

Preparing The Workplace For A Pandemic

Lawyers should be familiar with federal and state regulations as well as legal issues for employer clients

By Donald W. Benson and James E. Hart



Benson



Hart

How should California 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? What is an employer's role in promoting quarantine effectiveness, social distancing or preventative hygiene? This article examines the nature and threat of the pandemic occurrence of a disease, pertinent federal and California state regulations and guidelines and some of the major legal and logistical issues on which counsel should advise business clients for a possible pandemic.

What is a pandemic?

The Centers for Disease Control (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 to 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. 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. The 1918 pandemic killed an estimated 40 to 50 million people worldwide. Although the 1918 "Spanish influenza" was exceptionally deadly, the two subsequent pandemics also caused significant human deaths, including an estimated 2 million deaths in 1957 and 1 million deaths in 1968.

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. 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.

Transmission from birds to humans has been relatively rare, but 366 confirmed cases have resulted in 232 deaths in a wide geographic area, including Azerbaijan, Cambodia, China, Djibouti, Egypt, Indonesia, Iraq, Thailand, Turkey and Vietnam.

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.” 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. 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. This lack of immune defense makes it likely that people who contract such a type of influenza will experience more serious symptoms than those caused by normal influenza to which humans have already been exposed.

How likely is it?

The World Health Organization (WHO) bases its current pandemic planning on three assumptions: a pandemic would spread to all continents in less than three months; significant portions of the world’s population would require medical care; and medical supplies will be inadequate in all countries due to limited supplies of vaccines and antiviral drugs. Based on the comparatively mild 1957 influenza pandemic, the WHO projects approximately 2 million to 7.4 million deaths worldwide. Past pandemics generally have occurred in two or three waves, so that not all countries experienced the same level of disruption at the same time. Thus, employers may face various stages of disruption caused by a pandemic, including: overseas occurrence affecting travel and foreign suppliers and customers; high absenteeism at home, but with the ability to maintain near-normal operations; and near total absenteeism at home, making it difficult to keep operations open, along with possible disruption of utilities and quarantines of the facility area.

Pertinent federal regulations

Federal regulations and guidelines issued by the Occupational Safety and Health Administration (OSHA), the United States Department of Agriculture and the CDC may play a key role in shaping how businesses in the United States respond to a pandemic. A pandemic scenario would likely involve both OSHA’s blood borne pathogens and its respiratory protection standards. [29 C.F.R. §1910.134 (a)-(o)] The “general duty” clause of the Occupational Safety and Health Act [29 U.S.C. §654(a)] and similar California regulations [California Health & Safety Code. §120290] require an employer to provide a safe and healthy work environment for employees, thus giving OSHA broad statutory authority for issuing new regulations. OSHA has already issued new guidelines for various types of persons who may be affected by an avian influenza pandemic, such as those who clean poultry areas affected by the virus, airline personnel and citizens living abroad.

In February 2007, the CDC issued new community standards for mitigating an avian flu pandemic that recommend social-distancing strategies to reduce contact between people, including closing schools and daycare centers for up to 12 weeks, canceling public gatherings, planning for liberal work-leave policies and telecommuting strategies, and the voluntary isolation of cases and household quarantines.

Pertinent state regulations

The state of California and the county of Los Angeles are each working with the U.S. Department of Health and Human Services (HHS) to promulgate regulations and guidelines to manage pandemic conditions within the state and city. During a March 30, 2006, summit, the HHS, other federal agencies, and California and Los Angeles County public health and emergency management and response leaders met to develop an integrated influenza pandemic strategy. HHS Secretary Mike Leavitt, Gov. Arnold Schwarzenegger and Los Angeles County Supervisor Zev Yaroslavsky signed planning resolutions detailing each party's shared and independent responsibilities for pandemic planning.

Pursuant to these planning resolutions, in September 2006, California issued a Pandemic Influenza Preparedness and Response Plan to address disease surveillance, infection control and the allocation of scarce resources. For planning purposes, the California plan adopted an assumption that the pandemic could last from 18 months to several years.

Preparing a response plan

Employers should ensure that their pandemic response plan covers the basic aspects of the emergency plan, including:

- Designating the responsible pandemic contingency planner and emergency contact person;
- Communicating the employer's policies and the required steps for requesting leave and benefits to promote both maintaining operations and not losing the workforce once the pandemic ends;
- Developing a protocol and thresholds for reduced operations staged at set absenteeism levels;
- Developing monitoring systems to keep track of employees who may want to return to work too quickly and for those who may be ready to return without posing a risk to others; and
- Developing social-distancing strategies appropriate to the workplace to limit transmission risks, including cough etiquette, sanitation practices, limiting group meetings and limiting employee assembly opportunities at time clocks and cafeterias, etc.

Communicable disease policy

Attorneys should discuss with business clients whether to adopt a communicable disease policy requesting that employees notify the employer of their possible exposure to certain communicable diseases, so that the employer can reasonably respond proactively with education and workplace preventative steps such as increased disinfection or issuing personal protective equipment where appropriate.

Travel and quarantine policies

Employer travel policies should state that foreign travel should be limited 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.

HIPAA and other privacy laws

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires that an employer protect the privacy of its employees' medical information. [45 CFR §§160, 164 (2005)] Employers 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 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. [45 CFR §164.512(b)]

Employers may wonder whether to test employees during a pandemic in order to protect other employees. Both federal and state laws strictly regulate the ability of employers to test employees or to discriminate against employees who refuse to submit to tests. [See, e.g., California Constitution, Article 1, §1; Cal. Civ. Code §56.20(b)] Employers will have to determine whether to require testing, leaves of absence or other creative alternatives to safeguard the safety and privacy of their employees.

Workers' compensation

Employers should ensure that their workers' compensation insurance premiums are paid in full. Without the workers' compensation exclusive remedy for workplace injuries, employers experiencing workplace illnesses resulting from pandemic diseases may be liable under a variety of creative tort claims for negligence, wrongful death, etc. Under certain conditions, California does include communicable diseases that are contracted at the workplace within the list of work-related injuries that are covered by the workers' compensation statute. [Cal. Lab. Code §3600(a); 29 U.S.C. §§2601-2654 (2005); 29 C.F.R. §§825.100-.800 (2005)] Employers should consult with counsel about whether the workers' compensation 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 of absence policies

Employers should be mindful that a pandemic will likely occur in stages. At various times, employees may be subject to quarantine; they may be sick at work, and may need to be sent home; they may be home caring for sick family members; they may be forced home due to school closures; or they may want to remain at home in order to reduce the risk of infection to others. Employers should re-examine their leave policies to maintain compliance with pandemic social-distancing directives, maintain operations and sustain a functional and available workforce.

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 regulations may have a significant impact on leave policies. [29 U.S.C. §§2601-2654 (2005); 29 C.F.R. §§825.100-.800 (2005)] Qualifying employers must permit employees who have worked 1,250 hours in the previous 12 months to take up to 12 weeks of unpaid leave due to a "serious health condition." [29 U.S.C. § 2611(11) (2005)] 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. [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)] California provides additional protections to care for family members that must also be considered in conjunction with the FMLA. [Family Rights Act, Cal. Gov't Code §12945.2]

ACCOMMODATING DISABILITIES UNDER THE FEDERAL AMERICANS WITH DISABILITIES ACT AND CALIFORNIA'S FAIR EMPLOYMENT AND HOUSING 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). [42 U.S.C. §§12101-12213 (2005)] Once the ADA-protected employee returns to work, the employer will likely need to engage in the mandated process to determine whether any reasonable accommodation must be provided to help the employee perform the essential functions of his or her prior position. [29 C.F.R. §1630.9 (2005)]

As with the ADA, California's Fair Employment and Housing Act (FEHA) accommodates employees with disabilities. In fact, the FEHA provides greater protections than under the ADA, including possible accommodations to temporary conditions. [*Diaz v. Federal Express Corp.*, 373 F. Supp. 2d 1034, 1051–52 (C.D. Cal. 2005) (holding that unlike the ADA, the FEHA does not have a duration requirement for a disability)]

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.

In examining leave and benefit policies, prudent employers will consider the Employee Retirement Income Security Act of 1974 (ERISA), the federal statute that governs certain types of employee benefit plans and update and distribute Summary Plan Descriptions of its benefit plan to participants and their covered dependents. [29 U.S.C. §§1001-1461 (2005)]

EXAMINE PAY AND TELECOMMUTING RULES

Many employees may be working from home during a pandemic. Those telecommuting employees who are nonexempt employees under the Fair Labor Standards Act of 1938 (FLSA) [29 U.S.C. §§201-219 (2005)] or under similar California laws and wage orders can

create off-the-clock and overtime issues for employers.

Because California law also requires that employees be permitted periodic meal and rest periods and that the time worked and meal breaks taken be documented [California Labor Code §§226(a), 1174(d); California Wage Orders 1-17], noncompliance with these provisions may also become a problem for telecommuting employees. 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 e-mail and voice mail outside of regular work hours. These off-the-clock activities may push the total hours worked in a day over eight hours, or in a week beyond 40, entitling the employee to overtime pay at one and a half times the regular rate of pay. [29 C.F.R. §785.16(a) (2005)] In order to avoid problems under the FLSA and California laws, employers can require employees to check e-mails or to perform work only during specified hours of each day, to take meal and rest breaks and 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.

Conclusion

In the very worst of pandemic scenarios, employers may be called upon to be creative and flexible beyond the requirements of federal and state employment laws in order to assist employees and maintain a stable workforce.

- Donald Benson and James Hart are shareholders with Littler Mendelson, an employment and labor law firm representing management exclusively. Benson works in Atlanta and Hart practices in Orange County.

Certification

- This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour of legal ethics.
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1. The 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 to 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. 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.”

3. 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.
4. The World Health Organization (WHO) bases its current pandemic planning on three assumptions: (1) a pandemic would spread to all continents in less than three months; (2) significant portions of the world's population would require medical care; and (3) medical supplies will be adequate in all countries due to expanded stockpiles of vaccines and anti-viral drugs.
5. With a genetic adaptation, H5N1 might no longer be a bird virus, but a new human influenza virus to which the human immune system would have no pre-existing immunity so that 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.
6. In a pandemic scenario, OSHA's blood borne pathogens and its respiratory protection standards and the OSH Act's general duty clause may require employers to take certain safety steps in the workplace.
7. For planning purposes, the California Plan adopted an assumption that the pandemic could last from 18 months to several years.
8. Employers may face various stages of disruption caused by a pandemic including: (1) overseas occurrence affecting 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.
9. Company travel policies should state that foreign travel should be limited and in accordance with advisories issued by the CDC and the United States Department of State.
10. California provides criminal penalties for an employer that willfully exposes person(s) with contagious, infectious or communicable disease to someone else.
11. The federal Family and Medical Leave Act of 1993 (FMLA) and implementing regulations require qualifying employers to allow employees who have worked at least 1,250 hours in the previous 12 months to take up to 12 weeks of unpaid leave due to a “serious health condition.”
12. Influenza that requires continuing treatment by a physician over a three-day period will not likely be considered a protected “serious health condition” that triggers the FMLA right to return to a substantially equivalent job when the leave ends.
13. California provides additional protections to care for family members that must also be considered in conjunction with the FMLA.
14. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires

- that an employer protect the privacy of its employees' medical information.
15. As with the ADA, California's Fair Employment and Housing Act (the FEHA) accommodates employees with disabilities. In fact, the FEHA provides greater protections than under the ADA, including possible accommodations to temporary conditions.
 16. California law also requires that employees be permitted periodic meal and rest periods and that the time worked and meal breaks taken be documented.
 17. The Employee Retirement Income Security Act of 1974 (ERISA) is the federal statute that governs certain types of employee benefit plans.
 18. In order to avoid problems under the FLSA and California laws, employers can require employees to check e-mails or to perform work only during specified hours of each day, to take meal and rest breaks and to carefully record and submit documentation of their time worked.
 19. 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.
 20. 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.

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