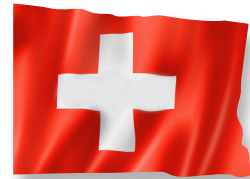


POLICY PAPER

Can you get sued in Switzerland?



The rights and obligations of Swiss companies and organisations vis-à-vis their travelling and expatriate staff

Michel Chavanne
attorney
r & associés, Lausanne

**Security
Management
Initiative**

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Where work is being done in a dangerous environment this paper should not replace or supplement the provision of specific legal advice, nor is it designed to be used directly by employers or employees for managing human resources. The paper should not be relied on exclusively, as it is not as exhaustive or complete as certain complex situations may require.

The masculine form is used merely simplify the text. No discrimination is intended.

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ABOUT THIS PAPER

This paper deals with the rules on employee protection in Swiss law that apply to employers, especially organisations working in high-risk and dangerous (complex) environments. It forms part of the follow-up to the review entitled “*Can you get sued? Legal liability of international humanitarian aid agencies towards their staff*”, published by SMI in 2011.¹

SMI’s 2011 paper looked at the legal situation in five countries – France, Italy, Great Britain, the United States and Sweden – and concluded that, in each of them, besides their moral and ethical concerns about the wellbeing of their teams of employees, international aid agencies were bound by legal standards and rules on the duty of care and the liability arising from employer/employee relations in their respective States.

ABOUT THE AUTHOR

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We would like to express our gratitude to the Swiss Federal Department of Foreign Affairs, SMI’s main sponsor. The paper has also received support from International SOS,² whose publications on the duty of care³ were also used as a reference in the drafting of this review.

¹ KEMP Edward & MERKELBACH Maarten, *Can you get sued? Legal liability of international humanitarian aid workers towards their staff*, Security Management Initiative, Geneva, 2011.

² www.internationalsos.ch.

³ CLAUS Lisbeth, *Le devoir de protection des employeurs à l’égard des expatriés, de leurs personnes à charge et des voyageurs d’affaires*, International SOS, 2009 and CLAUS Lisbeth, *Duty of Care and Travel Risk Management Global Benchmarking Study*, International SOS, 2011.

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The stakes

In a globalised world in which everyone is more and more mobile – everybody, whether they be employees or employers, who can and must move about in what can be volatile, unstable and sometimes even dangerous political environments – employment law necessarily plays an important role. Some claim rights, others insist on obligations, each knowing they will have to find a way to work together and, from time to time, deal successfully with the incidents, the snags, the accidents and, sometimes, the major problems that tend to crop up.

Nothing can be taken for granted when it comes to employment law, even in a legal system like Switzerland's, which is considered to be relatively stable.

The aim of this paper is two-fold: on the one hand, to raise employers' awareness of their responsibilities in terms of their duty of care towards their employees; and on the other, to suggest practical ways of reducing the risk of infringements of an employee's personal rights, in particular in the light of the case-law of the Federal Court and certain cantonal courts.

A priority in drafting this paper has been to make it accessible to executives, managers and human resource officers in any organisation working with people who travel, become expatriates or change home, often from one country to another.

In Switzerland, legislation and case-law on employment issues rarely distinguish between employers: a business firm, a humanitarian agency and an organisation for journalists posted to dangerous areas will all be treated by and large in the same way when it comes to employment law or social insurance.

Under Swiss law, international aid agencies' liability under employment law is identical, in both legislation and case-law, to that of any other employer, whether a multinational or a small or medium-sized enterprise.

Where the duty of care is concerned, the Swiss courts are swift to impose increasingly strict standards on employers, including those pursuing idealistic aims, as in a case heard by the Federal Court in May 2012.⁴

In Swiss law, an employer's liability as regards the duty of care is not contingent and does not depend on a company's legal structure, still less on that company's aims, whether idealistic or otherwise.

⁴ See Federal Court Decision 2C_462/2011 of 9 May 2012, recital 5.2, in which it was ruled that an association acting as a secretariat for professional associations should create and draw up rules for the intervention of trusted individuals outside the hierarchy so that staff could turn to them in the event of a dispute.

Below, very briefly, we give the main conclusions of the review.

The applicable law

First and foremost, it has to be said that deciding which law is applicable to a work relationship is not easy, especially in international situations.

The parties to an agreement – i.e., the employer and the worker – may agree, on certain conditions, to apply certain national rules. Where the parties have made no decision, Swiss law provides that in principle the law that applies is the law of the State in which the worker habitually carries out the work in question.

In any case, it should be pointed out that foreign law can never be applied if it would produce an outcome that is absolutely incompatible with the Swiss legal system.

The appropriate court

Generally speaking, the Swiss courts will claim jurisdiction in legal actions taken in the place of the defendant's domicile or the place where the worker's tasks are usually performed.

An employer's obligations arising from the duty of care

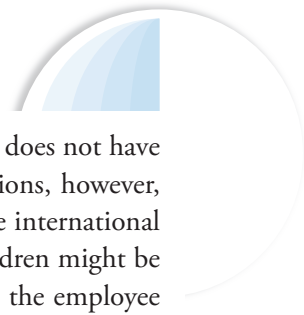
In Switzerland, employment law is made up of a set of rules from private law and public law. When dealing with any particular case, all these rules must be examined.

With cases relating to work outside Switzerland, extra care must be taken when examining the duties of an employer. By virtue of Article 328 of the Swiss Code of Obligations (CO; RS 220), which is the main point of reference in Swiss law, an employer's overall duties are as follows:

- duty of information;
- duty of prevention;
- duty of monitoring/ensuring the rules are followed;
- duty of intervention.

How an employer intervenes, and how strongly, will depend on a range of factors (the organisation's aims, the employee's ability and experience, the work environments, the knowledge of the organisation and the other enterprises involved in the same sector) and will have to be judged against the principle of proportionality.

Thus the higher the risks for the employee, the more the employer's intervention will need to be resolute and determined, perhaps even intrusive, for the employee, who will have to comply with their employer's instructions.



Generally speaking, it must be assumed, obviously, that an employer does not have responsibility for an employee's spouse or children. There are situations, however, in which an employer must act on their behalf, especially in sensitive international settings where the physical or mental wellbeing of the spouse or children might be jeopardised. Most probably this will also apply to any other partner the employee lives with.

Among the risks employers are often not aware of, and which deserve mention, are their responsibility for travelling employees and the application – albeit partial – of the duty of care after the work relationship has ended.

Where they have failed in their duty of care, employers and their representatives – especially decision-making bodies – must face various penalties. In civil cases, this will mainly entail making reparation for the damage and intangible harm caused. Penalties may also be imposed not just by the administrative authorities but also under the criminal prosecution system, and in fact after accidents, incidents or even harassment, it is not uncommon to see the prosecution authorities conducting enquiries that can lead to criminal penalties.

The employer's rights

The main article dealing with the rights of an employer in Switzerland is Article 321a CO, the counterpart to Article 328 CO, its mirror image.


Workers must carry out the work entrusted to them with care, and must loyally safeguard the employer's interests. This duty of diligence, like the employer's duty of care, can and must be specified in the contract, taking into account the professional risk, training, technical know-how, the job in question, the level of responsibility and the objectives stated in the contract.

Depending on the circumstances, employees are themselves bound to comply with the measures to ensure greater safety and reduce risk, in the same way as with precautions on building sites. Failure to comply with these measures may force an employer to impose sanctions up to and including dismissal with immediate effect (Art. 337 CO).

Conclusions, recommendations and observations

In conclusion, it should be noted that employers have probably broader responsibilities than some of them would expect, in particular in international environments and where partners and next of kin are concerned.

Among our recommendations, we would like to stress the prevention that every employer must demonstrate: employers must seek legal advice, get information about working conditions, analyse operating environments so that they can both take preventive measures and respond appropriately if there is an accident or a problem. Greater prevention means fewer disputes and, therefore, less involvement in court cases.



To make action plans more effective, and to defend its rights as strongly as possible in the event of a dispute, an employer must at all times be able to show that it has taken the appropriate measures, if necessary through full documentation and the drafting of suitable measures.

Finally, it should be said that the duty of care is more than a moral or ethical duty: it is a legal obligation and probably the foundation stone on which the representatives of an enterprise can build a human resources policy. Not surprisingly, this policy will be based on conducting a thorough risk analysis, deciding on the steps to be taken, and monitoring of them, and having the capacity to respond appropriately should these risks materialise.

Given these requirements, it is easy to understand the emergence, in enterprise circles, of employees with responsibility for hygiene, health and environment work.

I. INTRODUCTION

This paper looks at the rules in Swiss law that govern employers in relation to the protection of their employees, in particular as they concern bodies working in high-risk and dangerous (complex) environments. It follows up on the paper published by SMI in 2011,⁵ and makes no claim to dealing fully or exhaustively with the duty of care.

The responsibility vested in employers has wide-ranging consequences that go beyond the strictly legal aspect: although this is not the purpose of what follows, it should also be borne in mind that failure to fulfil the duty of care carries additional consequences such as loss of reputation, damage to national and international reputation, and undesirable effects on team morale and the recruitment of staff, as well as fund-raising.

II. LAW APPLICABLE IN SWITZERLAND AND THE JURISDICTION OF THE COURTS

It must be stated at the outset that here we will be dealing only with the Swiss rules applicable to work relationships, without taking into account other rules that might apply in a particular case on the basis of foreign elements. Still, it may be worth giving some references to the law applicable in Switzerland and the jurisdiction of the Swiss courts in the case of a work relationship in an international environment.

1. The law applicable to an individual employment contract

Since for lawyers the question of the law applicable to an employment contract with an international dimension is a very delicate one, the responses of national legal systems are partial, sometimes contradictory and, above all, riddled with uncertainty.

Here we are dealing with what is known as a conflict of laws: several laws from different countries may turn out to apply to the contractual relationship between an employer and its employee; on the other hand, it may also happen that no law applies, thereby creating a legal vacuum.⁶

In Switzerland the federal legislation on international private law (LDIP; RS 291) is the main legal text on this subject. In employment law, a distinction is made between the situation where the parties have agreed on the applicable law, and where they have not.

⁵ See Footnote 1.

⁶ DONATELLO Giuseppe, "Le droit applicable au contrat de travail", in Rémy Wylser (éd.), *Panorama en droit du travail II*, Stämpfli Editions SA, Berne 2012, pp. 109 ff.



a. Where the parties have agreed on the law applicable

To prevent abuse, and above all to prevent people from circumventing the application of Swiss law, the parties to an employment contract have very limited autonomy when it comes to deciding which law is applicable.

Pursuant to Article 121(3) LDIP, the parties to an employment contract may be subjected only to the law of the State in which:

- the worker has his habitual residence,⁷
- the employer has his establishment,⁸ or
- the employer has his domicile.⁹

To rule out any uncertainty about which law is applicable, it is undoubtedly preferable for the parties to choose the law, even though the Swiss legal system gives only limited autonomy.

b. Where the parties have not agreed on the law applicable

Where the parties have not agreed on the law applicable, Swiss law provides that in principle it is the law of the State in which the worker habitually carries out his work that applies (Art. 121(1) LDIP). Thus for the law of another State to apply, it is not enough for the worker to work there from time to time.¹⁰

If the worker habitually carries out his work in several States, the employment contract will be governed by the law of the State of the employer's establishment or, where there is no establishment, the employer's domicile or habitual residence (Art. 121(2) LDIP).¹¹ In exceptional cases, however, Article 117 LDIP could impede the application of Article 121 LDIP: Article 117(1) LDIP provides that in the absence of a choice of law, a contract will be governed by the law of the State with which it shows the closest links.

Given the above rules, it is our view – even if this is contradicted by some¹² – that there is justification for also applying the provisions of Swiss law on health protection in the case of work abroad, on two conditions: provided both the worker's domicile and the employer's headquarters are in Switzerland. The worker would then be assured of having a minimum of protection, such as it is understood in Switzerland.

It must be remembered that the application of foreign law may be ruled out if it would produce an outcome incompatible with Swiss public policy (Art. 17 LDIP).

⁷ Pursuant to Article 20(1)(b) LDIP, a physical person has his habitual residence in the State in which he lives for a certain period, even if this period is at first glance limited.

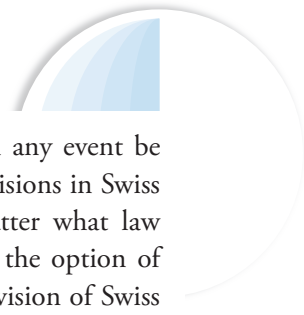
⁸ Pursuant to Article 21(4) LDIP, a company is established in the State in which it has its headquarters or in a State in which it has one of its branches.

⁹ A company's headquarters is deemed to be in the place referred to in its articles of association or partnership agreement (Art. 21(2) LDIP).

¹⁰ GEISER Thomas (Lüthi Jean-Jacques), "Art. 1", in: Thomas Geiser, Andrian von Kaenel, Rémy Wyler (éd.), *Commentaire de la Loi sur le Travail*, Stämpfli Editions SA, Berne, 2005, pp. 26 ff., esp. pp. 33 ff. on the subject of paragraph 3.

¹¹ For the application of this rule by the Federal Court in a recent case, see Order 4A_559/2008 of 12 March 2009, letter A.a.

¹² GEISER Thomas, *op. cit.*, Notes ad Art. 1, pp. 39 ff.



Where an employer fails in the duty of care, a Swiss court may in any event be expected to apply Article 18 LDIP laying down the mandatory provisions in Swiss law which, because of their particular aim, are applicable no matter what law is indicated by the LDIP. By this means, a Swiss court always has the option of applying Article 328 CO which is, in fact, a “quasi-mandatory” provision of Swiss law: no deviation shall be made to the detriment of the employee (Article 362 CO).

2. The court with jurisdiction

When the setting for the work relationships has been an international environment, the question of deciding which court has jurisdiction is just as sensitive as that of deciding which law is applicable.

According to Article 115(1) LDIP, the Swiss courts of the defendant’s domicile or the courts of the place in which the work is habitually performed have jurisdiction to hear cases relating to the employment contract.

A worker may even bring an action before the court of his place of domicile or his habitual residence in Switzerland (Art. 115(2) LDIP).

The application of LDIP, in particular the rules set out in Article 115 LDIP, may, however, be set aside in favour of international agreements ratified by Switzerland, such as the Lugano Convention¹³ or the bilateral agreements signed with the European Union.

¹³ RS 0275.12.



III. AN EMPLOYER'S DUTIES WITH REGARD TO THE DUTY OF CARE

The duty of care, as we understand it in this paper, presumes that both natural persons and organisations have a legal obligation to act towards others with prudence and vigilance in order to prevent any risk of foreseeable damage.

Before dealing specifically with what this duty entails, it is important to give a summary of the rules applicable under Swiss law to work relationships.

1. Employment law in Switzerland

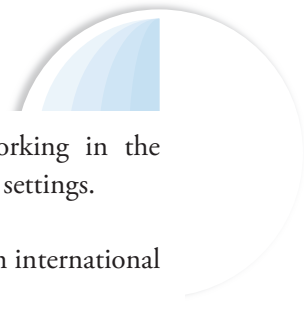
Employment law in Switzerland consists of a set of rules from both private and public law, which may be characterised as follows:

- private law of employment, that is, primarily, Articles 319 to 362 of the Code of Obligations. All amendments to the CO are the subject of a communication from the Federal Council or other reports – documents that are extremely useful when it comes to analysing these rules;
- collective labour law: this is a particularly important form of law in Switzerland. Those wishing learn about it are directed in particular to Articles 356 to 358 CO, to the federal law extending the scope of application of the collective bargaining agreement, and to the collective bargaining agreements between representatives from the trade unions and from employers' organisations;
- public employment law (health protection): this consists of a set of laws, orders and directives designed to protect health or prevent distortion of competition. Of the dozens, or even hundreds, of texts in this field, the main ones are as follows:
 - the federal law on employment in the industrial, craft and trade sectors (LTr; RS 822.11) and its orders;
 - the law on equality (LEg; RS 151.1);
 - the social security laws (for example the law on accident insurance, LAA; RS 832.20).

When it comes to the particular issue of the duty of care, as we will see, these distinctions between private law and public law – which are essential when it comes to matters such as social contributions or a worker's illness or accident benefits – ultimately have little practical impact, especially since the Federal Court decided that is Article 328 CO can be understood as a concretization of some provision of public law.¹⁴

While case-law on the duty of care is quite plentiful in Switzerland, to the best of our knowledge there is no specific decision on this duty in the context of work

¹⁴ ATF 132 III 257



relationships in multinationals or humanitarian organisations working in the international arena, even though some cases do involve international settings.

To summarise briefly, the following work situations tend to arise in an international setting:

- secondment: employees are sent abroad on secondment for a short period. They keep their initial employment contract, but an amendment is added to it;
- expatriation: employees are sent abroad for a fairly long period. Their employment contract may be suspended, in which case a new contract will be signed with the branch in the host country;
- a local contract: employees are sent abroad for an indefinite period, and their original employment contract is terminated by headquarters. The workers sign an employment contract directly with the branch in the host country and, for the time being, have no further contractual links with headquarters;
- a business trip or posting abroad: staff must travel abroad for a limited period, sometimes very frequently, to perform a task arising out of their employment contract.

Whichever law is applicable, it is important for every employer to attach particular importance to the mental and physical health of its staff. In addition to common conditions such as burn-out and depression, because of their work environment the staff in these organisations can also be more exposed to other problems, both physical (petty crime, hostage-taking, the risk of war or traffic accidents) and mental (in particular, post-traumatic stress disorder).¹⁵

2. Article 328 CO

When discussing an employer's duty of care, the basic reference point in Swiss law is unquestionably Article 328 CO.

By setting out an employer's duties in very general terms this article gives great leeway to all the parties concerned – employers and employees, obviously, but also judges. Judges can occasionally make surprising decisions when it comes to the duty of information, duty of prevention, duty of monitoring or duty of intervention. The application of the proportionality principle has, admittedly, meant that employers can only be required to do what is “economically feasible” for their enterprises; but as

¹⁵ Post-traumatic stress disorder (also known as posttraumatic stress syndrome, PTSS) is a severe anxiety disorder that can develop after exposure to any event that is experienced as being traumatic. It is a psychological reaction to a situation in which the physical and/or psychological wellbeing of the patient and/or someone connected to them has been threatened and/or effectively damaged (in particular by a serious accident, violent death, rape, assault, serious illness, war or an attack). The immediate reaction to the event will have been expressed in intense feelings of fear, helplessness or horror. PTSD is sometimes caused by acute stress as a reaction to an anxiety-inducing situation, but it can also appear much later (after several weeks, or months). While a fragile psychological or psychiatric state (e.g. depression or anxiety) may increase the risk of developing post-traumatic stress, a traumatising experience on its own may cause this condition to appear in people who have no previous history of it (cf. definition in Wikipedia: http://en.wikipedia.org/wiki/Posttraumatic_stress_disorder, consulted on 13.9.2012).



soon as an employee is injured by a machine, or taken hostage – with consequences which, as we know, can be fatal – then we see that this concept of proportionality is more likely to be interpreted to the detriment of employers, who cannot simply invoke fate, or plead their good faith or the risks inherent in the work of their enterprise.

Article 328 CO is what is known as a “quasi-mandatory” article in Swiss law, meaning that there can be no exceptions to the detriment of the employee (Article 362 CO). It defines the essence of the care due from every employer to their staff in the following terms:

1. In their work relationship the employer shall protect and respect the person of the worker; he shall show due consideration for his health and shall ensure respect for morality. In particular, he shall see to it that the workers are not sexually harassed and that, if they are, they are not put at a disadvantage as a result.
2. To protect a worker’s life, health and personal wellbeing he shall adopt the measures dictated by experience, applicable measures corresponding to the state of the art and adapted to the conditions of the holding or household, insofar as may be fairly required of him having regard to the work relationship and to the nature of the work.

This duty of care which, as previously indicated, is the corollary of the employee’s duty of loyalty (Art. 321a CO), is a very general one and has had to be given concrete definition by the courts. Depending on the circumstances, in order to protect the personal rights of its staff the employer must either take measures (preventive or supporting measures) or refrain from taking measures (limits on the power to give instructions that would run counter to the duty to protect the employees’ health).

The employer is thus bound to ensure that no damage is done by the company’s decision-making bodies, by supervisors, by other staff members,¹⁶ or indeed by third parties such as external contractors,¹⁷ suppliers or even clients.¹⁸

In parts of the world where hostages have been taken or where there are high rates of homicide, an employer thus has a duty to take the necessary measures to safeguard employees from such attacks on their person.

Article 328 CO imposes no obligation as to result, in the sense understood by lawyers: the employer’s priority must therefore be to their **obligation of diligence** to avoid being liable for the damage caused.

Protection of the person within the meaning of Article 328 CO encompasses mainly the following aspects:¹⁹

¹⁶ ATF 127 III 351 recital 4b = JT 2001 I 369.

¹⁷ THÉVENOZ Luc, “N 7 ad art. 101 CO”, CR-CO I, Hebling & Lichtenhahn, Bâle, 2003.

¹⁸ SUBILIA Olivier / DUC Jean-Louis, *Droit du travail, éléments de droit suisse*, Editions BIS & TER SNC, Lausanne, 2010, pp. 313 ff.

¹⁹ CARRUZZO Philippe, *Le contrat individuel de travail, Commentaire des articles 319 à 341 du Code des obligations*, Schulthess Éditions Romandes, Zurich/Bâle/Genève, 2009, pp. 273 ff.; SCHEIDEGGER Hans-Ulrich / PITTELOUD Christine, “Art. 6”, in: Thomas Geiser, Andrian von Kaenel, Rémy Wyler (éd.), *Commentaire de la loi sur le Travail*, Stämpfli Editions SA, Berne, 2005, pp. 111 ff.

- The protection of overall health, both physical and mental, including a duty of prevention in relation to the work environment;
- The safeguarding of personal and professional honour;
- An employer's duty of aid and assistance, for example in the event of interpersonal disputes within the enterprise;
- A ban on psychological and sexual harassment;
- The protection of privacy;
- Equal treatment.

Article 328 CO thus has a very wide scope, going beyond the duty of care as it is understood in other legal systems.

The extent of the protection effectively provided by Article 328 CO must be examined on a case-by-case basis, however, having regard especially to the work environment and the risks run, together with the worker's experience and knowledge.

3. The Law on Employment and its orders, and social insurance law

The law on employment, which forms part of public law, applies to the vast majority of Swiss employers and employees.

Whether or not it applies to workers in Swiss enterprises who are employed abroad is still an open question. The same uncertainty applies to Order 3 concerning the law on employment (OLT 3; RS 822.113), which specifies the measures an employer must take in order to prevent any damage to workers' physical or mental health.


Article 2(1) OLT 3 provides in particular that the employer must ensure that:

- a. ergonomically and hygienically, the working conditions are good;
- b. health is not damaged by physical, chemical or biological influences;
- c. efforts that are excessive or too repetitive are avoided;
- d. the work is properly organised.

Some legal authorities agree that Article 6 LTr,²⁰ whose content is very close to that of Article 328 CO, must be interpreted in exactly the same way.²¹ This means that there is a unified concept of the safety obligation applicable to both private and public law.

²⁰ See Appendix 2.

²¹ SCHEIDEGGER Hans-Ulrich / PITTELOUD Christine, *op. cit.*, p. 126.



The courts have no hesitation in incorporating rules from public law into Article 328 CO: public law thus forms part of the relationships in private law into which it is incorporated, thereby making this distinction between private and public law very often an artificial one.

Unlike Article 328 CO, Article 6 LTr allows a worker to turn to the law enforcement authority which, if it sees that the health of one or more workers is inadequately protected, may ask the enterprise concerned to take the necessary steps. When they have a contract, workers do not have to intervene personally in order to verify the application of Article 328 CO.

Article 6 LTr gives the cantonal supervisory authorities the power to intervene, a power not given by Article 328 CO.

4. What the duty of care entails under Swiss law

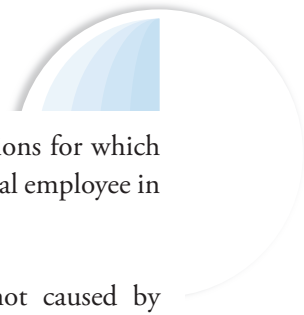
By virtue of the duty of care it is generally acknowledged that, whatever rules are applicable, employers have a responsibility to safeguard workers' lives, health and personal wellbeing. Concretely, this means that employers have:

- A duty of information: employers must inform workers of any unusual risks the latter may not be aware of and of the steps they must take to avoid them. The extent of the duty of information varies from one case to another. In practice it will depend on the work environment, the type of risk run, a worker's experience and knowledge, and the goals being pursued. Thus it might be felt that, for example, a worker leaving for a humanitarian operation in Haiti after the 2010 earthquake should receive more information about the situation in that country, the security conditions and the medical care available than a worker getting ready to settle in Singapore in 2011. Looking at it very pragmatically, all employers who have taken care to inform their employees properly about foreign postings are advised to sign, and get the workers to sign, a statement confirming that the latter have received all the appropriate explanations about the situation in their country of destination and that they have been able to ask competent, experienced people any questions about safety, living conditions, the health infrastructure and, in general, health risks in that country.
- A duty of prevention: employers must anticipate accidents and act accordingly. They therefore have a duty to prevent accidents, taking into account what may be envisaged in the normal course of events and making allowances for an employee's inattentiveness, or even carelessness. The employer must therefore anticipate.²²

More than forty years ago, the Federal Court was already sounding relatively demanding in what it required of an employer:

“(…) he must equip dangerous plant and machinery with suitable, state-of-the-art security devices (...). In addition, he shall be bound to instruct his employees on the risks to which they are exposed and to prescribe the behaviour they should

²² ATF 112 II 138.



adopt in order to avoid them. The nature and extent of the precautions for which an employer is responsible shall be largely determined by the individual employee in question, his training and his ability.”²³

The safety obligation includes the prevention of any accident not caused by unpredictable behaviour constituting serious misconduct on the part of the victim. Several years ago, in a tragic case where the owner of a villa had ordered weapons in his living room to be dusted without warning his employees that one of the pistols was loaded, and the gun went off unexpectedly, causing disability to an employee, the Federal Court found that the owner’s behaviour was at fault.²⁴

By analogy, it may be deemed today that employers working in delicate, sensitive international contexts must anticipate that hostages may be taken and that their employees may be among them. Of course, for readily understandable reasons, employers may observe a certain amount of discretion on the subject – all the same, that should not prevent them from looking ahead and preparing to deal with high-risk situations such as this.

Whether or not an enterprise has guidelines on how to act or react in the event of security problems is often a key factor in the eyes of judges responsible for examining the causes of an accident.²⁵ A lack of guidelines, or guidelines that do not meet the relevant requirements, could be taken as the result of negligence, or a refusal to face reality, on the part of the employer.

- A duty of monitoring / to ensure the application of the rules on the duty of care: even where employers have correctly instructed employees on compliance with certain rules they must ensure, through regular monitoring, that these rules are being followed. Employers must intervene to correct inappropriate behaviour. If there is a lack of monitoring, they may be held responsible. By way of example, one employer was convicted for having tolerated the behaviour of an employee who did not wear safety goggles and lost an eye as a result of this negligence.²⁶
- A duty of intervention: pursuant to Article 321d CO, employers have the authority to issue guidelines to ensure the protection of health and the prevention of accidents. In this context, employers must, however, act in a manner compatible with the requirements of Article 328 CO.

In principle, these guidelines and instructions issued by a particular employer cannot interfere with workers’ lives outside working hours, and some writers insist that employers are not entitled to issue such guidelines for workers’ behaviour outside the enterprise.²⁷ In this context, even more than for work periods, it is important to be tactful: it is absolutely essential to respect the constitutional rights and mandatory rights of employees.


²³ ATF 95 II 132 recital 1.

²⁴ ATF 112 II 138.

²⁵ As an example: Federal Court Decision 4A_132/2010 of 5 May 2011.

²⁶ ATF 102 II 18.

²⁷ BRUNNER Christiane / BÜHLER Jean-Michel / WAEBER Jean-Bernard / BRUCHEZ Christian, “N1 ad art. 321d CO”, in: *Commentaire du contrat du travail*, Editions Réalités sociales, Lausanne, 2004, p. 72.



Depending on the situation, it can be important to make some adjustments to take account of the needs and nature of the enterprises. Exceptions must be made here for the so-called “entreprises de tendance” (Tendenzbetriebe, or enterprises with an ideological aim whose activities are spiritual or political). In a landmark decision,²⁸ the Federal Court acknowledged that a person who signs a contract with such an enterprise accepts a more demanding duty of loyalty, which means that even outside of their professional work they must avoid any behaviour that might damage the image desired by the enterprise. In such circumstances there is a heightened duty of loyalty (Art. 321a CO) which to some extent legitimises certain orders from employers with regard to employees’ behaviour in their free time. In the case in question, the Federal Court ruled that a workers’ union with strong left-wing sympathies could legitimately dismiss one of its managers, who was closely connected to what were regarded as right-wing political movements.²⁹

In our view, another exception can also justify employers’ guidelines that interfere with workers’ lives outside working hours, when a conflict of interests, or the work environment, require certain rules of behaviour to be followed in order to guarantee the safety of an employer or of the workers themselves. In some very tense situations (e.g. armed conflict, or areas with high rates of petty crime), rules of behaviour (or safety rules) are designed to make the behaviour of certain organisations and their employees predictable, in order to ensure greater security from criminality.

For these reasons, compliance with rules on going out, including at times outside working hours, with time limits or geographical ones, can appreciably reduce the risk of harm, be it physical (assault, wounding, murder, hostage-taking, etc.) or mental. In some circumstances, compliance with such rules can prove crucial, or even vital: one thinks for example of employees who go to such unstable regions only for employment, like some who work in oil extraction, the mining of mineral deposits or armed conflict (security firms, humanitarian agencies).

Ultimately, the message is clear: in each case, the various interests will need to be weighed up and a decision made on whether the intervention – or non-intervention – by the employer is acceptable.³⁰

In our view, employers may, unquestionably, punish a failure to comply with safety rules with a warning or even, in serious cases, dismissal with immediate effect (application of Article 337 CO).

Workers who fail to comply with safety rules are in fact jeopardising not just their own wellbeing (which the employer is supposed to protect) but also that of their colleagues, their supervisors, or even their employer. Given their obligations, employers may thus be left with no option but to punish, as clearly as possible, any (potentially) dangerous behaviour.

²⁸ ATF 130 III 699 recital 4.1.

²⁹ ATF 130 III 699 recital 4.2.

³⁰ DANTHE Marie-Gisèle, “Les limites de l’art. 328 CO au droit de donner des directives et de contrôler l’activité du travailleur”, in: Rémy Wyler (éd.), *Panorama en droit du travail*, Stämpfli Editions SA, Berne 2012, pp. 163 ff., esp. pp. 166 to 168.

5. The principle of proportionality³¹

The principle of proportionality plays a key role in the application of the duty of care. It is readily understandable that an employer should not be held responsible for every accident and every illness that may affect its employees. On the other hand, especially in cases where there is a strong likelihood that a disaster may occur – such as with asbestos or, for an organisation working in armed conflicts, the risk of war – employers nowadays are expected to take precautions and very decisive measures to prevent their staff, as far as possible, from being affected by an accident or illness. Thus the borderline between intervention and non-intervention is not clearly defined, and can vary depending on the time, the work environment, the economic situation, the frequency and seriousness of the risks, and the predisposition and experience of the workers concerned.

In applying the principle of proportionality, the Federal Court has several times specified that the measures to be taken must be economically feasible for the enterprise and their cost/benefit ratio must be reasonable in relation to their effectiveness. Thus if inexpensive measures allow the prevention of an accident that is quite unlikely to occur, they must be taken.³²

To find out whether an employer has fulfilled its obligations to protect health, it is not enough to refer to the knowledge of the enterprise concerned: one must also take into account its way of working,³³ the experiences generally of other enterprises in the same sector, and the advances made by the administrative authorities in both theory and practice.³⁴

Several years ago already, the Federal Court recalled that it was not very important to find out whether an employer knew the measures that should have been taken to avoid an accident: if an accident did happen the employer could be held responsible even if it did not know the measures to take, but should have known them.³⁵ It therefore comes as no surprise to read the following in a decision handed down by the Federal Court in 1996: “Save in the event of serious misconduct on his part, an employee does not have to bear the operational risks entailed in using machines that benefit the employer”.³⁶

When examining the principle of proportionality, should the enterprise’s aim – for profit or not for profit – be taken into account? Admittedly, on some occasions the Federal Court has underlined the fact that a worker’s bodily integrity cannot be sacrificed to the employer’s comfort or its desire to make a greater profit³⁷ – all the same, it is hard to imagine the Federal Court exculpating an NGO that installed machines as defective as those that injured an employee in a commercial enterprise,

³¹ PETERMANN Frank, ARV/DTA, 1/2005, pp. 1 ff; CARRUZZO Philippe, *op. cit.*, p. 279.

³² ATF 110 II 163.


³³ ATF 57 II 165.

³⁴ ZK, Art. 328, N. 18, p. 383.

³⁵ ATF 72 II 317, 57 II 65, quoted in ZK, ad 328, N. 18, p. 383.

³⁶ Federal Court Decision of 27 September 1996, reproduced in RFJ 1997, pp. 240 ff.

³⁷ See ATF 102 II 18: the same reasoning could be applied to a number of other decisions of the Federal Court, such as its decision to convict Aluminium Suisse S.A. in 1984 (ATF 110 II 163).



on the grounds that the NGO was a non-profit organisation.³⁸ The employer *a priori* undertakes the same duty of care whether the work is done on an oil rig or whether it involves a social activity for a category of disadvantaged people.

6. The special case of a worker's partner and children

1. Overall situation

Generally speaking, employers are under no special obligation towards a worker's partner or children, as there is no direct contractual relationship between the employer and the partners or children: the employment contract is binding only on the employer and the worker.

The fact remains, however, that in the event of a setback (for example if workers need to be evacuated from an area that has become too unstable and dangerous) the employer will be faced with more than a moral dilemma: what must be done with the worker's family – the partner, married or not, and children who have accompanied them?

Very often, in such circumstances, employers spontaneously treat the next of kin in the same way as the worker. It is felt to be a moral duty, the application of an ethical code: an employer could not, or should not, be content to evacuate a colleague while leaving their loved ones behind.

Legally, what are an employer's obligations in such a situation? The truth is, this is a question that has not greatly exercised lawyers, let alone judges. *A priori*, there are two possible solutions: address the issue in the employment contract, or apply the general principles of law. Thus, in application of Article 112 CO (stipulation for another), an employer could very well give contractual undertakings vis-à-vis a worker's relatives in an employment agreement, from which the partner and children could directly derive entitlements in their favour.

In general, where nothing has been settled in the employment contract, the employer is considered to bear only limited responsibility, based mainly on Article 41 CO and Articles 27 and 28 of the Swiss Civil Code (CC; RS 210). This is the extra-contractual liability and responsibility for personal protection that all individuals who have not signed a contract with one another must bear in their relationships.

The employers' liability towards the worker's partner and relatives can, though, derive from Art. 328 CO itself. Indeed, one easily imagines the stress and traumatizing situation a worker would experience, if his employer refused, for instance, to arrange for the evacuation of his partner and relatives. Such refusal could be qualified as a violation of the worker's own rights of personality and accordingly lead to a direct, contractual liability of the employer.

³⁸ ATF 90 II 227.

2. The situation with secondment, expatriation or a local contract

In the event of secondment, expatriation or a local contract, employees are frequently accompanied by a partner or children. It is in the interests of employers, for their part, to make living conditions during the period spent away from headquarters as attractive as possible, so that a good number of employees will make themselves available to work away from their usual workplace.

In practical terms, an employer's duties towards the next of kin are not clearly established.

When it comes to safety, it cannot not realistically be accepted that an employer should bear less responsibility for their employees' next of kin than for the employees themselves. By way of example, and as described above, if an employee has to be evacuated because of the tense security situation in the country they have been posted to, it is hard to imagine the employer refusing to make resources available for evacuating their partner and children too. As a result, the tenses the security situation, the more the employer will have to bear "contractual-type liability" for next of kin (see above).

By analogy with the employee's duty of loyalty (Art. 321a CO), which applies even more strongly to managerial staff,³⁹ in the event of secondment or expatriation the employer's duty of care must be considered more extensive than in a normal situation: this means that, in certain circumstances, employers cannot disregard the personal situation of employees or their next of kin. Employers must be very mindful not just of workers' physical and mental wellbeing, but also of the health and wellbeing of their next of kin. This extension of the duty of care will be all the more marked where an employer knew its employee's personal situation, had agreed to the presence of their partner and children in the place of work outside headquarters and had required the employee to comply with certain safety rules in the workplace.

A few years ago the Federal Court thus ruled that the seriousness of the danger and the ease with which it could be controlled were decisive: the employer's obligations would be assessed more severely if the risk was serious and if it was possible to mitigate these risks at no great cost.

In concrete terms, employers are required to give their seconded or expatriate employees a safe place in which to work and live, with safety conditions guaranteed for the workers, obviously, but also for all the next of kin accompanying them.

³⁹ Federal Court Decision 4A_558/2009 of 5 March 2010 reflecting case-law ATF 104 II 28, and also STAHLIN Adrian, "No 8 ad 321a CO", in: ZK, Zürich, 2006; PORTMANN Wolfgang, "No 14 ad 321a CO", in: BSK, Bâle, 2011. Still on this subject, see also ATF 130 III 28, dealing with the behaviour of managers which must be assessed more rigorously owing to the particular prestige and responsibility they derive from their position in the enterprise.



7. The case of the “travelling worker”

The case of a worker who has to travel to another country to perform certain tasks there is a very common one. These “travelling workers”, who are not always experienced, have not always wished or been able to prepare, and are not necessarily closely supervised by headquarters. This is clearly a category of workers at risk, for whom employers – often without realising it – bear just as much responsibility as they do for expatriates.

8. The duty of care after the end of a work relationship

An employer’s duty of care does not end on the last day of the period of notice for terminating the employment contract. Although the legal basis for this obligation is not clearly defined, the fact remains that Article 328 CO does apply “to a certain extent”, in the words of the Federal Court.⁴⁰

Among these residual obligations persisting past the date of termination of the contract is the employer’s duty of confidentiality in relation to external communication.⁴¹

Where employers know that their staff’s health has been endangered during the work relationship, they might reasonably be expected to inform the staff and perhaps, if necessary, arrange a medical examination. Over 30 years ago, however, the Federal Court refused to extend the employer’s duty of care in this way.⁴² The caution of our country’s highest court in choosing to apply the rules of contract law strictly, in the knowledge that predictability is one of the fundamental assets of a legal system, is understandable. Under certain circumstances such a position could, nonetheless, be perceived as too rigid, and bordering on the unacceptable.

9. Summary of the practical application of the protection principle

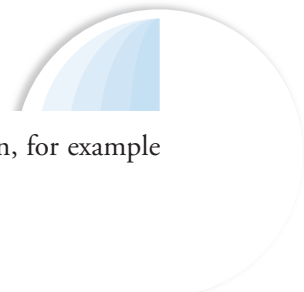
Very briefly, then, in our view the following four criteria should be studied by an employer concerned to take measures that will meet the requirements of Article 328 CO:

- a) The measures necessary according to experience;
- b) The measures corresponding measures corresponding to the state of the art;
- c) The measures proportionate to the circumstances;
- d) The measures acceptable in the case of the individual workers: the weaker and younger the workers are, the more decisive the measures will have to be; the more dangerous the environment they will be working in, the more their employer

⁴⁰ BETTEX Christian, “L’application temporelle de l’art. 328 CO”, in: Rémy Wyler (éd.), *Panorama II du droit du travail*, Stämpfli Editions SA, Berne, 2012, pp. 57 to 66, which proposes that at the end of a work relationship Article 28 CC should be applied rather than Article 328 CO.

⁴¹ Federal Court Decision 4C.379/2002 of 22 April 2003 and ATF 130 III 699 ff.

⁴² ATF 106 II 134 recital 3.



will have to take steps to protect them, and even their next of kin, for example where they have been posted far from home.

10. Penalties for breach of the duty of care

Breach of the duty of care can carry very heavy consequences. In the event of an accident or illness, an employer may incur both civil and penal consequences, in addition to possible administrative penalties.

Under civil law

Where employers have breached their duties relating to the protection of the lives, health or personal wellbeing of workers, their liability is governed by the general rules on contractual liability or extra-contractual liability in Swiss law.

In principle the burden of proof falls to the employee: it is they who must prove the employer's breach of the contract, the damage sustained and the causal link between these two elements.

In practice, however, after an accident it is often the employer who must show that they were not at fault and, in particular, that they have fulfilled all their obligations. This is an unacknowledged deviation from the legal system which has been pointed out by some specialists.⁴³

In the event of an accident or illness an employer may, certainly – at least to begin with – pass on the responsibility to any social insurance⁴⁴ or private insurance⁴⁵ they may have taken out. But, in all cases, a worker who feels aggrieved may bring an action for damages directly against the employer, for some or all of the damage suffered.

Anyone whose personal rights have been infringed is also entitled to compensation for intangible harm pursuant to Article 49 CO, but, here too, provided there is a causal link between the infringement of Article 49 CO and the intangible harm they have suffered.⁴⁶

The scale of the moral compensation varies depending on the seriousness of the harm done, but in Switzerland it remains especially when compared to the practice in other countries.⁴⁷


⁴³ STREIFF Uli / VON KAENEL Adrian / RUDOLPH Roger, *Kommentar zum Arbeitsrecht*, 2012, ad 328, no 16, p. 551.

⁴⁴ See in particular the following laws: LAA; Law on old-age insurance and survivors (LAVS, RS 831.10); Law on invalidity insurance (LAI; RS 831.20); Law on unemployment insurance and insolvency compensation (LACI; RS 837.0).

⁴⁵ See the law on insurance contracts (LCA; RS 221.229.1).

⁴⁶ CARRUZZO Philippe, *op. cit.*, p. 310.

⁴⁷ For some illustrations: CARRUZZO Philippe, *op. cit.*, p. 313-314.



Under criminal law (for an employer's decision-making bodies and representatives, for an organisation)

Where an accident or illness is attributable to an employer, the latter may also find itself accused of criminal offences such as negligent manslaughter (Art. 117 of the Swiss Penal Code, hereafter abbreviated as CP),⁴⁸ criminal negligence causing bodily harm (Art. 125 CP), endangering the life of others (Art. 129 CP), sexual acts with dependents (Art. 188 CP), or failure to install protective devices (Art. 230 CP). In this context, not only individuals as such (decision-making bodies, supervisors, managers or colleagues) may be punished, but also the enterprises themselves (Art. 102 CP).⁴⁹

Other public law legislation also lists the criminal consequences of infringements by employers of requirements such as the duty of care. Like the law on employment,⁵⁰ however, it appears that these criminal provisions⁵¹ are secondary in importance to the general criminal provisions mentioned above.

Under administrative law

Two laws in particular – the law on employment (LTr) and law on accident insurance (LAA) – grant the cantonal and federal administrative authorities the power to intervene.

The power to enforce the law on employment is set out in Articles 41 and 42 LTr. This power falls (in principle) to the cantons (Art. 41 LTr; cantonal bodies responsible for enforcing the LTr) and the Confederation (Art. 42 LTr; SECO,⁵² federal bodies responsible for enforcing the LTr).

Other laws, such as the Federal law on the employment service and the recruitment of services (LSE; RS 823.11), may also grant powers to the administrative authorities, including the power to impose sanctions.

The administrative authorities may impose wide and varied sanctions (fines, refusal of a work permit, suspension of operations, etc.), whose impact on an enterprise can be extremely damaging.

⁴⁸ RS 311.0.

⁴⁹ We are not aware, however, of any case in which Article 102 CP was applied.

⁵⁰ MOREILLON Laurent, "N° 3 ad art. 59", in: Thomas Geiser, Andrian von Kaenel, Rémy Wyler (éd.), *Commentaire de la Loi sur le Travail*, Stämpfli Editions SA, Berne, 2005, p. 626.

⁵¹ See Articles 59 to 62 LTr, and Articles 112 and 113 LAA.

⁵² SECO – the State Secretariat for Economic Affairs – is the Confederation's central authority for all issues to do with economic policy.

IV. THE EMPLOYER'S RIGHTS – THE EMPLOYEE'S OBLIGATIONS

1. In general

Although there is much case-law on employees' obligations it has to be said that, over the last twenty or thirty years, it has not had the same impetus, or been developed as much, as the case-law on employers' obligations.

In general, workers' obligations are dealt with in Articles 321 and following of the Code of Obligations.

These articles provide that a worker must perform the work in person (Art. 321 CO), has a duty of diligence and loyalty (321a CO), has a duty of notification and settlement (321b CO), may be called on to work additional hours or perform additional work (Art. 321c CO, Art. 12 LTr) and has a duty to comply with the employer's guidelines.

2. The employee's duty of diligence and loyalty

Generally speaking, Article 321a CO is to the worker what Article 328 CO is to the employer. Article 321a(1) CO provides that a worker must perform the work entrusted to him with care and must loyally safeguard the legitimate interests of the employer. This is what is also known, in other words, as the employee's duty of diligence and loyalty. This provision remains very general, however, and needs to be given concrete form.


The extent of the duty of diligence is stipulated in the contract, taking into account the work-related risk, the training or technical knowledge needed for performing this work, and the worker's aptitudes and qualifications (Art. 321e CO), and also what might be expected of a "normal, reasonable" person placed in the same situation.⁵³ In any event, the precise shape taken by the duty of diligence and loyalty will have to be defined on the basis of each individual contractual relationship and the actual circumstances.⁵⁴

This duty of diligence may consist either in a duty of abstention or in positive acts. By way of example, a worker on a building site who realises that a machine he is not responsible for represents a danger to other workers or third parties has a duty to intervene or to get experts to intervene in order to remove the danger, even if this duty of intervention is not written into his job description.

Employees are also no doubt duty-bound to ask their employer questions where they have doubts about a situation or have noticed that something is wrong.

⁵³ SUBILIA Olivier / DUC Jean-Louis, *op. cit.*, p. 120, esp. N° 6.

⁵⁴ STREIFF Uli/VON KÄNEL Adrian/Rudolph Roger, *op. cit.*, p. 171-172.



The duty of loyalty will be heightened if the worker acts as a manager or director:⁵⁵ managers, who are better paid and perhaps better trained, must take more responsibility within their work structures.

Here, by way of illustration, are some concrete cases where an infringement of Article 321a CO was recognised by the Federal Court:

- abuse of the internet that can impair work performance;⁵⁶
- incitement to falsify accounting records (bribes);⁵⁷
- disclosure of business secrets.

3. The employee's situation in the event of risk to the health and safety of employees themselves

The health and safety of employees has always been a concern of Swiss law, but – for primarily historical reasons – mainly in relation to accidents.

Thus in the sphere of accident prevention the Federal Court has indicated that the guidelines of the SUVA (Swiss national accident insurance fund) may be followed, where their aim is to inform employers of the various precautions and safety measures to take.⁵⁸

The law on employment (LTr), Order No. 3 of the LTr and the order on the prevention of work-related accidents and illnesses (OPA; RS 832.30) lay down precise requirements for ergonomics and health protection at work.

Workers that become aware that they are exposed to threats for their security or health will accordingly have to inform their employer, especially if these risks are high and may have important consequences for the physical and mental integrity of the employees.

4. Potential sanctions for infringements of Article 321a CO

Where there is an infringement of these obligations a worker may be held liable for damages and intangible harm (Art. 321e CO) or may be given disciplinary penalties up to and including a warning, or even, in the most serious cases, dismissal with immediate effect (Art. 337 CO). In some situations criminal sanctions may also be imposed, as happened to the worker subject to the law of employment who intentionally infringed certain provisions on health protection (Art. 60(1) and (2) LTr, Art. 113 LAA, Art. 333(3) CP). Sometimes a worker may even be incurred a criminal conviction for negligence (Art. 113(2) LAA).

⁵⁵ ATF 104 II 28.

⁵⁶ Federal Court Decision 4C.349/2002 of 25 June 2003.

⁵⁷ ATF 124 III 25 = JT 1998 I 127.

⁵⁸ ATF 114 IV 173 = JT 1989 IV 2.

V. CONCLUSIONS, RECOMMENDATIONS AND OBSERVATIONS

1. Conclusions

In Switzerland, employers are taking more and more responsibility for their employees. As in other countries, however, too little effort seems to be devoted to prevention. Some see this as an undesirable effect of legislation that is too general, such as Article 328 CO which, in addition to puzzling some employers, also gives little comfort to judges concerned for the security of the law.

The conclusions set out in the paper published in 2011 by SMI⁵⁹ are still valid: although addressed to international aid agencies, they reflected principles and requirements that affect every employer bound by Swiss law. As that paper found at the time:

1. Employers' obligations and responsibilities are not restricted to the requirements set out in written employment contracts. Over and above these requirements, employers may be subject to the provisions of private law, public law or criminal law, which may extend their liability.
2. Employees, and even their relatives, may bring proceedings against employers, including – where the employment contract is valid in an international environment – in foreign courts.
3. In some circumstances, decision-making bodies, managers or even the workers themselves could be held personally liable in the event of serious harm caused while the work is being performed.
4. In an international environment, defining the applicable law and the court with jurisdiction can be complicated: it is therefore advisable for the parties to take an interest in these questions.
5. The specifics of national law and sources of law will vary from one country to another. Nevertheless, some principles are common to all situations.⁶⁰

2. Recommendations

As in other countries, in Switzerland the nature and scope of employers' legal liability for the health and safety of their staff may seem disconcerting. Although it is not always possible to prevent compensation claims from employees or their relatives, it is desirable, nonetheless, to take steps to reduce risk. Employers must be able to show, in all circumstances, that they have acted responsibly, in other words that they have taken the necessary steps to protect the lives and safety of those who have been harmed. Only in this way can employers limit their liability in such a way that they can effectively oppose a compensation claim if it is lodged with a court.

⁵⁹ KEMP Edward / MERKELBACH Maarten, *op. cit.*, p. 50.

⁶⁰ For a demonstration of this conclusion, see for example CLAUS Lisbeth, *Le Devoir de Protection des employeurs à l'égard des expatriés, de leurs personnes à charge et des voyageurs d'affaires*, International SOS, 2009.



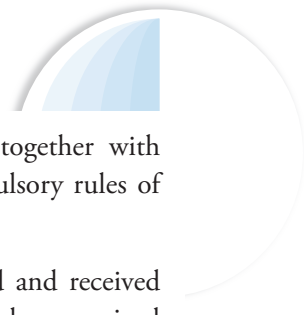
Combining as it does both legal and operational requirements, the following approach is recommended:⁶¹

1. Seek legal advice on national law and other legislation applicable to health and safety at work.
2. In each organisation, put one body or person in charge of all issues relating to compliance with the legal obligations and provisions applicable to health and safety in the workplace.
3. Analyse the general work environment of your organisation and define the related risks and threats.
4. Carry out surveys and assess the potential threats and risks created by the specific work environment in relation to each single programme of the organisation and the concrete tasks performed in that context.
5. These risk analysis should be routine and commonplace and should not be confined to the start of the activity, the deployment or the programme.
6. Define and implement the measures to reduce or eliminate risk (including training for teams, alarm systems, safety equipment, the rules and procedures to be followed, and supervision and instructions in relation to the risks, all in the required (or an appropriate) language).
7. Regularly revise the risk assessments and risk mitigation measures, to adapt them to the circumstances.
8. Envisage introducing additional protection in case of liability, such as the choice of applicable law and clauses on the jurisdiction of the courts or - as far as possible - exclusion of liability.
9. Have an action plan for dealing with emergencies or events affecting employees or their relatives (for example in relation to health, wellbeing, safety or the deterioration of the work environment). The plan's effectiveness will increase if it is regularly tested and put into practice.
10. Introduce remedial measures. These could include financial provision for compensation for damages (health, invalidity, injury, death, loss of income, treatment, etc.) caused to an employee, or to their next of kin. Organisations working abroad should envisage insurance cover suited to their respective work environments (war situation, security, violence, criminality, natural disasters, etc.) and should ensure proper cover for their employees.

In addition, all employers would be well advised to draw up and keep the relevant paperwork so that they can at all times show the following:

1. An assessment of the legal nature of their relationship with their staff in terms of the laws applicable, the possible choice of law and jurisdiction issues that may emerge (done for example by an outside legal adviser).

⁶¹ Another approach suggested is that described by International SOS in its publication entitled "Duty of Care and Travel Risk Management Global Benchmarking Study", 2011 (a summary of which may be found at http://www.internationalsos.com/en/files/Duty_of_Care_2011_Executive_Summary.pdf), where it gives 10 best practice recommendations for duty of care – see Appendix 4.

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2. Written contracts with staff/consultants/sub-contractors, etc., together with the staff rules and regulations showing, in particular, the compulsory rules of behaviour or safety rules.
 3. Signed consent from employees confirming that they have read and received the written contract and the staff rules and regulations, that they have received information on the environment in which they are to be deployed and the tasks they will be performing there, the risks associated with this environment and the risk mitigation measures the organisation has introduced, the health and safety guidelines, and the training they have received, and that they consider these measures being appropriate
 4. The requirement for staff members to renew their understanding of these documents periodically, and proof that they have done so.
 5. Risk assessments, including action plans and other measures taken to reduce or eliminate these risks.
 6. A valid, express delegation of authority (specifying those responsible and their responsibilities, supervision and monitoring), drawn up in writing and given to all those involved.
 7. A system for reporting incidents and processes involving the recording of any accidents or incidents that have not actually caused injury or death, but which might have caused them, together with any corrective or preventive action taken on these occasions.
 8. Documentation of the regular reviews of all policies and procedures currently in force meant to ensure they are up to date and of the amendments made.
 9. Proof that every employee sent abroad for work is covered by the employer's liability insurance and by insurance covering their needs in the event of illness or accident.

3. Closing observations

The issues addressed in this paper have very important implications for all employers. To conclude, we would like to highlight three of them:

1. The duty of care is not just an ethical and moral concern: it entails a legal obligation. Steps must be taken to comply with laws, regulations, rules and provisions that give relatively objective criteria as benchmarks.
2. Good practice and good governance constitute only a partial response to the duty of care: good governance loses all meaning if it does not take account, from the outset, of the obligations arising from the laws, regulations and guidelines that apply irrespective of an organisation's internal policy, and sometimes even unbeknownst to the organisation.
3. As the third and last conclusion, the key role played in this sphere by human resource officers within an organisation must be underlined. It is usually they who must – and, above all, who can – ensure that recommendations such as those listed above are implemented. Their role is vital.

ATF	Decision of the Federal Court (Arrêt du Tribunal fédéral)
Art.	Article
CL	Lugano Convention of 30 October 2007 (RO 2010 5609)
CP	Swiss Penal Code (RS 311.0)
JT	Journal des Tribunaux (Courts Review)
LAA	Law on accident insurance (RS 832.20)
LACI	Law on unemployment insurance and insolvency compensation (RS 837.00)
LAI	Law on invalidity insurance (RS 831.20)
LAVS	Law on old-age insurance and survivors (RS 831.10)
LSE	Federal law on the employment service and the recruitment of services (RS 823.11)
LTr	Federal law on employment (RS 822.11)
OLT3	Order No. 3 concerning the law on employment (RS 822.113)
OPA	Order on the prevention of work-related accidents and illness (RS 832.30)
RJF	Fribourg Review of Case-law (Revue Fribourgeoise de Jurisprudence)
RS	Systematic Compendium [of Swiss Federal Law] (Recueil systématique)
SECO	State Secretariat for Economic Affairs
SMI	Security Management Initiative

Art. 321a CO (Code of Obligations) – Due diligence and loyalty

- ¹ A worker shall exercise care in performing the work entrusted to him, and shall loyally safeguard his employer's interests.
- ² He shall be bound to use the employer's machines, work tools, technical plant and apparatus and vehicles in accordance with the relevant rules, and to treat them with care, together with the equipment made available to him for carrying out his work.
- ³ During the period of his contract a worker shall not do paid work for a third party insofar as it adversely affects his duty of loyalty and, in particular, entails competition for his employer.
- ⁴ During the period of the contract a worker shall not use or disclose facts intended to be kept confidential, such as trade or business secrets he has learned during his service to the employer; he shall be bound to secrecy even after the termination of the contract as required by the safeguarding of the legitimate interests of his employer.

Art. 328 CO (Code of Obligations) – Protection of the worker's personal rights

1. In general

- ¹ In the work relationship the employer shall protect and respect the personal rights of the worker; he shall show due consideration for his health and shall ensure respect for morality. In particular, he shall see to it that workers are not sexually harassed and that, if they are, they are not put at a disadvantage as a result of sexual harassment.
- ² To protect a worker's life, health and safety he shall adopt the measures dictated by experience, applicable in the state of the art and adapted to the conditions of the holding or household, insofar as may be fairly required of him having regard to the work relationship and the nature of the work.

Art. 6 LTr (Law on Employment) – Obligations on employers and workers

- ¹ To protect workers' health an employer shall be bound to adopt the measures shown by experience to be necessary, whose implementation is made possible by the state of the art and which are suited to the operating conditions of the enterprise. He must furthermore adopt all the measures necessary to protect the health and safety of workers.
- ² In particular, the employer must equip his plant and organise the workflow in such a way as to safeguard workers as far as possible from the dangers threatening their health and from overwork.
- ^{2bis} The employer shall also ensure that the worker is not forced to consume alcoholic drinks or other psychotropic substances in the performance of his duties. The Federal Council shall regulate exemptions.
- ³ The employer shall ensure that workers cooperate with health protection measures. Workers shall be bound to assist the employer in implementing the health protection regulations.
- ⁴ The health protection measures that must be adopted in enterprises shall be determined by means of an order.

GENERAL BIBLIOGRAPHY

BETTEX Christian, “L’application temporelle de l’art. 328 CO”, in: Rémy Wyler (éd.), *Panorama II du droit du travail*, Stämpfli Editions SA, Berne 2012, pp. 57 ff.

BRUNNER Christiane / BÜHLER Jean-Michel / WAEBER Jean-Bernard / BRUCHEZ Christian, “N1 ad art. 321d CO”, in: *Commentaire du contrat de travail*, Editions Réalités sociales, Lausanne, 2004, p. 72

CARRUZZO Philippe, *Le contrat individuel de travail, Commentaire des articles 319 à 341 du Code des obligations*, Schulthess Editions, Zurich/Bâle/Genève, 2009, pp. 273 ff.

CLAUS Lisbeth, *Le devoir de protection des employeurs à l’égard des expatriés, de leurs personnes à charge et des voyageurs d’affaires*, International SOS, 2009.

CLAUS Lisbeth, *Duty of Care and Travel Risk Management, Global Benchmarking Study*, International SOS, 2011.

DANTHE Marie-Gisèle, “Les limites de l’art. 328 CO au droit de donner des directives et de contrôler l’activité du travailleur” in: Rémy Wyler (éd.), *Panorama en droit du travail*, Stämpfli Editions SA, Berne 2012, pp. 163 ff., esp. pp. 166 to 168.

DONATELLO Giuseppe, “Le droit applicable au contrat de travail”, in: Rémy Wyler (éd.), *Panorama II du droit du travail*, Stämpfli Editions SA, Berne 2012, pp. 109 ff.

GEISER Thomas (Lüthi Jean-Jacques), “Art. 1”, in: Thomas Geiser, Andrian von Kaenel, Rémy Wyler (éd.), *Commentaire de la Loi sur le Travail*, Stämpfli Editions SA, Berne, 2005, pp. 26 ff., esp. pp. 33 ff.

KEMP Edward & MERKELBACH Maarten, *Can you get sued? Legal liability of international humanitarian aid workers towards their staff*, Security Management Initiative, Geneva, 2011.

MOREILLON Laurent, “N° 3 ad art. 59”, in: Thomas Geiser, Andrian von Kaenel, Rémy Wyler, *Commentaire de la Loi sur le Travail*, Stämpfli Editions SA, Berne, 2005, p. 626.


PETERMANN Frank, “Rechte und Pflichten des Arbeitgebers gegenüber psychisch labilen oder kranker Arbeitnehmer”, in: *Zeitschrift für Arbeitsrecht und Arbeitslosenversicherung/Revue de droit du travail et d’assurance-chômage*, 1/2005, pp. 1 ff. (cited as ARV/DTA).

PORTMANN Wolfgang, “N° 14 ad art. 321a OR”, in: Heinrich Honsel, Nedim Peter Vogt, Wolfgang Wiegand (éd.), *Basler Kommentar, Obligationenrecht I, Art. 1-529 OR*, Helbing Lichtenhahn Verlag, Basel, 2011, p.1832 (quoted as BSK).

SCHEIDEGGER Hans-Ulrich / PITTELOUO Christine, “Art. 6”, in: Thomas Geiser, Andrian von Kaenel, Rémy Wyler, *Commentaire de la Loi sur le Travail*, Stämpfli Editions SA, Berne, 2005, pp. 111 ff.

STAEHLIN Adrian, “Der Arbeitsvertrag: Art. 319-362 OR”, *Zürcher Kommentar*, Schulthess Verlag, Zürich, 2006, pp. 370 ff. (cited as ZK).

STREIFF Uli / VON KAENEL Adrian / RUDOLPH Roger, *Arbeitsvertrag, PraxisKommentar zu Art. 319-362 OR*, Schulthess, Zürich/Basel/Genf, 2012.



SUBILIA / DUC Jean-Louis, *Droit du travail, éléments de droit suisse*, Éditions BIS & TER SNC, Lausanne, 2010, pp. 313 ff.

THEVENOZ Luc, “N° 7 ad art. 101 CO”, in: Luc Thévenoz / Franz Werro (éd.), *Commentaire Romand du Code des obligations I, art. 1-529*, Helbing & Lichtenhahn, Bâle, 2003 (cited as CR-CO I).

ELECTRONIC REFERENCES

Swiss Federal Court

<http://www.bger.ch/fr/index.htm>

Case-law of the federal authorities (free)

<http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht.htm>

Recueil systématique (Systematic Compendium)

<http://www.admin.ch/ch/f/rs/rs.html>

Recueil officiel (Official Compendium)

<http://www.admin.ch/ch/f/as/index.html>

Bilateral agreements with the European Union

<http://www.europa.admin.ch/themen/00500/index.html?lang=fr>

LEGAL PROCEDURE

Lawyers in the legal aid services of the different Law Societies (*permanences de l'Ordre des avocats*) can give low-cost advice on all issues to do with employment law.

- Legal aid service of the Geneva Law Society

http://www.odageneve.ch/index.php?option=com_content&task=view&id=20&Itemid=90

- Legal aid service of the Lausanne Law Society

http://www.oav.ch/site/index.php?option=com_content&view=article&id=70&Itemid=53

- Legal aid service of the Valais Law Society

http://www.oavs.ch/index.php?option=com_content&view=article&id=68&Itemid=61



APPENDIX 4 – GOOD PRACTICE IN THE DUTY OF CARE: TEN TIPS

Ten recommendations for good practice in the duty of care to travellers and expatriates⁶²

1. Increase awareness at all levels within the enterprise
2. Involve all the key stakeholders in planning the duty of care
3. Expand policies and procedures for travel risk management
4. Audit service providers from the duty of care perspective
5. Communicate, educate and train staff and stakeholders
6. Assess risk prior to every employee trip
7. Track travelling employees at all times
8. Implement an employee emergency response system
9. Implement additional management controls
10. Ensure that service providers are fully involved and coordinated

⁶² Devoir de Protection et Gestion du Risque Voyage – Étude Comparative Internationale, International SOS, 2011

SECURITY MANAGEMENT INITIATIVE (SMI)

The Security Management Initiative (SMI) aims to serve the international aid community and its national and international staff to operate safely and securely across the insecure environments in which they work. SMI strives to contribute to reducing the human and program costs of agencies operating in these environments, thereby enabling agencies to better fulfill their mission.

SMI functions as a focused human resource centre for risk and security management of NGOs and international agencies working in hostile environments. SMI provides authoritative research, training and advisory services in risk and security management for national and international NGOs and aid agencies.

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