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The HR Implications of Privatized War; Putting Employees in Harm's Way

[A Government Contracting Alert from the Office of Jon W. van Horne.]¹

The recent flap regarding the private security services provided to the State Department by Blackwater has obscured a very important reality about the Iraq war.² Since 2000, the number of Defense Department contracts has nearly doubled. Presently the number of civilian contractor employees in Iraq exceeds the number of military personnel there. As more and more services within the military are outsourced, reliance on civilian contractors to support overseas active military operations has increased significantly. As a result, civilian contractor employees face risks once handled entirely by military personnel. In places like Iraq and Afghanistan (and many other places in an increasingly dangerous world), civilian contractor employees face the very real possibility of injury, kidnapping and death. For the sake of these employees and their families, these risks must be addressed by appropriate insurance coverage, something for which Congress has in fact provided.

Federal Workmen's Compensation Law: Federal law requires all U.S. government contractors and subcontractors to secure workers' compensation insurance for their employees working overseas. The related statutes include the Defense Base Act, 42 U.S.C. §§ 1651-54 and the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50.

The Defense Base Act covers these contractor activities:

- Work on U.S. military bases outside of the United States
- Public work contracts with any U.S. government agency, including construction and service contracts, in connection with national defense or with war activities outside the United States;
- Work funded under the Foreign Assistance Act, if the contract is performed outside of the United States;
- Providing welfare or similar services outside of the United States for the benefit of the Armed Forces, e.g. the USO.

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If any one of the above criteria is met, all employees engaged in such employment, regardless of nationality, are covered under the Act. Additionally, the prime contractor is responsible for assuring coverage of subcontractor employees.

Three major insurance carriers currently providing Defense Base Act insurance coverage are ACE-USA, AIG, and CAN. A number of companies self-insure.

One problem contractors have faced is that the appropriate clause is often not incorporated in government contracts. Without the contracting officer's acknowledgement that the Defense Base Act applies, it may be a challenge to get the cost of the insurance recognized in the contract price. Without the clause in the contract, the contractor may be unaware that the statutorily mandated workmen's compensation insurance should be obtained.

The War Hazards Compensation Act. The WHCA provides benefits to persons covered by the DBA who are injured or killed due to an "armed conflict" in the foreign country where the claimant is working; or who are detained or taken prison by hostile forces. The WHCA provides coverage to employees who would not otherwise be covered because the injuries or deaths were caused by hostile action.

Risk Management: In addition to providing insurance for employees, the contractor needs to take into account the dangerous environment into which it is placing its employees by seeing that the employees, on-site managers and executives are educated as to the risks and the steps that can be taken to minimize those risks. Employees need to know what to expect both physically and mentally and what steps to take in advance, what situations to avoid, what defensive steps can be taken to minimize the danger involved in working in a dangerous environment and what to do if the worst happens. Managers and executive need to know what preventative action to take and what steps need to be taken in the event of an employee's injury, abduction or death.

Education of this type needs to be provided by individuals and organizations that have on-the-ground, recent experience in these kinds of situations and that can provide practical, timely guidance for employees and for the organization. To get a gritty feel for what is required, see "Staging Security in a Theater of War" by Scott Ast in the Security Management Online Archive (<http://www.securitymanagment.com/library/001728.html>).

Conclusion: Putting one's employees into a war zone is a complicated, expensive and stressful activity. Issues are raised with which U.S. businessmen and most government contractors may not be comfortable. Nevertheless, these issues need to be addressed before employees are sent into harm's way.