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Don't Just Wing It

By Donald W. Benson
and Gina M. Cook

**Follow this
guide to
prepare
your business
clients for a
possible avian
flu pandemic**

How should Tennessee employers prepare their workplaces for possible pandemics of avian influenza, Severe Acute Respiratory Syndrome (SARS) or illness spread by bioterrorism? Is the risk of a pandemic illness significant enough to merit the devotion of time and resources necessary to secure the continuity of business operations?¹ What is the employer's role in promoting quarantine effectiveness, social distancing or preventative hygiene?

Or, is the near-hysteria over the possibility of a pandemic caused by avian influenza or another similarly contagious illness merely the latest version of a doomsday forecast, similar to the prediction that Y2K would shut down global business operations? That prediction spawned an entire industry devoted to business preparations for the millennium, and almost every company of significant size devoted considerable amounts of management and IT time and capital to achieving readiness for Y2K.

Of course, many attorneys, accountants, consultants and vendors profited handsomely from these efforts, but it should be noted that business productivity gains in the early years of this century may be due, in no small part, to the updating and planning that occurred in advance of Y2K.

Accordingly, it is possible that the current alarmist news coverage focused on the possibility of a pandemic may encourage similarly creative business and legal planning that will not only help to minimize the effects of any such pandemic, but also foster the type of productivity gains that resulted from the attention devoted to the threat of Y2K.

This article will first examine the nature and threat of the pandemic occurrence of a disease such as avian influenza and its possible effects on Tennessee business operations. It will then discuss pertinent federal and Tennessee state regulations and guidelines including the "State of Tennessee Department of Health Pandemic Influenza Response Plan." Finally, the remainder of the article will highlight some of the major legal and logistical issues on which counsel should advise business clients in an effort to ensure that they are properly prepared for a possible pandemic.

Pandemic: A Global Outbreak of Disease

The United States Centers for Disease Control and Prevention (CDC) has set forth three conditions that must exist in order for a global outbreak of a disease to occur: (1) the emergence of a new type of virus for which humans have little or no immunity; (2) the capability of this new virus to infect and cause illness in humans; and (3) the capability of the virus to spread easily and without interruption among humans.² A pandemic results when these three factors converge with regard to a disease.

We have experienced three influenza pandemics in the previous century: "Spanish influenza" in 1918, "Asian

influenza" in 1957, and "Hong Kong influenza" in 1968.³ The 1918 pandemic killed an estimated 40 to 50 million people worldwide.⁴ Although the 1918 "Spanish influenza" was exceptionally deadly, the two subsequent pandemics also caused significant human deaths, including an estimated two million deaths in 1957 and one million deaths in 1968.⁵

Currently, public health officials are alarmed over the pandemic potential of the current strain of avian influenza, H5N1. Although the vast majority of avian influenza viruses do not infect humans, on rare occasions these bird viruses can infect other species, including pigs and humans.⁶ H5N1 has spread by bird migration and commerce into the domestic and wild bird populations of 50 countries in Asia, parts of Europe, the Middle East and Africa.⁷ Transmission from birds to humans has been relatively rare, but 348 confirmed cases have resulted in 216 deaths in a wide geographic area including Azerbaijan, Cambodia, China, Djibouti, Egypt, Indonesia, Iraq, Thailand, Turkey and Vietnam.⁸

An influenza pandemic occurs when a new virus subtype emerges that has not previously circulated in humans and "starts spreading as easily as normal influenza — by coughing and sneezing."⁹ Public health experts are particularly concerned that H5N1 might ultimately mutate into a strain that is contagious among humans because it is an influenza A subtype and has genetic similarities to influenza strains that have spread among humans.¹⁰ With such a genetic adaptation, H5N1 would no longer be a bird virus, but a new human influenza virus to which the human immune system would have no preexisting immunity.¹¹ This lack of immune defense makes it likely that people who contract such a type of influenza will experience more serious disease than that caused by normal influenza to which humans have already been exposed.¹²

What Is the Threat of the Occurrence of a Pandemic and Potential Level of Disruption?

The emergence of a virus that meets the biological characteristics set forth by the CDC seems quite plausible given the rapidity with which viruses develop and change. Moreover, viruses that have these characteristics are assisted in their spread through populations and from one population to the next by the reality of a truly global economy in which people travel far more than they did 50 years ago. Many more American companies now have their own sales, logistics, operations and financial employees who regularly travel to their companies' overseas plants, or to those of their vendors or buyers. Similarly, personnel from these vendors and buyers are making onsite calls to businesses in the United States. The prevalence of these international trips has led the World Health Organization (WHO) to estimate that a global pandemic for a highly contagious airborne disease like avian influenza could reach pandemic distribution in as little as three months.¹³

The WHO is currently working under three assumptions with regard to planning for a possible pandemic. The first assumption is that a pandemic would spread to all continents in less than three months.¹⁴ The second assumption is that significant portions of the world's population would require medical care, and the third is that medical supplies would be inadequate in all countries due to limited supplies of vaccines and antiviral drugs.¹⁵ Based on the comparatively mild 1957 influenza pandemic, the WHO projects approximately 2 million to 7.4 million deaths worldwide.¹⁶ The level of disruption to business that might be posed by a pandemic will depend in part on the stage of the pandemic. Past pandemics have generally occurred in two or three waves, so that not all countries experienced the same level of disruption at the same time.¹⁷ Thus, employers may face various stages of disruption caused by a pandemic including: (1) overseas occurrence affecting

Continued on page 14

travel and foreign suppliers and customers; (2) high absenteeism at home, but with the ability to maintain near-normal operations; and (3) near total absenteeism at home, making it difficult to keep operations open, along with possible disruption of utilities and quarantines of the facility area.

Business disruption levels also will be significantly affected by the level of interdependence between a business's operations in the United States and businesses in other areas of the world in which the pandemic is most likely to start. Many American businesses are now directly a part of, or directly affected by, the global economy. These companies sell to or buy from locations in other countries. If those countries experience a pandemic that significantly limits their ability to buy American products or to deliver the goods and services that United States companies have purchased, the ability of American plants and operations to stay open in the United States will be affected.

Overall, not only could the lead time for influenza pandemic planning be extremely short, but uncertainty regarding the level of disruption that a particular virus may pose makes the problem even more vexing for planners. SARS was ultimately contained far short of causing massive deaths and disruptions to worldwide commerce, and, to date, the spread of smallpox or anthrax through bioterrorism has been largely avoided. Nevertheless, business planners may do well to heed the current alarms about the potential disruption that a virus such as avian influenza could cause, given the history of past influenza pandemics and the ever increasing level of global connectivity.

Pertinent Federal Government Regulations and Guidelines

Existing federal regulations and guidelines issued by the Occupational Safety and Health Administration (OSHA), the United States Department of Agriculture (USDA) and the CDC may play a key

role in shaping how businesses in the United States respond to a pandemic. Governmental agencies may be expected to build upon this existing frame¹⁸ work in developing new regulations in response to an emerging disease threat.

In a pandemic scenario, OSHA's blood-borne pathogens standard and respiratory protection standard¹⁹ would come into play. In addition, the "general duty" clause of the Occupational Safety and Health Act²⁰ requires an employer to provide a safe and healthy work environment for employees, thus giving OSHA broad statutory authority for issuing new regulations. In November 2006, OSHA acted on this authority and issued new guidelines for various types of persons who might be affected by an avian influenza pandemic, such as those who clean areas affected by the virus, airline personnel and citizens living abroad.²¹

Given the fact that the source of a virus is often birds or animals, the USDA also can be expected to play a major role in preventing the spread of any pandemic virus. For example, to stem the spread of avian influenza virus to the United States, the USDA helped to enforce a federal ban on the importation of all birds from the Asian countries that experienced an outbreak of the virus.

In February 2007, the CDC issued new community standards for mitigating an avian flu pandemic.²² These mitigation guidelines include social distancing strategies to reduce contact between people during the outset of a pandemic when vaccines and medicines will not be readily available. These guidelines include closing schools and daycares for up to 12 weeks, canceling public gatherings, planning for liberal work-leave policies and telecommuting strategies, and the voluntary isolation of cases and quarantine of household contacts. These guidelines also include the new Pandemic Severity Index, which rates the severity of an influenza outbreak from levels 1 through 5, much like the Saffir-Simpson scale used by the National Hurricane Center to rate a hurricane's intensity. The use of social distanc-

ing measures will be based on the Pandemic Severity Index, matching the level of distancing methods to the magnitude of the pandemic.

Pertinent Tennessee State Government Regulations and Guidelines

In addition to and in conjunction with federal regulations and guidelines, the state of Tennessee is working with the U.S. Department of Health and Human Services (HHS) to maintain its own regulations and guidelines to manage pandemic conditions within the state. On April 10, 2006, the HHS and other federal agencies held a summit with Tennessee public health and emergency management and response leaders to discuss and create policies for dealing with an influenza pandemic. Governor Phil Bredesen and HHS Secretary Michael Leavitt signed a Planning Resolution detailing the HHS's and Tennessee's shared and independent responsibilities for pandemic planning.²³

Under the Planning Resolution, the HHS has accepted responsibility for providing guidance, technical assistance, and (subject to available funding) financial assistance for pandemic planning. The state of Tennessee has agreed to devote numerous resources to state and local planning and the development of an operational plan for responding to a pandemic influenza. In July 2006, Tennessee issued this operational plan which covers such areas as disease surveillance, infection control, and the allocation of scarce resources.²⁴ The operational plan also includes recommended social distancing strategies for schools and businesses that will be implemented under the authority of the Tennessee Commissioner of Health.²⁵

Tennessee bases its plan on the 1918-1919 influenza pandemic.²⁶ The plan adopts for planning purposes the following assumptions: Such an influenza will have an incubation period of an average of two days.²⁷ Sick patients may shed the virus up to one day before symptom

onset and the peak infectious period is the first two days of illness.²⁸ Each ill person could cause an average of two to three secondary cases if no interventions are implemented. Planners anticipate at least two “waves” of local epidemics for most communities, although they may be more severe if they occur in fall and winter.²⁹ Each wave of pandemic disease in a community will last six to eight weeks.³⁰ The entire pandemic period will last two years before the virus becomes a routine seasonal influenza strain.³¹

Using these assumptions, the Tennessee plan estimates that planners should anticipate a severe pandemic creating 1.8 million illnesses (30 percent of the population); 900,000 patients in need of outpatient care; 198,000 hospitalizations; 29,700 intensive care unit cases; 14,850 in need of mechanical ventilation; and 38,060 deaths (2 percent).³²

Based on guidance issued by governmental agencies thus far, employers may be faced with very detailed governmental workplace regulations in the face of a pandemic. Accordingly, preparation for a pandemic should include identifying the management team responsible for monitoring new governmental regulations and adopting procedures for communicating changes to affected supervisors and employees to ensure compliance with any new requirements.

Preparation in the Workplace

Employers who prepare for a possible pandemic will need to think of a broad range of issues associated with disaster planning. Preparation should take into account both federal and Tennessee directives. When drafting a pandemic preparation plan, employers should include procedures for handling employees who are sick in the workplace and the implementation of health and hygiene measures, such as remote work strategies and crisis management procedures, to promote social distancing and cut down on transmission risks. Employers also should consider implementing health and medical initiatives such as disease screening and

vaccination programs. Given that large numbers of employees may be absent from the workplace in the event of a major avian influenza or other disease outbreak, employers should implement plans for new employee training, cross-training of existing employees, and developing a pre-planned communications strategy for contacting large numbers of employees located outside of the work site. Each of these areas for planning and preparation raises its own set of legal issues and potentially far-reaching legal requirements.

Communicable Disease Policy

Employers should consider adopting a communicable disease policy and procedures as one of the first planning measures to implement in advance of any potential pandemic. Attorneys should advise business clients to consider adopting some version of the following employee policy, tailored, as appropriate, to meet individual business needs and the dangers confronted by the client's specific employees:

Communicable Illness

In order to help keep [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, 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 the extent reasonably possible but, obviously, full confidentiality cannot be guaranteed under these circumstances.

Travel and Quarantine Policies

Companies also should consider addressing their employee travel policies regarding foreign travel. Policies should state that travel should be curtailed in

accordance with advisories issued by the CDC and the United States Department of State. Employees traveling to areas with current outbreaks of a communicable disease should be required to obtain and maintain all recommended vaccinations and to follow recommended health precautions.

The potential for the imposition of quarantine for travelers to certain areas also must be considered. If an employee travels for work reasons to a region for which quarantine upon return home is required or advisable, the employer should request the employee to inform his or her supervisor or human resources department immediately so that home work assignments or paid administrative leave can be arranged. If an employee travels on personal business to a region requiring quarantine upon his or her return home, the company should consider allowing the employee to use sick leave, accrued paid-time-off or vacation time, or be placed on unpaid administrative leave. If the employee is diagnosed with a communicable illness or quarantined in association with such an illness, the company should consider requiring a note from a medical provider stating that the employee may safely return to work before permitting the employee to return to the work site.

The Tennessee Plan recommends that businesses consider setting a protocol for the conditions triggering a business closure and establishing plans for how to cope with a period of closure.²³ Mandatory closure of gatherings of more than one hundred persons may be ordered during a severe pandemic (defined as one that kills roughly one in 50 ill persons).²⁴

Compliance with HIPAA

The Privacy Rule regulations issued by the Department of Health and Human Services under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)²⁵ require that an employer protect the privacy of its employees' medical information. Businesses should consult with legal counsel to determine

Continued on page 16

which diseases an employee or potential employee must disclose to the employer and who will have access to the information provided. 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.²⁶

Workers' Compensation

Employers should ensure that their workers' compensation (W.C.) insurance premiums are paid in full. Without the W.C. exclusive remedy for workplace injuries, employers may be liable under all sorts of creative tort claims for negligence, wrongful death, etc. Under certain conditions, Tennessee does include communicable diseases that are contracted at the workplace within the list of work-related injuries that are covered by the W.C. statute.²⁷ Employers should consult with counsel about whether the W.C.

bar is available in the states in which they employ workers, paying particular attention to states in which external sales representatives are based.

Clarify Leave Policies

Employers have a tendency to think of leave policies as a benefit subject to employee abuse and may initially be concerned with ensuring that employees remain at work as absenteeism grows in response to an outbreak of disease. In the various stages of a pandemic, however, the problem may be quite different. First, there may be employees who have traveled for business who find themselves subject to quarantine but can work from home. Second, there may be sick employees, or employees caring for sick family members, whom the employer wants to remain at home in order to reduce the risk of infection to others.³⁸ Third, there may be sick employees who will come to work and

will need to be sent home to keep them from spreading the infection. Fourth, under the new policies issued by the CDC, schools and daycares may be shut down for an extended period of time and employees may be without any means of available child care. Finally, there may be some employees who are too afraid to venture out in public from fear of contracting illness.

In some or all of these situations, both the CDC's and Tennessee's response plans stress that employers should consider how to use leave policies to (1) maintain compliance with pandemic social distancing directives; (2) maintain operations; and (3) sustain a functional and available workforce. Employers must recognize that a pandemic presents a double-edged sword to the average American worker — go to work and risk becoming ill, or stay home from work and risk losing your job and ability to support your family. According to a recent poll conducted by the Harvard School of Public Health, a large proportion of working adults with children thought that, if faced with pandemic conditions, they could arrange childcare so that at least one employed adult in their household could go to work if schools and daycares were closed for an extended period of time.³⁹ However, when asked about possible financial difficulties due to missed work, a greater number of adults reported they would face financial problems, especially if they were forced to miss work for seven to 10 days.⁴⁰

Therefore, an employer's pandemic response plan should ensure that leave policies address the needs of the employer as well as the employee. Leave should be employed in such a way as to limit unnecessary social interaction but minimize the more troubling effects of employee absenteeism on business operations and an employee's financial situation. Paid leave, or unpaid leave with health benefits, can mean the difference in maintaining the work force in the area or experiencing significant

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employee turnover. Avoiding such turnover can be particularly significant as a business seeks to resume normal operating levels. Similarly, fighting every claim for unemployment benefits may not be in the employer's interest if the denial of benefits encourages the pool of available workers to shift to areas unaffected by the disease. Ensuring that there is a leave plan in place and that the plan has been communicated to employees will help to minimize the impact of workplace absenteeism on both employers and employees, whether the emergency is a pandemic or a natural disaster such as Hurricane Katrina.

In considering leave issues, business clients should be counseled on the requirements of applicable federal, Tennessee state and local leave laws that govern paid or unpaid leave for sick employees; employees caring for immediate family members; first-responder health care providers; and employees called to active military service to enforce a quarantine. Leave policies

should clearly spell out the following items: (1) how the employee requests leave; (2) any requirements for regularly reporting his or her medical condition; (3) whether the leave is paid leave; (4) whether any benefits (such as health insurance, matching 401k contributions, vacation pay, etc.) are provided or continue to accrue during the leave period; and (5) when the leave is exhausted, whether the employee will be returned to work.

Statutes and Regulations That May Affect Leave Policies

The Family and Medical Leave Act

The federal Family and Medical Leave Act of 1993 (FMLA) and implementing regulations⁴¹ may have a significant impact on leave policies. If the employer has more than 50 employees at a location, and an employee who has requested leave has worked at least 1,250 hours within the last 12 months for that employer, the FMLA provides that the employee can elect to take up to 12 weeks of unpaid

leave due to a "serious health condition."⁴² Influenza that requires continuing treatment by a physician over a three-day period will likely be considered a protected "serious health condition" that triggers the FMLA right to return to a substantially equivalent job when the leave ends.⁴³ If the employee is absent from the workplace for several months but was never told that this absence exhausted the FMLA leave period, the employer's obligation to reinstate the employee may extend far into the future.⁴⁴

The Americans with Disabilities Act

Similarly, those employees who suffer permanent health problems affecting a major life activity like breathing may be entitled to protection under the Americans with Disabilities Act of 1990 (ADA).⁴⁵ Once the ADA-protected employee returns to work, the employer will likely need to engage in the mandated process to determine whether any reasonable accommoda-

Continued on page 18



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tion must be provided to help the employee perform the essential functions of his or her prior position.⁴⁶

ERISA and Accrued Leave and Benefit Policies

In preparing for a possible pandemic, employers should examine any contractual promises contained in handbooks and leave policies. These policies may allow employees to accrue, from year to year, large amounts of paid leave. Employers may need to consider the inclusion of exception clauses for disasters, emergencies and epidemics that limit the lump-sum use of such paid leave. Employers who fail to plan for such contingencies could experience tremendous financial liability for such leave at the time when they can least afford it.

In examining leave and benefit policies, the Employee Retirement Income Security Act of 1974 (ERISA), the federal statute that governs certain types of

employee benefit plans, must be considered.⁴⁷ Prudent employers will at once confirm that the proper, updated Summary Plan Descriptions (SPD) of its benefit plan are distributed to plan participants and their covered dependents. Otherwise, the plan provisions allowing the plan to be changed may not be enforceable.⁴⁸ Worse still, if the employer cannot prove that the participant or beneficiary received a revised SPD, then the employer may be required to provide higher benefits according to some previous, and more generous, version of the plan.⁴⁹ Further, in the event of a pandemic, a self-administered plan will have an immediate need to increase the size of its administrative staff to handle the anticipated increase in benefit requests and appeals. Unfortunately, under ERISA, the question of whether or not the participant is entitled to benefits will most often be determined based solely on the record before the plan adminis-

trator (whether an in-house benefits administrator or a third-party entity hired to provide and record benefits), not at some future time when lawyers can flesh out the file through discovery. Accordingly, it is crucial that the plan allocate sufficient resources to develop fully the administrative file, or benefits may be later awarded by the courts to otherwise unqualified applicants.

Examine Pay and Telecommuting Rules

A pandemic may lead to many employees working from home. Those telecommuting employees who are non-exempt employees under the Fair Labor Standards Act of 1938 (FLSA)⁵⁰ can create off-the-clock and overtime issues for employers. The employee who is performing the normal work activities of the job over a computer from home may be working substantial additional time without management's knowledge or supervision. Additionally, these employees may be checking email and voice mail outside of regular work hours. These off-the-clock activities may push the total hours worked in a week beyond 40, entitling the employee to overtime pay at one and a half times the regular rate of pay.⁵¹ In order to avoid problems under the FLSA, employers can require employees to check emails or to perform work only during specified hours of each day, to carefully record and submit documentation of their time worked, and to ask and receive permission prior to working in excess of 40 hours in a week.

Communicating a Pandemic Response Plan to Employees

Before employers present a pandemic response plan to their employees, they should ensure that its contents are compliant with state and federal laws and are as up-to-date with both local, state and federal guidelines for pandemic response as possible. The fluctuation in conditions, especially in relation to avian influenza, is constant worldwide and the government's meas-

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See page 4A of this issue of the *Journal* for information on this related CLE —

PANDEMIC PREPAREDNESS AND CONTINUITY OF OPERATIONS PLANNING —

which will cover pandemic preparedness and continuity planning in the community and courts.

ures for responding are subject to alteration at any time.

In addition, employers should ensure that their pandemic response plan covers the basic aspects of emergency planning in a way that employees can understand. The following is just a handful of concerns that a business's pandemic response plan should address:


- Does the response plan designate a person within the company who is responsible for pandemic contingency planning?
- Does the response plan designate a contact person for employees in case emergency conditions disrupt communications?
- Does the response plan identify the company's leave policies and outline in a clear and understandable fashion the steps an employee must take to qualify for leave?
- Does the response plan identify a back-up arrangement if the company's IT person becomes ill and is unable to provide assistance and ensure the proper storage of electronic data?
- In a similar vein, will the pandemic response plan include a pre-pandemic cross-training program for employees?
- Does the response plan provide any guidelines for employees who are stranded due to business travel?
- If the response plan provides for work absenteeism options such as telecommuting or shift-swapping, does it outline the procedure for employees to follow if they wish to engage in these optional forms of working?
- Does the response plan provide

for actions an employee should take if schools and daycares are suddenly closed and what an employee should do if these closures will continue for an extended period of time?

- Does the response plan outline the company's conditions for business closure and re-opening?
- Does the response plan summarize a contingency plan for paying employees their wages in case banks or financial institutions are closed as a result of emergency conditions?

These concerns, and many others, should be addressed clearly and concisely. Once approved, the pandemic response plan should be distributed to all employees either via the employee handbook or special publication. Each employer should also maintain a copy of the response plan on their premises for easy access.

Conclusion

In the very worst of pandemic scenarios, employers may be called upon to be creative and flexible beyond the requirements of employment law in order to assist employees and maintain a stable work force.⁵² Expanded employee assistance, leave and attendance policies and extra efforts to communicate about benefits and provide arrangements for the continued payment of wages during facility shutdowns can be instrumental steps in maintaining a loyal work force. As employers become more attuned to the significant risks of pandemics, prudent planning for such contingencies will become a normal part of their emergency preparedness. 



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Notes

1. Recent news reports again place avian flu on the front page of pandemic concerns. *USA Today* reports on Dec. 17, 2007 that "the World Health Organization warned Monday that countries should be on alert for bird flu because it is again on the move, with Pakistan reporting new infections and Myanmar logging its first human case." *The New York Times* reports on Jan. 3, 2008, that "Egyptian authorities and The World Health Organization announce that four women died in Egypt of avian flu in the last week in unrelated cases."

2. U.S. Dept. of Health & Human Servs., Centers for Disease Control & Prevention, "Questions and Answers about Avian Influenza (Bird Flu) and Avian Influenza A (H5N1) Virus" (2006), <http://www.cdc.gov/flu/avian/gen-info/qa.htm>.

3. World Health Org., "Ten Things You Need to Know About Pandemic Influenza" (2005), <http://www.who.int/csr/disease/influenza/pandemic10things/en/index.html>.

4. *Id.*

5. *Id.*

6. *Id.*

7. U.S. Dept. of Health & Human Servs., Centers for Disease Control & Prevention, "Avian Influenza: Current Situation" (2007), <http://www.cdc.gov/flu/avian/outbreaks/current.htm>; World Health Org., "Epidemiology of WHO-Confirmed Human Cases of Avian Influenza A(H5N1) Infection," 81 *Weekly Epidemiological Record* 249, 249 (2006), available at <http://www.who.int/>

Continued on page 20

wer/2006/wer8126/en/ index.html.

8. World Health Org., "Cumulative Number of Confirmed Cases of Avian Influenza A/(H5N1) Reported to WHO" (2007), Week of Jan. 3, 2008, at http://www.who.int/csr/disease/avian_influenza/county/en/.

9. World Health Org., supra note 2.

10. U.S. Dept. of Health & Human Servs., Center for Disease Control & Prevention, supra note 6.

11. World Health Org., supra note 2.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. 29 C.F.R. § 1910.1030 (a)-(i) (2006).

19. *Id.* § 1910.134 (a)-(o).

20. *Id.* § 654(a). See also T.C.A. 50-3-102(b)(4). Tennessee's own version of OSHA provides for the ability to build upon federal guidelines and programs.

21. U.S. Dept. of Labor, Occupational

Safety & Health Admin., OSHA Guidance Update on Protecting Employees from Avian Flu (Avian Influenza) Viruses (2006), <http://www.osha.gov/dsg/guidance/avian-flu.html>.

22. U.S. Dept. of Health & Human Servs., Center for Disease Control & Prevention, "Interim Pre-pandemic Planning Guidance: Community Strategy for Pandemic Influenza Mitigation in the United States — Early Targeted Layered use of Non-Pharmaceutical Interventions" (2007), available at <http://www.pandemicflu.gov/plan/community/mitigation.html>.

23. U.S. Dept. of Health & Human Servs., Center for Disease Control & Prevention, "Planning Resolution Between Secretary of Health and Human Services Michael O. Leavitt and Governor Phil Bredesen of Tennessee" (2006), available at <http://www.pandemicflu.gov/plan/states/tennessee.html>.

24. U.S. Dept. of Health & Human Servs., Center for Disease Control & Prevention, "Tennessee's Pandemic Influenza Response

Plan" (2006), available at <http://www.pandemicflu.gov/plan/states/tennessee.html>.

25. See *Tenn. Code Ann.* § 68-1-201(2) which gives the Tennessee Commissioner of Health power to declare quarantine and prescribe rules and regulations necessary to prevent the introduction of an epidemic disease into the state or control the spread of an epidemic disease within the state.

26. "State of Tennessee Department of Health Pandemic Influenza Response Plan," July 2006, p.5.

27. *Id.*, p. 6.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*, p. 7.

33. "State of Tennessee Department of Health Pandemic Influenza Response Plan," July 2006, pp. 156-57.

34. *Id.*, p. 157.

35. 45 CFR §§ 160, 164 (2005).

36. See *Id.* § 164.512(b).

37. Under Tennessee's Workers' Compensation statute, *Tenn. Code Ann.* § 50-2-103, if the employee's disease meets certain tests imposed by law, it can be compensated. There must be a causal relationship between the employment and the disease. It cannot be a disease that is an ordinary disease of life to which others are exposed.

38. In this regard, employers must be aware of the risk of possible racial and national origin discrimination if groups of workers in affected industries (e.g., poultry processing) who must be sent home are predominantly from a particular ethnic or racial group.

39. See supra note 21 at p. 47.

40. *Id.*

41. 29 U.S.C. §§ 2601-2654 (2005); 29 C.F.R. §§ 825.100-800 (2005).

42. The term "serious health condition" is defined at 29 U.S.C. § 2611(11) (2005).

43. See, e.g., *Miller v. AT&T Corp.*, 250 F.3d 820, 832-33 (4th Cir. 2001) (holding that flu symptoms and treatment constituted serious health condition requiring FMLA leave).

44. But see *Ragsdale v. Wolverine World Wide Inc.*, 535 U.S. 81, 95-96 (2002) (striking down regulations that prohibited employers from

continued on page 34



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retroactively designating leave as FMLA leave). The effect of this decision is that employees will not be entitled in every case to more than 12 weeks' leave if an employer fails to designate time as FMLA qualifying.

45. 42 U.S.C. §§ 12101-12213 (2005).

46. 29 C.F.R. § 1630.9 (2005).

47. 29 U.S.C. §§ 1001-1461 (2005).

48. See, e.g., *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 75 (1995) (holding that an employer could eliminate retiree medical benefits based on reservation of right to amend plan provision set forth in summary plan description).

49. *Id.*

50. 29 U.S.C. §§ 201-219 (2005).

51. "Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked." 29 C.F.R. § 785.16(a) (2005). Generally speaking, if an employer "suffers or permits" the employee to work, knowing or acquiescing in the performance of work, and such work benefits the employer, then the work is compensable. *Id.* § 785.11.

52. Prudent planning for such pandemic contingencies will become a normal part of an

employer's emergency preparedness. Creative approaches to preparedness can be developed using the currently voluntary National Fire Protection Association (NFPA 1600) Standard on Disaster/Emergency Management & Business Continuity (2004), which is available at <http://www.nfpa.org/assets/files/PDF/NFPA1600.pdf>. This standard has been endorsed by the United States Department of Homeland Security.

Medical Examiner *continued from page 28*

856, 862 (Tenn. 1985).

32. *Supra* note 3 at 366.

33. *McMahon v. Young*, 276 A. 2d 534, 535 (Pa. 1971).

34. John Day, "Do you believe in magic?" *Tort Law Topics* 38 *Tenn. Bar J.* (Jan. 2002).

35. *Supra* note 26 at 4-5.

36. The Tennessee Supreme Court has held that a physician breaches an implied covenant of confidentiality when divulging medical information by informal conversations without the patient's consent. See *Givens v. Mulliken ex rel. Estate of McElwaney*, 75 S.W. 3d 383, 409 (Tenn. 2002). In addition, Tennessee statutory law prohibits the medical examiner from the unauthorized release of photographs, videotapes or audio recordings without the express written consent or direction of the next of kin. See *Tenn. Code Ann.* § 38-7-119.

37. Werner Spitz & Daniel Spitz, *Spitz and Fisher's Medicolegal Investigation of Death* 811 (Charles C Thomas Publisher 4th ed. 2006).

38. Vinay Kumar, Abul Abbas & Nelson Fausto, *Robbins and Cotran Pathologic Basis of Disease* 1279-81 (Elsevier Saunders Publishing 7th ed. 2005).

39. Univ. of Wash. Dept. of Pathology, Guidelines for Laboratory Testing for Osteogenesis Imperfecta at www.Pathology.Washington.edu/Clinical/Collagen/Guidelines/Osteogenesisphp (Sep. 9, 2007).

40. A. James Rutenber, Janet Lawler-Heavener, Ming Yin, Charles Wetli, W. Lee Hearn and Deborah Mash, "Fatal Excited Delirium Following Cocaine Use: Epidemiologic Findings Provide New Evidence for Mechanisms of Cocaine Toxicity." 42(1) *J. Forensic Sci.* 29-30 (1997).

41. *Supra* note 23 at 500.

42. *Id.*

43. See Deborah Mash, John Pablo, Qinjies Ouyang W. Lee Hearn and Sari Izenwasser, "Dopamine Transport Function Is Elevated In Cocaine Users," 81 *J. Neurochem.* 292 (2002).

44. *Supra* note 23 at 361.

45. *Id.*

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But Seriously, Folks!

continued from page 32

Heck, we allow legislators to serve while drunk, why not jurors? Remember the classic lawyer movie, *Twelve Angry Men*? There may soon be a sequel, *Twelve Drunk Men and Women*.

If the legislature changes the law and allows drunk jurors, we may soon hear a judge address the jury as follows: "Ladies and gentlemen of the jury, please wake up! It's happy hour!"

And now, if you will excuse me, I am going to take a nap. Now, where did I put that transcript of that medical deposition? ☹️