do your employees know how to book travel with the company's preferred TMC? What are consequences for employees who do not? When an employee books travel or accommodation without regard to company policy, it can be very difficult to track and contact that employee in case of an emergency. As a result, many companies restrict travel reimbursement to those trips booked through preferred TMCs. Some provide for manual entry of out-of-policy travel into a traveler tracking system for those trips not managed by the TMC.
- **Destination Intelligence.** To stay out of harm's way, employees need up-to-date information about the threats they may encounter during their trip. Pre-trip information about the intrinsic threats (security, health, weather, transportation) of a particular location is important — as are updates to changing situations as they unfold. In addition, travelers and expatriates need timely, actionable information before, during and even after a trip to help keep them safe while away from the home work site and to help them react quickly if help is required.
- **Airline Safety.** In 2006, the European Union first published its "Black List" of unsafe airlines, those airlines prohibited from flying or restricted in their flights within European airspace. While the Black List is specific to the E.U., many airlines on the list operate outside the E.U. Companies and employees have ready access to this airline safety information. Acting on knowledge about unsafe carriers can ultimately reduce the severity of airline incidents, as well as avoid corporate liability for employers who know — or should have known — about the risk but still permitted employees to travel on unsafe airlines.
- **Number of Employees on a Flight.** One way to contain corporate exposure is to limit the number of employees who are permitted to travel on one flight. How is the company monitoring the number of people on booked flights? Who is responsible for acting if a threshold is exceeded? Check the traveler tracking technology in place for automated notification capability. Ensure that the notification feature is engaged for those who need to know.
- **Hotels.** In a preferred hotel program, a company negotiates favorable rates with specific hotels and then asks or demands that employees stay at these properties. Such practices are a standard component of corporate travel programs. However, mandating hotel choices can expose employers to greater liability if something goes wrong. It is therefore important to take into account safety and security factors when selecting hotels. Information such as presence of hard-wired smoke detectors in every guest room, adequate emergency lighting, locking devices on windows and doors and even crime in surrounding neighborhoods, is generally available from the hotel chains providing your lodging.
- **Ground Transport.** Statistically, corporate travelers are at greatest risk of fatality while driving. Check your policies and providers for transporting travelers within cities or countries with high security threats. Remember to review your policies regarding driving following a long-haul flight, when travelers are most likely to be fatigued behind the wheel. Some companies are implementing taxi or limo services to drive employees home after a long business trip.
- **Hotlines.** Despite the best preparation, even a seasoned traveler may find him/herself in trouble on the road. Each traveling employee, expatriate and expat family member should know whom to call if something goes wrong. Most companies have multiple response vendors — for medical assistance, security evacuations, kidnapping response and IP theft. Many companies, though, are consolidating their response under one global hotline so their employees are not left wondering which phone number to call in a time of need. Hotline staff should be equipped with your company's unique protocols and vendor information, engaging a response appropriate to each caller's needs and the company's policies.



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- **Benchmarking for Standard of Care.** Duty of Care does not define specific travel risk management policies for organizations. It does, however, consider Standard of Care, which compares the policies and procedures of one company against those of its peers in the industry. If peer employers are capturing itineraries for traveler tracking, providing pre-trip information, keeping travelers and expatriates aware of new risks and providing emergency assistance support, any employer who is not doing the same is putting itself at risk. Consultants may be hired to conduct a formal benchmarking. The National Business Travel Association (NBTA) Foundation has also introduced a Travel Risk Management Maturity Model (TRM3), developed by iJET International, to collect benchmarking data across industries. At a minimum, organizations should be informally comparing their programs to their peers, to ensure that they are keeping up with the standards being set in their industries.

THIRD: CHANGE, TRAIN AND COMMUNICATE

Even the best risk management policies are not enough to meet the Duty of Care requirements. These policies must be widely communicated, accepted and followed across the enterprise. Corporate policies are often covered as part of a new employee orientation and available on a company intranet. But policies, and in particular changes to policies, must be communicated to employees more than once for them to be remembered. Effective communication typically involves more than one outlet, with emails, employee newsletters, posters in common areas and voicemail messages all playing a part, depending on the communication channels that work best in your organization. To be effective, the policies must also be integrated into business processes. It should be easy for everyone involved in a particular functional unit — employees, managers, corporate managers, security personnel, external vendors, etc.— to do the right thing, every time.

MOVING FORWARD WITH DUTY OF CARE

As organizations extend their operations globally, their risk profiles similarly expand. Particularly within emerging markets, employees and other stakeholders are exposed to a greater number and variety of risks. Ensuring the safety and resiliency of operations becomes a central business function under these circumstances. It is not surprising, therefore, that surveyed executives increasingly see their risk areas as key drivers of long-term profitability. Mitigating threats to personnel no longer represents a second- or third-order management priority. Rather, risk management, and with it core concepts including Duty of Care, is increasingly becoming an integral part of enterprise resource planning. Already, Duty of Care acts as an important driver within forward-leaning organizations focused on transitioning their risk functions away from simple compliance and toward business performance.

Duty of Care is here to stay. Laws like the Corporate Manslaughter Act in the U.K. and the Model Work Health and Safety Act in Australia are part of a broader international trend toward expanding organizations' responsibilities to their employees and other stakeholders. Failure to meet these obligations can expose an organization to liability in the case of harm to an employee and, in some cases, individuals who are not employed by a company but can be reasonably assumed to be within a firm's realm of responsibility. Given these changes, taking a proactive approach toward developing and implementing Duty of Care practices can help to ensure compliance while optimizing an organization's enterprise risk management strategy, giving it a competitive advantage.

References:

¹ Hill, G. N., & Hill, K. T. Hill (2009). Nolo's Plain-English Law Dictionary (1st Edition). Berkley, California. NOLO.

² Corporate Responsibility and Health Care Quality: A Resource for Health Care Boards of Directors (2007). The Office of Inspector General of the U.S. Department of Health and Human Services and The American Health Lawyers Association.

³ "Employers' health and safety responsibilities," March 2012. www.direct.gov.uk/en/Employment/HealthAndSafetyAtWork/DG_4016686

⁴ "Occupational Health & Safety Administration: About OSHA." <http://www.osha.gov/about.html>

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About iJET

Driven by Intelligence. Powered by Technology. For over a decade, iJET has delivered operational risk management solutions to multinational corporations and government organisations around the world. Integrating world-class open source intelligence with award-winning risk management technology and global response services, iJET provides more than 500 clients with the strategic support they need to anticipate, respond to and emerge from business disruptions with a competitive edge. iJET's unique combination of people, products, purpose and passion help us deliver intelligent risk management solutions.