Global Personal Liability: A Comparative Analysis of Laws and Approaches Around the World

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Occupational health and safety (OHS) legislation around the world imposed personal liability on officers and senior managers of companies. That liability, in some cases, applies extra-territorially – in the sense that US based officers of global companies may be liable for offences committed by their company in foreign jurisdictions. This paper will explore those liabilities.

Introduction: Global Personal Liability

Previously, OHS was subjected to a measure of derision or banished to the “non-priority” pile of many executives. OHS now is recognized as an important area of consideration for companies in planning and implementing their operations. An entire industry of professional practice has developed around the area of OHS. At the same time, around the world, laws regulating OHS have developed.

Since the first recognition of OHS as a simple part of the common law in 1837\(^2\), OHS has taken its place amongst the pantheon of laws as its own discrete area of legal practice. Many jurisdictions now have volumes of legislation which provide requirements for OHS. Alongside this, discrete regulatory bodies exist to ensure the specific enforcement of OHS laws.

With the increased recognition of OHS around the world, a line of thought has emerged – the individuals who are the “minds” of an organization – its officers, should be held responsible for OHS outcomes in an organization. The importance of officer input into company decisions, and the impact of their decisions cannot be understated.\(^3\) Naturally, this has led to scrutiny of

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2 *Priestley v Fowler* [1837] 150 E.R. 1030

those officers, leading to personal liability for OHS offences and incidents. Moreover, in some cases that personal liability may be imposed upon those officers, even if they are outside of the jurisdiction in which a relevant offence or incident occurred.

The approaches to personal liability of officers varies from jurisdiction to jurisdiction – both in terms of legislation and practical enforcement and prosecution.

**Overview of Regimes**

**Comparison of Jurisdictions**

The approaches by both the legislature and regulators in different jurisdictions in relation to the personal liability of officers varies immensely. On one end of the spectrum, there are jurisdictions which impose positive duties, personal liability, and penalties on officers under their OHS legislative regimes. On the other hand, some jurisdictions have no specific personal liability or duties for officers under their OHS regimes and instead turn to general criminal legislation to prosecute OHS breaches. Depending on the jurisdiction, liability for those offences, OHS-specific or otherwise, may be enforced upon officers of companies, even where those officers are not within the jurisdiction.

**The Spectrum of Regulation**

In comparing the approaches and visually mapping the various approaches to regulating personal liability used around the world this paper has two measures. The centralizations and regulations axes show how different jurisdictions “rate” in terms the strength of their enforcement of personal liability on officers for OHS.

The **centralization** axis reflects the level of responsibility which is placed upon an officer. That is – how much responsibility for OHS rests personally on a director – how “centralized” is the responsibility on the officer. For example, a jurisdiction which allowed an officer to fully delegate OHS related duties would be less centralized than one which placed ultimate responsibility for all responsibilities on the officer. A jurisdiction which had more officer specific duties in its legislation would be more centralized than one without specific duties.

The **regulation** axis reflects the vigor with which a jurisdiction exhibits a tendency to prosecute officers as individuals. It is important to remember that the approach of individual OHS regulators in each jurisdiction will determine the strength of any OHS regime. Even a jurisdiction exhibiting very little in the way of written law may have an extremely strong enforcement culture against officers. An in-depth analysis of this issue is beyond the scope of this paper but factors affecting a regulator’s prosecution activity include:

- regulator budget;
- powers ascribed to regulators by legislation;
- government and regulator policy; and
- regulator focus (e.g. industry or activity).

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4 For a more complete view on some of these issues and considerations generally, see Klaff, D. “Evaluating Work: Enforcing Occupational Safety and Health Standards in the United States, Canada, and Sweden,” 7 J. BUS. L. 613 (2013)
Specific regulator policies should be consulted for a view on the approach to enforcement in any given jurisdiction. Combining the regulation and centralization axes provides an “Officer Enforcement Profile” which may be mapped as follows:

![Officer Enforcement Profile Diagram](image)

**Figure 1: Officer Enforcement Profile**

The Officer Enforcement Profile maps the strength of a jurisdiction’s enforcement of personal liability as it relates to officers for OHS. The quadrants go from 1-4 from weakest to strongest, on the following basis.

1. **Absentee** – this quadrant is characterized by a lack of laws and a lack of activity against officers by regulators against officers for OHS issues. An overall lack of recognition of the responsibility of officers.
2. **Sedentary** – this quadrant is characterized by the existence of moderate to strong laws and regulations which impose specific responsibilities on officers, but only weak to moderate regulator activity to back up those laws.
3. **Active** – this quadrant is characterized by a set of legal regulations which are either not positive or not highly prescriptive. However, strength of regulation means that this quadrant has overall strong enforcement, with the activity of regulators being a more determinative factor of enforcement than the presence of laws.
4. **Comprehensive** – this quadrant is characterized by a full set of prescriptive but not exhaustive legal obligations for officers to ensure OHS outcomes, backed up by robust activity from a regulator. Although this is nominally the toughest quadrant, an “Active” quadrant may be just as effective as a “Comprehensive” quadrant due to commensurate strength of regulation.
To illustrate the different approaches to be mapped, we have chosen to compare four broad jurisdictions (not including jurisdictions within those jurisdictions themselves) as exemplars which present very different attitudes and approaches to personal liability of officers for OHS offences. Those jurisdictions are:

- Australia;
- China;
- Sweden; and
- The United States of America

These exemplars are reflective of particular trends or attitudes toward enforcement of OHS offences against officers. Other jurisdictions not covered may fall within similar profiles as the exemplars.

“Officers”
This paper refers to personal liability placed on officers, who are the individuals traditionally considered to be those who direct an organization’s activities. This is the term used throughout this paper. In Australia, an officer is variously defined by certain categories. The chief categories being “a director or secretary of the corporation” or a “person who makes, or participates in making decisions that affect the whole of a substantial part of the business of the corporation.”

However, this definition is not used in all jurisdictions. For example, China uses “person in charge,” rather than “officer.” In Sweden, case law refers to “highest manager.” This paper proceeds on the basis that the roles of executive management and those who make decisions which substantially affect a corporation are largely commensurate across jurisdictions, irrespective of the title being used.

Warning Against False Conclusions
It is not necessarily the case despite the varied approaches, that any particular system of enforcing personal OHS liability against officers is superior to any other. Exigencies of a particular jurisdiction – history, other laws and government policy, for example – can make a method which works in one jurisdiction, unworkable in another. It is important to remember this before drawing any sweeping inferences regarding whether a particular system relating to the personal liability of officers in respect of OHS offences is superior to any other.

Personal liability of officers is a means to an end and not an end in itself. It is useful only to the extent that it drives socially responsible corporate behavior in relation to safety. If that outcome is best achieved through other means in a particular jurisdiction, then they should be pursued. The rationale for applying personal liability to officers is to ensure that OHS outcomes are achieved by providing personal incentive to the officers of a company. However, the societal recognition and culture around workplace safety of a particular jurisdiction plays a huge part in the measure of self-regulation. Some systems may be necessarily less centralized or regulated in relation to the personal liability of officers because the jurisdiction’s general recognition of OHS or culture around OHS is better. An analysis of this however, is beyond the scope of this paper.

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5 Corporations Act 2001 (Cth), s9 (Australia)
6 See Klaff, generally.
Australia

Exemplar Overview

Australia has recently undergone a nearly uniform reform of its OHS laws and regulations across nearly all of its jurisdictions. Eight of nine jurisdictions have now implemented (or are in the process of implementing) the national uniform *Work Health and Safety Act 2011* (WHS Act) and associated regulations (WHS Regulations) (together, WHS Laws). The WHS Laws create duties for both organizations and officers of those organizations alike. The state of Victoria has opted to continue with its own non-uniform laws and regulations.8

Australia has been subject to generally increased OHS regulation over the past few years. Each jurisdiction within Australia has its own regulator with its own enforcement focus. Recently, the regulators for the Australian Capital Territory and Queensland have shown a willingness to pursue officers of companies for breaches of their OHS duties, despite the relative infancy of the WHS Laws9.

Australia is an exemplar jurisdiction for an enforcement style which places positive, specific duties on directors within its OHS legislative regime, giving a clear set of guides to officers and duties to fulfil. Other jurisdictions which exhibit this style include Germany and Canadian jurisdictions including Ontario and British Columbia. Enforcement levels vary within those jurisdictions. Both New Zealand and the United Kingdom also recognize officers as being potentially liable for the OHS failures of their organizations though they do not possess positive duties – rather the duties are framed in the negative, by stating in what circumstances an officer may be liable for OHS failures.

Centralization

**High Centralization:** Australia’s WHS Act includes a specific duty for officers to exercise due diligence to ensure their organization complies with its applicable OHS obligations. In Australia, the relevant duty holder is a “person conducting a business or undertaking” (PCBU), a concept which captures what is traditionally characterized as an “organization.”10 This duty is non-delegable.11 While there is only a singular duty/offence imposed on officers, failure to discharge any one of the 6 prescriptive due diligence duties within that duty amounts to the same breach of duty.

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7 Based on Safe Work Australia’s *Model Work Health and Safety Act*. The State of Western Australia is as at the date of publication, in the process of implementing uniform legislation.

8 **Occupational Health and Safety Act 2004 (Vic), Occupational Health and Safety Regulations 2007 (Vic)**

9 Proposed prosecution of Kenoss Contractors by WorkSafe ACT, recent prosecutions by Work Health and Safety QLD including *Police v Hugh John Spencer* (Cairns Magistrates Court 15 January 2014)

10 Please see also Tooma, M. “Due Diligence: Persons Conducting a Business or Undertaking” (2012) CCH.

Moderate-High Level of Regulation: Australian regulators have shown an enthusiasm for prosecuting officers. In a recent case an officer was sentenced to 12 months jail for the deaths of two workers.  

Duties and Obligations of Officers  
Due Diligence Duty  
As noted above, the Australian WHS Laws provide that an officer:

\[ \text{Must exercise due diligence to ensure that the person conducting the business or undertaking complies with that duty or obligation}^{13} \]

(where the PCBU\(^{14}\) owes a duty or obligation under the relevant WHS Laws).

Under the WHS Laws, PCBUs in Australia are required to discharge a “primary duty of care” to ensure, so far as is reasonably practicable, the health and safety of workers and others who might be affected by the conduct of the business or undertaking\(^{15}\). Breaches of this duty can lead to penalties for the PCBU. However, as noted above, officers of a PCBU themselves may also be directly charged for breach of their own duty to exercise due diligence to ensure that the primary duty of care of the PCBU is met. This is a positive, non-delegable duty and officers are unable to say in their defence that they did not have influence or control over a particular matter.

The due diligence duty has six elements, requiring that officer stake reasonable steps:

1. to acquire and keep up-to-date knowledge of work health and safety matters;
2. to gain an understanding of the nature of the operations of the business or undertaking and generally of the hazards and risks associated with those operations;
3. to ensure that the person conducting the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimize risks to health and safety from work carried out as part of the conduct of the business or undertaking;
4. to ensure that the person conducting the business or undertaking has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information; and
5. to ensure that the person conducting the business or undertaking has, and implements, processes for complying with any duty or obligation of the person conducting the business or undertaking under this Act; and
6. to verify the provision and use of the resources and processes referred to in paragraphs [3-5].\(^{16}\)

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\(^{13}\) s27, Work Health and Safety Act 2011 (Cth), and other identical provisions of the WHS Laws.

\(^{14}\) See reference at n8

\(^{15}\) See s19, Work Health and Safety Act 2011 (Cth) and other equivalent provisions.

\(^{16}\) See s27(5) Work Health and Safety Act 2011 (Cth) and other equivalent provisions.
As stated, officers need to take reasonable steps to fulfil these elements of the due diligence duty. What is reasonable is a balancing act which is determined by reference to the facts and circumstances of any particular case.

Delegation
The officer’s duty is non-delegable. Officers are required to discharge their duty personally. They cannot rely on others to discharge the duty on their behalf.

Offences
A breach of the officer’s duty attracts a sliding scale of fines and possible imprisonment depending on the seriousness of the breach. Given that the officer’s duty is tied to the PCBUs primary duty, the penalty applicable is generally tied to the seriousness of the breach of the PCBUs primary duty. These are criminal offences.

The WHS Act prescribes the following three “categories” of penalties which are generally adhered to throughout the relevant Australian jurisdictions. The penalties range from $600,000 and five years in prison to $100,000, depending on the “category” of offence – based on the seriousness of the dereliction of duty.

China

Exemplar Overview
China is an enigma to itself – a large, but still developing economy with a very patchy track record when it comes to OHS. In terms of growth is has no peer. However, a string of major accidents has characterized the last decade of China’s industrial development. Likewise, China’s growth has seen numerous reports of drastic working conditions in a number of factories associated with large, western companies such as Apple, Samsung, and GM. It was reported that more than 27,000 people were killed (or missing) as a result of Chinese workplace accidents in the first half of calendar year 2013.

Chinese law is still developing. The main Chinese laws dealing with liability for OHS offences, including liability for officers, is the Law of the People’s Republic of China on Work Safety (Work Safety Law) and the Regulations on the Reporting, Investigation and Disposition of Work Safety Accidents (Work Safety Accidents Regulation). Other relevant statutes include the Labor Law of the People’s Republic of China and the Law of the People’s Republic of China on Prevention and Control of Occupational Disease. Different districts in China possess their own regulations which vary. Enforcement of OHS laws has historically been poor in China,

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17 See ss31-33 Work Health and Safety Act 2011 (Cth) and equivalents in other jurisdictions. Note that Queensland has the same scale but with different levels of penalty.
however and very little can be gleaned about the application of the specific laws themselves in court, for example.

China is not an exemplar of any other jurisdictions – rather it is an example of the challenges faced in regulating OHS in a rapidly developing industrial economy where laws are still developing, and the responsibility for OHS which may be placed on officers in such a circumstance.

Centralization

**High-level of Centralization:** A number of provisions in the various laws target the “person in charge” of the “enterprise”, while others place the responsibility on persons “directly in charge” and even government departments charged with oversight.

Regulation

**Low-level of Regulation:** While there has been a stated intention (and action) by the Ministry of Health and the State Administration of Work Safety to increase enforcement (especially following the Qingdao pipeline plant explosion\(^{20}\)) and a recent amendment to the Work Safety Law to increase penalties and powers, the historical level of regulation in China has been relatively low. The demographics of China make enforcement very difficult for the authorities who typically eschew proactive enforcement for an “after-the-fact” and ad-hoc response to major incidents.

Duties and Obligations of Officers

**Duty to Ensure**

A number of specific clauses in the Chinese OHS laws place duties on “principal leading members of production and business units”. What could be considered the primary duty is located at Article 5 of the Work Safety Law:

> Article 5 Persons in charge of production and business units are in full charge of work safety of their own units.

This primary duty is expanded on by Articles 17 and 18 of the Work Safety Law which sets out a number of responsibilities for persons in charge:

> Article 18 The principal persons-in-charge of production and business entities are charged with the following responsibilities for work safety in their own entities:

  1. setting up and improving the responsibility system for work safety in their own entities;
  2. making arrangements for formulating rules and operating regulations for work safety in their own entities;
  3. making arrangements for formulating and implementing plans for education and training in work safety in their own entities;
  4. guaranteeing an effective input into work safety in their own entities;
  5. supervising over and inspecting work safety in their own entities and, in a timely manner, eliminating hidden dangers threatening work safety;

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(6) making arrangements for the formulation and implementation of their own entities’ rescue plans in the event of accidents; and
(7) submitting to higher authorities timely and truthful report on accidents due to lack of work safety.

**Article 19** The responsibility system for work safety of a production or business entity shall specify the responsible persons, scope of responsibilities, assessment standards and other relevant content...

Further, persons in charge are required to obtain requisite knowledge about their operations.

“Production unit” and “business unit” are not defined in any of the statutes. Likewise, it is difficult to precisely determine the ambit of the duty of “persons in charge,” as that term is not defined. It can be concluded that the duties are levelled at either a managing director at the highest level, or at the lowest level, divisional managers/executives of a company.

What is clear, however, is that there is a positive duty placed on those “persons in charge” in China. That duty comes along with a number of specific responsibilities similar to Australia’s “due diligence,” including the need to ensure appropriate resources for the discharge of OHS requirements. There is no guidance on whether delegation of responsibility is acceptable, although there is recognition that “safety experts” are required to be employed. It is likely that delegation occurs in practice, though this does not provide guidance as to whether delegates may bear responsibility. Given the strong wording of the laws directed at “persons in charge” it seems unlikely that responsibility for OHS issues could be abdicated.

**Offences**

There are a variety of offences in China which may be levelled at “persons in charge”. Chapter VI of the Work Safety Law provides:

**Article 90** Any decision-making body, the principal person-in-charge of a production or business entity or individual investor that fails to guarantee, in accordance with the provisions of this Law, the funds for input essential to work safety, thus resulting in the lack of conditions for work safety, the production or business entity shall be ordered to set it right by providing the necessary amount of funds within a specified time limit. If it is not set right within the time limit, the production or business entity shall be ordered to suspend production or business operation for rectification.

In the event of the violation of laws as mentioned in the preceding paragraph, which leads to the occurrence of an accident due to lack of work safety, the principal person-in-charge of the production or business entity shall be discharged from his post, and the individual investor shall be fined not less than RMB 20,000 but not more than RMB 200,000. If the violation constitutes a crime, criminal liability shall be imposed in accordance with relevant provisions of the Criminal Law.

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21 Article 24, Work Safety Law
Article 91 Where the principal person-in-charge of a production or business entity fails to perform his duty for control over work safety as provided for in this Law, he shall be ordered to set it right within a specified time limit. If the person fails to do so within the time limit, the persons shall be find not less than RMB 20,000 but not more than RMB 50,000 and the production or business entity shall be ordered to suspend production or business operation for rectification.

The principal person-in-charge of a production or business entity who commits the violation of laws as mentioned in the preceding paragraph, which leads to the occurrence of an accident due to lack of work safety, shall be discharged from his post; if the violation constitutes a crime, criminal liability shall be imposed in accordance with relevant provisions of the Criminal Law.

The principal person-in-charge of a production or business entity on whom a criminal punishment is imposed or who is discharged from his post in accordance with the provisions in the preceding paragraph, he may not, within five years starting from the date on which the criminal punishment is served or the date on which he is discharged from his post, work as a principal person-in-charge for any production or business entity. If the person is liable for a serious or extremely serious accident due to lack of work safety, the person shall not work as a principal person-in-charge for any production or business entity in the industry concerned for life.

Article 92 contains provisions for fines where an accident occurs due to a failure to perform legally set responsibilities. These fines can be up to 80% of the person in charge’s previous year’s annual income.22

The Work Safety Law also expressly provides that the criminal law may be used to charge a person in charge where a breach of the Work Safety Law also constitutes a crime. The Criminal Law of the People’s Republic of China contains a quite open definition of “crime” in Article 13, essentially allowing for any crime to be determined on a case by case basis. A breach of the Work Safety Law which would also be a crime would likely be captured under Article 15 which reads as follows:

A negligent crime refers to a crime committed by a person who should have foreseen that his act would possibly produce socially dangerous consequences but who fails to do so through negligence or, having foreseen the consequences, readily believes that they can be avoided, the result bring that these consequences do occur.

Enforcement Against Officers
As stated above, OHS enforcement has traditionally been a weak point in China. However, a recent spate of industrial accidents has forced Chinese authorities to re-evaluate their positions. Amended laws with higher penalties for persons in charge are a clear signal that China intends to not only enforce OHS requirements against companies, but also against a company’s persons in charge. The blacklist against work safety offenders in the recent amendments to the Work Safety Law bodes well for enforcement in the future.

22 Article 92 of the Work Safety Law appears to be heavily replicated at Article 38 of the Work Safety Accidents Regulation
For example, in the wake of the Jilin Plant Explosion\textsuperscript{23}, Chinese authorities found 108 individuals (including both company executives and government overseers) were responsible for the incident, and a number of individuals were referred for criminal prosecution.\textsuperscript{24} It is clear from that instance that China is seeing an increase in enforcement against persons in charge. It remains to be seen whether this will be an after-the-fact exercise, or whether OHS enforcement will become more proactive in the future. Nevertheless, it is important to remember this increase is building on an extremely low base-rate of enforcement in China to begin with.

We could find no records of directors or managers of Chinese companies being held to account for OHS breaches while being based outside of the jurisdiction.

**Sweden**

**Exemplar Overview**

Sweden is a civil law jurisdiction, often touted as one of the world leaders in OHS, consistently making lists for being one of the safest countries in the world in which to work. The basic framework for OHS in Sweden lies in the *Work Environment Act (1977:1160)* (*WEA*) which has the stated purpose to “prevent illness and accidents in the course of employment and to otherwise achieve a sound work environment.”\textsuperscript{25} The *WEA* is supported by the *Work Environment Ordnance (1977:1166)* (*WEO*) and its associated regulations. The legislative scheme imposes obligations upon a number of potential parties.

Sweden is an example of a jurisdiction with an enforcement style which holds officers within a company, as individuals, and not the company in question that is responsible for failures should an incident occur. Further, the jurisdiction recognizes and approves of a level of delegation of responsibility by officers to others, in view of the fact that an officer cannot realistically have day-to-day control of every operation by a company. Other jurisdictions of this nature include Italy and France. Japan may also be seen to be similar, as the jurisdiction requires that a person in the company is appointed to be responsible for safety.

**Centralisation**

**Low/Moderate Centralization:** Sweden exhibits a moderate level of centralization. The *WEA* places duties nominally on “employers”, but through developed case law, practice dictates that “highest managers” of an organization bear the duty. However, the jurisdiction allows a significant level of delegation to those within an organization in certain circumstances under both case law and in the *Provision on Systematic Work Environment Management AFS 2001:1* (*PSWEM*). Notwithstanding that the duties may be delegated, the “highest manager” retains the requirement to verify that the delegation is working in practice. However, none of the laws single out “officers” as being liable for OHS duties specifically.


\textsuperscript{24} Ibid at n23

\textsuperscript{25} Section 1, Work Environment Act
**Regulation**

**Moderate/High Regulation:** While the general level of enforcement is high and strong communication between the regulator and prosecutors has led to a higher commitment to prosecutions, it has been noted there is general difficulty in Sweden in prosecuting individuals for OHS breaches. Further, it appears that few individual managers in practice are actually convicted of offences under the WEA due to the generally cooperative resolution of OHS issues.

**Duties and Obligations of Officers**

**Duty on the Employer**

The principal obligation under the WEA is, as stated above, placed on the employer as follows:

1. **Section 2** The employer shall take all precautions necessary to prevent the employee from being exposed to illness or accidents. One point of departure shall in this connection be that anything that can lead to illness or an accident should be changed or replaced so that the risk of illness or an accident is eliminated.

   The employer shall consider the special risk of illness and accidents which may be entailed by an employee performing work alone.

   Premises, as well as machinery, tools, safety equipment and other technical equipment, shall be kept in a good state of repair. (SFS 2002:585)

2. **Section 2a** The employer shall systematically plan, direct and inspect activities in a manner which ensures that the work environment meets the prescribed requirements for good work environment. He shall investigate work-related injuries, continuously investigate the hazards of the activity and take the necessary measures to correct the same. Measures which cannot be taken immediately shall be scheduled for later resolution.

   To the extent required by the activity, the employer shall document the work environment and measures adopted with respect thereto. Action plans shall be drawn up in this regard...

Despite the WEA clearly placing the duty on “employers”, Swedish case law has generally pointed to the “highest manager” in any given company, rather than the legal person of the company itself. This appears to be an artefact of Swedish law – penal sanctions cannot be sought against a legal person, only against a natural person. The “highest manager” may refer to a director or member of the board as officers of the company, but in practice, delegation means that this is rarely the case.

There are also duties placed on employees under the WEA, which also apply to officers as employees of a company. However, there is no record of any prosecution or enforcement against an officer in this regard.

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26 See Fooks et al. “International comparison of (a) techniques used by state bodies to obtain compliance with health and safety law and accountability for administrative and criminal offences and (b) sentences for criminal offences (2007), Health and Safety Executive UK, Chapter 16

27 Work Environment Act (1977:1160), Chapter 2, ss2,2A (non-official translation)

28 Noting that Swedish law does not allow for the prosecution of companies – see also Case no B3184-03, NJA 2004 s126.
Delegation

Swedish case law and the PSWEM indicate that the safety responsibilities of the “highest manager” are able to be delegated to other individuals within a company. Section 6 of PSWEM (amended by AFS 2003:4)\(^{29}\) states:

The employer shall allocate the tasks in the activity in such a way that one or more managers, supervisors or other employees are tasked with working for the prevention of risks at work and the achievement of a satisfactory working environment.

The employer shall make sure that the persons assigned these tasks are sufficient in number and have the authority and the resources that are needed. The employer shall also make sure that they have sufficient knowledge of

- rules with significance for the working environment,
- physical, psychological and social conditions implying risks of accidents and ill-health,
- measures to prevent ill-health and accidents, and
- working conditions which contributes to a satisfactory working environment.

The employer shall make sure that those assigned the tasks have sufficient competence for the conduct of a well-functioning systematic work environment management.

This explicit recognition of delegation in the PSWEM reflects the development of case law in the area and the conditions required for a delegation of authority to be proper. Under that framework, delegation is effective where:

- the delegation is “needed”;
- the delegate has sufficient knowledge/training/competence; and
- the delegation is “clear”\(^{30}\) – though Swedish courts have seen fit to deem subordinates responsible for safety issues where the delegation would appear to be less than clear\(^{31}\).

The delegation of responsibility means that should an incident occur, the delegate may face penal liability. However, the responsibility is not automatic. In cases where the delegate is given insufficient resources or is not an appropriate person by way of lack of knowledge, the delegating officer still may be held responsible. Otherwise, officers can effectively farm out their responsibilities and avoid penal sanction for OHS incidents. In a statement on delegation and allocation of liability, the WEAS notes:

[T]he internal allocation of tasks and responsibilities is not crucial to the location of penal liability, but it does normally make a big difference in judicial proceedings. In the judicial proceedings account is had of whether the obligations incurred by a natural person are matched

\(^{29}\) See PSWEM, Section 6, accessed at http://www.av.se/dokument/inenglish/legislations/eng0101.pdf

\(^{30}\) See Case No A:93-06-03, NJA 1993 S.245

\(^{31}\) See Case No. B-3184-03, NJA 2004. s126
by adequate powers and economic resources and whether that person possessed adequate competence for them.”

Offences
Failure to meet a general duty under WEA is not an offence in itself, unless there is non-compliance with an injunction or notice by a WEA inspector which can be characterized as “intentional” or “negligent.” In this case, an officer (or delegate) with responsibility may be charged and fined or imprisoned.

Otherwise, Sweden looks to its general criminal law to impose sanctions on individuals whose dereliction of OHS duties may cause harm. Offences are drawn from the Swedish Penal Code. For example, where a death occurs due to a work related accident:

*A person who through carelessness causes the death of another shall be sentenced for causing another’s death to imprisonment for at most two years or, if the crime is petty, to a fine. If the crime is gross, imprisonment shall be imposed for at least six months and at most six years.33* 

Section 10 of Chapter 8 also provides that offences such as the one above may be applied in a work-related situation and through a neglect of a duty under WEA. Other similar offences are available for where someone is injured, or merely exposed to a risk.34 Again, these charges are laid against the responsible individual, be it an officer or a delegate, where a responsibility is effectively delegated.

We have been unable to find references to Sweden prosecuting overseas based offices for breaches of the WEA or other OHS incidents, though we do not see there would be difficulty in such an application.

Enforcement Against Officers
There is no specific way to measure enforcement against a person who would conventionally be considered an officer, given the delegation of responsibilities available in Sweden. Prosecutions can be against the “highest manager”, but delegates can be as far ranging as site managers, supervisor, or department heads.

Generally, Sweden boasts a strong track record of prosecutions against individuals for OHS-related offences (although there is noted difficulty in prosecuting individuals)35. However, it also appears that most OHS-related issues are solved through voluntary compliance at what could be considered an early stage.

A strong culture of safety permeates Swedish society. That safety culture leads to a focus on ensuring work health and safety.

32 See guidance by WEAS “The difference between responsibility for the work environment and penal liability” accessed at: http://www.av.se/inenglish/inspections/thedifference.aspx
33 Chapter 3, Section 7 of the Penal Code
34 See chapter 3, sections 7 and 8, chapter 36, section 7 of the Penal Code
35 See Fooks et al. “International comparison of (a) techniques used by state bodies to obtain compliance with health and safety law and accountability for administrative and criminal offences and (b) sentences for criminal offences” (2007), HSE UK, page 499
The enforcement style in Sweden may be an artefact of that general recognition. Apart from the fact that no penal liability can be placed on companies, Swedish law places variable responsibility on individuals within an organization for OHS issues and incidents. There is no arbitrary assignment of duty or responsibility to officers, but instead a recognition that OHS responsibilities, in practice, are delegated to others within an organization with more direct control.

This style of enforcement allows officers to avoid liability – but only where they have in fact effectively delegated responsibility to a person who is appropriately knowledgeable and resourced. This system might mean less responsibility for officers generally, but appears to be no impediment to fostering a generally strong recognition for safety in society and at all levels of the workforce.

**United States of America**

**Exemplar Overview**
The USA is a conglomerate of a number of jurisdictions, with the federal *Occupational Safety and Health Act 1970* (OSH Act) applying directly to regulate OHS in twenty-eight of the states and certain territories under federal authority. The remaining twenty-two states have their own OSH Act approved plans.\(^\text{36}\) The OSH Act is administered by the Occupational Safety & Health Administration (OSHA), a division of the United States Department of Labor. Under the OSH Act umbrella there are a number of further standards and regulations. This exemplar analysis will focus on regulation through OSHA and the OSH Act.

The USA is a jurisdiction which exemplifies an almost complete “hands-off” approach to the liability of officers. There are no OHS duties specifically upon officers of a company under the OSH Act. The position appears similar in the non-OSH Act regulated states. The jurisdiction therefore, exhibits attributes very little responsibility to officers as individuals and focuses more on the company as a whole. Other jurisdictions with a similar focus include the Netherlands.

**Centralization**

*Low Centralization:* The lack of offences and responsibility placed on officers of companies means that the USA is a jurisdiction which exhibits a low level of centralization. It is only in very specific circumstances that an officer can be prosecuted as an individual for a failure of a breach of OHS duties. This of course, is separate from other OHS-related offences that an officer, as an individual, may commit and for which prosecuted.

**Regulation**

*Low-level of Regulation:* A low-level of regulation in relation to officers specifically of course says nothing about the actual level of OHS enforcement generally in the USA which is fairly aggressive\(^\text{37}\) with more citations recently issued than in the past. However, as regards officer-focused enforcement, the lack of recognition in the OHS Act, or established case law, for the

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liability of officers means that there simply exists no particular focus on enforcing OHS offences directly against officers.

Duties and Obligations on Officers

**Duty on the Employer**

The primary OHS duty under the OSH Act is found in section 5:

(a) Each employer –

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

This duty lies with the “employer,” defined in the OSH Act as:

[A] person engaged in business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State.

In general, it is the corporation which will employ workers, rather than individuals who own or work for the corporation. The corporation will be the employer and therefore, the corporation will be liable the OSH Act duty and officers will not be personally liable. While nominally, officers of a corporation should take steps to ensure the company meets its obligations, it is rare that the company’s individual officers would be held liable for any failure to discharge those obligations.

There have been rare cases, however, where OSHA has sought to attribute the duties (and breach thereof) above to individual officers using the doctrine of “piercing the corporate veil”. It has been held, however, that such piercing is proper only where “an officer’s or director’s role in a corporate entity (particularly a small one) may be so pervasive and total that the officer or director is in fact the corporation and is therefore an employer”. This doctrine was recently applied in a pair of New Jersey cases, where the close control that the companies’ presidents and directors had over the organizations’ actions and operations were such that the corporations had no “distinct personalities” from the officers and directors – the individuals were fined accordingly. It is only in rare circumstances like this, it seems, that officers may be held personally liable.

Despite the above, there is no bar on authorities prosecuting officers of corporations using other means such as the general criminal law where workplace injuries or fatalities occur.

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38 *Occupational Safety and Health Act of 1970*, s5, 29 USC 654
39 *Occupational Safety and Health Act of 1970*, s3(5), 29 USC 652
40 See *Skidmore v Travelers Insurance Co.* 356 F. Supp. 670, 672 (E.D.La) aff’d, 483 F.2d 67 (5th Cir. 1973).
42 See the appeal decision in *Altor Inc. and Ors v Secretary of Labor*, 11-2718 (3rd Cir. 2012) for further guidance.
Offences
Violation of the primary duty or violation of safety standards can lead to a number of offences being imposed. Section 17 of the OSH Act provides for a number of penalties. Foremost amongst those offences is the offence for wilful or repeated violations of the primary duty, standards, OSHA orders and the like. As discussed above, however, these offences can be held against individual officers, only if officers can be shown to essentially be indistinguishable from their corporations, by way of extremely close control of the company, or otherwise.

General criminal law also may be employed in certain circumstances to prosecute company officers, which may occur sometimes as a result of referrals from OSHA or the relevant state authority. An example of this is the prosecution of Craig Sanborn, managing member and primary owner of Black Mag Gunpowder Factory in New Hampshire. An explosion at the factory in May 2010 led to the death of two employees. Mr Sanborn was convicted of manslaughter and negligent homicide under New Hampshire criminal law. It was noted in the case that Mr Sanborn did not provide adequate training or a safe work environment.

Enforcement Against Officers
As stated above, enforcement against officers as individuals specifically is rare in the USA. The OSH Act does not provide for the prosecution of officers individually for their company’s breaches of OHS duties. OSHA, therefore, has no particular focus in that area.

Otherwise, OSHA has generally kept pace with its more recently aggressive enforcement policies. One particular initiative which could affect officers of companies is OSHA’s Severe Violator Enforcement Program (SVEP), which focuses on companies demonstrating indifference to their OSH Act obligations “by committing wilful, repeated, or failure-to-abate violations.” Companies may be added to the SVEP list, seeing them subject to increased oversight. As it has been noted that companies on the SVEP list tend to be “smaller” companies, there is some possible potential for small company directors to be caught up in personal enforcement actions should they meet the criteria for “piercing the veil.”

While overseas based directors have been prosecuted in other areas, we have not been able to find any record of an overseas based director of a company which has breached the OSH Act being prosecuted by OSHA.

The USA is a clear example of a jurisdiction which has limited recognition of personal liability for officers under its OSH laws. While OHS is clearly a continuing and growing focus, no particular focus is placed on officers as individuals.

43 29 USC 666
44 s17(a) OSH Act
46 Ibid n47
47 For more information on the Severe Violator Enforcement Program, see page at https://www.osha.gov/dep/svep-directive.html, accessed 1 March 2015
The enforcement style and system in the USA means that officers are, as stated, only liable where they completely control the operations of their companies. While this says nothing about the overall strength of enforcement applied by OSHA, it is to be noted that the duty on officers to ensure the safety of workers has no personal coercive element to it. This is to say nothing regarding the overall level of enforcement in the USA.

**Conclusion**

**Enforcement of Personal Liability Around the World**
At this juncture a summary plot on our Officer Enforcement Profile provides some insight into the relative strength of regulation surrounding enforcement of personal officer liability for OHS globally in Figure 2.

As previously stated, quadrant 4 – “comprehensive” is the theoretical ideal for regulation of officers in a jurisdiction where OHS outcomes are aimed to be ensured through the placing responsibility on the shoulders of officers of organizations, and holds officers, and their decisions to be of primary importance. As one would expect, this “comprehensive” state is difficult to achieve, and it seems that none of the exemplar jurisdictions exhibit “comprehensive” qualities.

**Leading by Legislation**
In those jurisdictions which place positive duties and specific personal liability on officers, what we see is a typically legislature-led push, in an attempt to obtain “comprehensive” status. China and Australia as exemplars, have recently reformed laws, looking to create a stronger system of regulation in respect of officers. What appears apparent, especially in relation to China, is that regulator activity lags behind the legal reform. The hope in those jurisdictions is that officers will fear the potential of regulator activity, rather than the actuality of it. While some outcomes are achieved, and officers must certainly be wary, without the actual force of regulation legislative changes alone imposing personal liability on directors is insufficient.
Regulator Activity is Key
Despite all of this and because of the importance of officer decisions, officer enforcement is not the only way to achieve strong OHS outcomes. Officers do not have to be made personally liable for an effective system to exist. Sweden is an example of this – a jurisdiction which until recently only recognized officer liability in case law alone, allows officers to delegate, and relies in many cases on its general criminal law to prosecute individuals, still has strong OHS outcomes, both in a general sense and as measured on the Officer Enforcement Profile. This is because culturally, Sweden has a strong and well-ingrained recognition of the importance of workplace safety and a relatively active regulator. Because of its strong safety culture, Sweden, even though it lacks the formal laws to make it a “comprehensive” jurisdiction, still exhibits an extremely strong profile.

Without an active regulator and strong workplace culture, Sweden would be more akin to the system in the USA. While improving, the USA does not possess the same proactive regulation and workplace culture. There is also extremely limited recognition of personal liability of officers for OHS. In many ways the USA could be viewed as attempting to emulate the Swedish model, but it is still developing in that regard.

Final Thoughts

From our review of our four exemplar jurisdictions, it is clear to see the different approaches taken around the world to the personal liability of officers. From jurisdictions which are heavily prescriptive, to those which are not – each jurisdiction places emphasis differently, some seeing

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49 See Hopkins, generally.
officers as the lynchpin (ie. Australia, China) and those who see the organization as a whole as important (ie. Sweden, USA).

It is difficult to neatly sum up an area which possesses so many facets. What is clear is that officer decisions may affect OHS outcomes of an organization. Those decisions are important, and it therefore may make sense to impose liability on those whose decisions can have wide-ranging impacts potentially affecting the health and safety of workers. However, it is apparent that the imposition of personal legal liability, without more, does not lead to a comprehensive system. Indeed, even without positive legal duties on officers, general awareness, culture, and regulator activity appear to be far more important to achieving OHS outcomes.

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