


PREPARING FOR A PANDEMIC

Potential issues law firms need to think about in facing the threat of a pandemic

By Donald W. Benson, Mark T. Phillis and Shannon H. Paliotta

A vertical test tube is the central focus, containing a vibrant red liquid. A white, pill-shaped object is suspended in the liquid. Above the tube, a red droplet is captured mid-fall, creating a sense of motion. The background is a soft, out-of-focus blue, suggesting a laboratory setting with a grid pattern visible at the bottom.

Should Pennsylvania lawyers prepare their firms for possible pandemics of avian influenza, severe acute respiratory syndrome or bioterrorism-induced illnesses? Is the risk of a pandemic significant enough to justify devoting the time and resources necessary to ensure the continuity of business operations? What is a firm's role in promoting quarantine effectiveness, social distancing or preventative hygiene?

The U.S. Centers for Disease Control and Prevention (CDC) identifies three conditions leading to a global disease outbreak: the emergence of a new type of virus for which humans have little or no immunity; the capability of this new virus to infect and cause illness in humans; and the capability of the virus to spread easily and without interruption among humans. A pandemic results when these three factors converge.

We have experienced three deadly influenza pandemics in the past century: "Spanish influenza" in 1918 (40-50 million deaths), "Asian influenza" in 1957 (2 million deaths) and "Hong Kong influenza" in 1968 (1 million deaths).

Currently, public health officials are alarmed over the pandemic potential of the current strain of avian influenza, H5N1, and fear that it could mutate into a strain that is contagious among humans and to which the human immune system would have no pre-existing immunity. H5N1 has spread by bird migration and commerce into the domestic and wild bird populations of 50 countries. Transmission from birds to humans has been relatively rare, but the World Health Organization (WHO) reports that as of the end of May 2008, 383 confirmed cases had resulted in 241 deaths in a wide geographic area, including Asia, the Middle East and Europe.

The Threat, the Potential

Given how rapidly viruses mutate and the current global economy, the WHO is working under three assumptions in planning for a possible pandemic: that a pandemic would spread to all continents in fewer than three months; that significant portions of the world's population would require medical care; and that medical supplies would be inadequate in all countries due to limited supplies of vaccines and anti-viral drugs. Based on the comparatively mild 1957 influenza pandemic, the WHO projects approximately 2 million to 7.4 million deaths worldwide.

Pertinent Federal Regulations and Guidelines

Existing federal regulations and guidelines issued by the U.S. Occupational Safety and Health Administration (OSHA), the U.S. Department of Agriculture and the CDC may play a key role in shaping how businesses in the United States respond to a pandemic. Government agencies may be expected to build upon this existing framework in developing new regulations in response to an emerging disease threat.

In a pandemic, OSHA's bloodborne pathogens and respiratory protection standards would come into play. In addition, the "general duty" clause of the Occupational Safety and Health Act requires an employer to provide a safe and healthy work environment for employees.

In February 2007, the CDC issued community standards for mitigating an avian flu pandemic, including social-distancing strategies to reduce contact between people during the outset of a pandemic, when vaccines and medicines would not be readily available. These guidelines anticipate closing schools

and daycare centers for up to 12 weeks, canceling public gatherings, planning for liberal workplace-leave policies and telecommuting strategies, and voluntary isolation and quarantine.

Social-distancing and precautionary steps in the office environment could include the following:

- Educating lawyers and staff regarding cough and sneeze etiquette.
- Increasing the availability of alcohol sanitizers and soap and water stations.
- Ensuring the proper disposal of tissues and cleaning materials.
- Training to disinfect regularly any commonly shared surfaces, including doorknobs, faucet handles, security keypads, copier and keyboard pads, etc.
- Minimizing group meetings, waiting in lines and dining in common areas, and instead encouraging communication through e-mails and teleconferences.
- Implementing proper procedures and precautions for those tasked with cleaning up after sick employees and visitors.
- Tracking the leave dates of employees so that the firm can monitor whether employees are returning to work too soon after becoming sick.
- Communicating with visitors and delivery persons regarding firm policies to minimize exposure.
- Rescheduling meetings and rearranging waiting and common areas to reduce exposure risks.
- Providing personal protective equipment such as masks or gloves where appropriate and education of personnel on the proper use, removal and disposal of such equipment.

Pertinent Pennsylvania Guidelines

At the end of 2005, Pennsylvania published an Influenza Pandemic Response Plan (IPRP) assigning responsibilities to state and local agencies



Currently, public health officials are alarmed over the pandemic potential of the current strain of avian influenza.

for establishing and coordinating the response to a pandemic. The IPRP also informs the public about isolation and quarantine/community containment procedures, travel management and the planned distribution of vaccines and anti-virals.

Preparation in the Workplace

Firms that prepare for a possible pandemic will need to think of a broad range of issues associated with disaster planning, including both federal and Pennsylvania directives. The following are just some of the issues plans should address.

Communicable Disease Policy

Law firms should consider adopting a communicable disease policy as one of the first planning measures. A sample communicable disease policy could be as simple as the following:

Communicable Illness

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

Firms should consider revising their travel policies to state that all business travel would be curtailed in accordance with advisories issued by the CDC and the U.S. Department of State. Lawyers



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. If a lawyer travels for work reasons to a region for which a quarantine upon return home is imposed, the firm should require that it be notified immediately so that home work assignments or paid administrative leave can be arranged.

Leave Policies

Law firms initially may be concerned with ensuring that employees remain at work as absenteeism grows in response to an outbreak of disease. As a pandemic progresses, however, the concerns may change. Both the CDC's and Pennsylvania's response plans stress that all employers should consider how to use leave policies to maintain compliance with social-distancing directives, maintain operations and sustain a functional and available workforce. Law firms must recognize that a pandemic may present employees with a double-edged sword — either go to work and risk becoming ill or stay home from work and risk losing your job and your ability to support your family. How a firm's plan addresses these concerns would be critical, given that the ability of lawyers and staff to work independently and cope financially may differ greatly.

Therefore, a firm's pandemic response plan should ensure that leave policies

Firms that prepare for a possible pandemic will need to think of a broad range of issues associated with disaster planning.

address the needs of the firm's clients, attorneys and staff. Leave plans should be developed and implemented to limit unnecessary social interaction but minimize the more troubling effects of employee absenteeism on the firm's operations and on its employees' financial well-being. Paid leave or unpaid leave with health benefits can mean the difference in maintaining key personnel or experiencing significant employee turnover.

Of course, firms must continue to ensure that their leave policies comply with existing laws, such as the recently expanded Family and Medical Leave Act and the Uniformed Services Employment and Reemployment Rights Act. Firms should also ensure that any short- and long-term disability policies comply with current law.

Pay and Telecommuting Rules

Many employees may work remotely or from home during a pandemic. Those telecommuting employees who are nonexempt employees under the Fair Labor Standards Act or Pennsylvania Minimum Wage Act can create off-the-clock and overtime issues for employers.

Law firms should consider adopting a communicable disease policy as one of the first planning measures.

To avoid such problems, firms can require that employees check e-mails or perform work only during specified hours of each day, carefully record and submit documentation of the time worked and obtain permission prior to working more than 40 hours in a week.

Impact of Other Laws

The privacy rules under the Health Insurance Portability and Accountability Act of 1996 require employers to protect the privacy of their employees' medical information, but there are public health exceptions. Firms should examine carefully what diseases their employees must disclose, who will have access to this information and whether reporting to public health authorities may be required. Every effort must be made to maintain the privacy of the infected employee when informing employees of potential exposures in the workplace.

Firms should confirm that workers' compensation insurance premiums are paid in full. Without this exclusive remedy for workplace injuries, employers may be liable under all sorts of creative tort claims for negligence, wrongful death, etc. Under certain conditions, Pennsylvania includes communicable diseases that are contracted at the workplace within the list of work-related injuries covered by workers' compensation.

Similarly, those employees who suffer permanent health problems affecting a "major life activity" such as breathing may be entitled to protection under the Americans with Disabilities Act and the Pennsylvania Human Relations Act. Firms will need to work with any disabled lawyers or staff members to determine whether they need a reasonable accommodation to enable them to perform the essential functions of their jobs.

Developing and Communicating a Response Plan

Before law firms present a pandemic response plan to their employees, they should ensure that its contents cover the basic aspects of emergency planning in a way that employees can understand, including:

- Designating a responsible pandemic contingency planner and emergency contact person.
- Communicating firm policies, including the required steps for requesting leave and available 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.

The pandemic response plan should be distributed to all employees via either an employee handbook or special publication.

Conclusion

In the very worst of pandemic scenarios, law firms' creativity and flexibility would be taxed in order to continue to serve their clients, assist their employees and maintain a stable workforce. Expanded employee assistance, clear leave and attendance policies, and communication about benefits and wage continuation during office closures can be instrumental steps in maintaining not only a loyal workforce but also loyal clients. As firms become more attuned to the significant risks of pandemics, prudent planning for such contingencies will become a normal part of their overall emergency preparedness planning. 🌐



Donald W. Benson

Donald W. Benson is a senior litigator in Littler Mendelson P.C.'s Atlanta office. He focuses on communicable disease issues in the workplace and is a frequent speaker and writer on employment-related topics including pandemics, MRSA staph infections, RICO/immigration lawsuits, restrictive covenants, and wage and hour compliance and litigation. He may be reached at dbenson@littler.com.



Mark T. Phillis

Mark T. Phillis is a shareholder in Littler Mendelson's Pittsburgh office. He is a frequent speaker for PBI on a variety of employment-related topics. He both counsels employers on employment practices and defends management in discrimination, wage and hour, and other employment-related disputes. He may be reached at mphillis@littler.com.



Shannon H. Paliotta

Shannon H. Paliotta is an associate in Littler Mendelson's Pittsburgh office. She represents employers in a broad range of employment law matters arising under both federal and state law and advises them on litigation avoidance. She may be reached at spaliotta@littler.com.

To comment on this article for publication in our next issue, please e-mail us at editor@pabar.org.