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## *Are Companies Prepared to Handle the Avian Flu?*

by Donald W. Benson

In the first stages of an epidemic, employers may face not only high absentee rates among their employee base, but also sick workers who need to be sent home for the protection of the other workers.

Worst-case epidemic scenarios predict two-thirds of workers may be out of commission if an avian, or bird, epidemic hits: either they are sick, their family members need care at home, or they are too scared of infection in public places to go to work.

There may even be a government-imposed quarantine around the work facility. Employers could face the harsh realities of shutting their facilities down temporarily and making arrangements for how best to deal with those employees who are unable or unwilling to work.

In order to ward off potential threats of an epidemic, employers should begin appointing a management team to develop emergency responses procedures sooner rather than later.

Specific assignments for an emergency response team should include the following:

- coordinating with federal,

state and local authorities in control of public health and safety in case of quarantines and inoculation efforts

- developing and implementing evacuation procedures
- preparing facility shutdown check-lists
- identifying key personnel
- determining methods for communicating effectively with employees.

Employers also must prepare for and address their regulatory and contractual obligations to employees and be aware of how existing employment laws will come into play in the event of a pandemic.

They should also anticipate new federal or state rules and regulations issued in response.

In order to prepare for such events, employers may take the following steps:

### **A. OSHA**

The Occupational Safety and Health Act (OSHA) requires employers to provide a safe and healthy workplace for all employees.

Review the Health and Human Ser-

vices' and the Centers for Disease Control's Business Pandemic Influenza Planning Checklist.

This checklist can be found at [www.pandemicflu.gov/plan/businesschecklist.html](http://www.pandemicflu.gov/plan/businesschecklist.html).

OSHA has already published limited guidelines to minimize the contraction and spread of avian flu for employers in the poultry, laboratory and airline industries. OSHA will certainly, in the next few months, issue additional guidelines on how U.S. businesses should prepare for such a pandemic.

### **B. COMMUNICABLE DISEASE PROGRAM**

Employers can adopt a communicable disease policy and procedures. Consider some version of the following employee policy appropriate for your business needs and the dangers confronted by your employees.

#### **Communicable Diseases**

In order to help keep the [COMPANY] safe, we need your help. If you are (a) diagnosed with an illness that is communicable in our workplace such as active TB (tuberculosis) or

SARS (severe acute respiratory syndrome) or Avian Flu; (b) if you believe you may have been exposed to a person so diagnosed; and/or (c) if you have recently visited a location in which there has been an outbreak of such an illness and you do not feel well or are exhibiting any symptoms of the illness in question, you must report this to [insert title of appropriate Company representative].

This information will be kept confidential to a reasonable extent but, obviously, full confidential cannot be guaranteed under these circumstances.

### C. HIPAA

The Health Insurance Portability and Accountability Act (HIPAA) requires that an employer protect the privacy of its employees' medical information.

Business should consult with legal counsel to determine which diseases an employee or potential employee must disclose to the employer and who will have access to the information.

When there is a need to inform other employees of a possible workplace exposure, every effort must be made to maintain the privacy of the infected employee.

### D. WORKER'S COMPENSATION

Pay worker's compensation insurance premiums in a timely manner. Without the exclusive remedy for workplace injuries, employers may be liable under all sorts of creative state torts for negligence, wrongful death, etc.

Some states also include communicable diseases that are contracted at the workplace in the list of covered work-related injuries.

Employers should consult with counsel about whether the worker's compensation bar is available in the states in which they have workers, with particular attention to states where external sales representatives are based.

### E. RE-EXAMINE LEAVE POLICIES

Employers may be subject to a number of federal and local leave laws that require paid

or unpaid leave for sick employees, those taking care of immediate family members, first-responder healthcare providers and/or those called to active military service to enforce a quarantine.

Whenever an employee leave issue arises, your policies should clearly spell out the following: (1) how the employee requests the leave and the requirements to regularly report his/her condition; (2) whether the leave is paid or unpaid; (3) whether any benefits are provided or continue to accrue during the leave (such as health insurance, matching 401k contributions, vacation pay, etc.) and (4) whether the employee will return to work when the leave is exhausted.

### 1. THE FAMILY AND MEDICAL LEAVE ACT

If the employer has more than 50 employees at a location, and if the employee has worked at least 1,250 hours within the past 12 months for that employer, then the Family and Medical Leave Act (FMLA) provides that the employee can elect to take up to 12 weeks of unpaid leave due to a "serious health condition."

A flu that requires continuing treatment by a physician over a three-day period will likely count as a protected "serious health condition," thus triggering the FMLA right to return to a substantially equivalent job when the leave ends.

If the employee is out for several months and was never told that this situation exhausted the FMLA leave period, then the employer's obligation to reinstate the employee can extend far into the future.

The employer may face a retaliation lawsuit for not returning an employee to work whose condition has finally improved, but who may have been out for a year or longer and "fallen through the cracks."

### 2. AMERICANS WITH DISABILITIES ACT

Those employers who suffer permanent health problems affecting a major life activity such as breathing may be entitled to protection under the Americans with Disabilities Act (ADA).

Once the ADA-protected employee returns to work, the employer will likely need to engage in the mandated interactive process to determine whether any reasonable accommodation must be provided to help the employee perform the essential functions of his or her prior position.

### 3. COMPANY LEAVE AND BENEFIT POLICIES

Now is the time for employers to reexamine their contractual promises contained in employee handbooks and leave policies, which allow employees to accrue, from year to year, large amounts of paid leave.

Employers may need to implement exception clauses for natural disasters, emergencies and epidemics, limiting the lump-sum use of such paid leave.

Employers who fail to plan for such contingencies could have a large liability hit just at the time when they can least afford it.

ERISA is the federal statute that governs certain types of employee benefit plans. Prudent employers will at once confirm that the proper, updated Summary Plan Descriptions (SPD) of its benefit plans are distributed to plan participants and their covered dependents.

Otherwise, the plan provisions allowing the plan to be changed may not be enforceable. Worse, the employer may be stuck providing higher benefits according to some previous, and more generous, version of the plan, because the employer cannot prove that the participant or beneficiary received the SPD.

Furthermore, a self-administered plan will experience an immediate need to increase the size of its administrative staff to handle the anticipated increase in benefit request and appeals.

Unfortunately, under ERISA, whether or not the participant is entitled to benefits will most often be determined based solely on the record before the administrator, not at some further time when lawyers can flesh out the file through discovery.

It is crucial that the plan allocate sufficient

resources to fully develop the administrative file, or benefits may be later awarded by the courts to otherwise unqualified applicants.

## **F EXAMINE PAY AND TELECOMMUTING RULES**

A flu pandemic may lead to a situation in which many employees work from their homes. As a result, those telecommuting workers who are non-exempt employees under the Fair Labor Standards Act (FLSA) can create “off-the-clock” and overtime issues for employers. The at-home employee who is constantly checking e-mail or voicemail messages may be entitled to pay for those minutes and hours.

These off-the-clock activities may push the total hours worked in a work-week beyond 40, thus entitling the employee to overtime pay at one-and-a-half times the regular rate of pay.

Employers can require employees to check e-mails or to perform work only during specified hours, to carefully record and submit their time worked and to ask and receive permission to work in excess of 40 hours in a week.

So, which employers should be most concerned about a pandemic?

Initially, the most at-risk employers are likely to be those with workers in regular, close contact with birds or pigs, such as slaughterhouse or meatpacking facilities, where the likelihood of animal to human transmission may be highest.

Employers with inspectors or sales representatives who travel to countries where outbreaks are likely to occur also should begin preparations for potential outbreaks.

Although every employer hopes never to have to use such a comprehensive communicable disease program, the need for such planning is crucial and urgent.

In order to fully prepare for such an eventuality, establishing a comprehensive communicable disease policy and set of procedures will involve a far-ranging review of company employment policies and practices.