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Lawyers Face Civil Liberties Challenge of SARS

by J. Kevin Lilly

A deadly disease originates in China, where it is misdiagnosed and misunderstood. Public health agencies respond slowly and fitfully as the death toll grows. When it reaches North America, health professionals, government officials and the courts wrestle with the proper response. Claims of discrimination on the basis of race and equal protection draw media frenzy and public outcry.

Does this sound like the story behind Severe Acute Respiratory Syndrome, known as SARS? No, it describes the plague in San Francisco between 1900 and 1908.

Some things don't change. Then, as now, the threat posed by a virulent and deadly disease strained a system of legal rights not designed to meet a crisis. In 1900, epic court battles raged over a quarantine imposed over San Francisco's Chinatown.

Claiming that the plague didn't exist, and that quarantining the city's Chinese citizens was unfair and unconstitutional, the plaintiffs in *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900), obtained an injunction ruling that the quarantine, imposed with "an evil eye and

an unequal hand," violated Equal Protection Clause under the 14th Amendment. Vilified by business and other interests, the bacteriologist who advocated the quarantine, Joseph Kinyoun, barely escaped jail for contempt.

Now, governments, businesses and employers are being asked to respond to the threat posed by SARS. Once again, measures taken to contain the disease and protect employees from it run up against a system of law designed to protect individual freedom and privacy. As in 1900, how lawyers respond to this challenge will say much about the status of our democracy.

Medical authority gives little definitive guidance about what provides safety from SARS. At least some strains are easily communicated through the air and, therefore, can be communicated in the workplace. To make matters more murky, medical experts have not devised a reliable test for the virus.

President Bush has signed an executive order adding SARS to a list of seven other communicable diseases for which a person can be quarantined by public health authorities. However, when and if public

authorities impose a quarantine in any particular case is unclear.

Law firms have a duty to provide a safe workplace for all employees under Occupational Safety and Health Administration regulations, but no guidelines on how an employer must respond to this particular threat exist.

Without them, firms must simply use their best judgment to meet their base-line duty to provide a safe workplace in whatever manner is reasonably necessary.

Like the unfortunate Kinyoun, employers confronting the threat of SARS must navigate the legal rights of citizens to be free from discrimination based on race and national origin. Though this time around, no one likely will advocate the immediate burning of Chinatown, affected people eventually could claim that they are victims of discrimination.

In a conundrum unknown in 1900, modern day employers must also comply with laws forbidding discrimination against persons with disability or those perceived as having a disability.

For example, the requirement that an employee undergo a medical examination before returning to work could be viewed as based not on objective evidence but on a generalized assumption that someone traveling to an affected area could be infected with SARS. Though the employer may not end up at the brink of jail, as Kinyoun did, an employer may find itself defending a claim that its policies were written with “an evil eye and an unequal hand.”

So how should law firms and other employers respond? Consider establishing a written communicable illness policy that covers SARS and other communicable diseases. The following issues should be addressed:

- Exposure to, or contraction of, which illnesses should necessitate disclosure to the firm, and how should the disclosure be made?
- When should an ill employee stay home, when will an ill employee be sent home, and when should the employee return?
- When, if ever, will an employer require ill employees, or those who have been exposed to an ill employee, to be quarantined?
- Will employees be paid for the time spent quarantined?
- What sick benefits are available to employees, and will travel or other limitations be imposed on sick employees?

If all of this weren't enough, eventually SARS-related absences are bound to bump up against another difficult area, the state's wage and disability law.

Under these laws, the following issues could arise. If an employee becomes ill while traveling on a work-related assignment, is the employee eligible for workers compensation benefits? Probably yes. If the employee is not ill, but still quarantined, must he or she be paid? The answer to this may depend on the employee's status. If an employee has no sick or leave time, the employee may be required to take time off without pay.

As with all leaves, this can cause problems with employees who are not compensated on an hourly basis. An employee from overtime requirements, such as a manager or professional, must be paid his or her salary if the employee performs any work in the work-weeks in which the administrative leave occurs. If such an employee is quarantined for

a complete week, and performs no work in that week, the employee may not need to be compensated.

Taking this approach creates risks for an employer, however. If, for example, the employee was required to take a leave after becoming ill performing company duties, such as on firm-related travel, the firm may be required under state Labor Code to indemnify an employee for all losses incurred in the discharge of his or her duties. Would that include sitting at home without pay while quarantined?

In 1900, many in San Francisco found themselves with their fellow citizens in court when they should have been killing the rats and fleas that actually were spreading the disease. Then, as now, knowledge and preparation is the answer.

For more information on SARS, please see the U.S. Centers for Disease Control Web Site at www.cdc.gov.