



Outside Counsel Pandemic Preparation For New York Workplaces

Expert Analysis

It is front-page news that many Mexicans have recently died or been sickened by an outbreak of swine influenza A, and that the Mexican government is taking dramatic steps to try to control the scope of the outbreak. In the United States, as of yesterday, the Centers for Disease Control and Prevention had confirmed 50 cases of infected individuals in five states; 28 of those 50 cases are in New York City. The government has now declared a “health emergency,” and the World Health Organization raised its global pandemic flu alert level to four.

The bioterrorism threat, and the possibility of a pandemic unrelated to a terrorist attack, such as this recent swine influenza outbreak, remain real causes for concern. Our government has recognized the continuing threat,¹ and all New York employers need to prepare their workplaces as well, not just for illness spread by bioterrorism, but also for possible pandemics of swine influenza, avian influenza, Severe Acute Respiratory Syndrome (SARS), and the like.

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? The answer is “yes.” Does the employer have a role in promoting quarantine effectiveness, social distancing or preventative hygiene? Again, the answer is “yes,” and the details follow.

A Global Outbreak of Disease

We have experienced three influenza pandemics in the previous century: “Spanish influenza” in 1918, “Asian influenza” in 1957 and “Hong Kong influenza” in 1968.² The 1918 pandemic was exceptionally deadly and killed an estimated 40 to 50 million people worldwide.³ Currently, the Centers for Disease Control and Prevention (CDC) has identified the pandemic potential of the current strain of avian influenza, H5N1. As of March 23, 2009, the World Health Organization (WHO) reported that 412 confirmed human cases of H5N1 have resulted in 256 deaths in a wide geographic area spanning portions of Asia, the Pacific, the Middle East and Africa.⁴

The WHO projects approximately two million to 7.4 million deaths worldwide in a future pandemic.⁵ It recommends that pandemic planning be based on the assumptions that (1) a pandemic would spread to all continents in fewer than three months; (2) significant portions of the world’s population would require medical care; and (3) current supplies of vaccines and anti-viral drugs would be inadequate in all countries.

By
**David
Wirtz**



Regulations and Guidelines

Existing federal regulations and guidelines issued by the Occupational Safety and Health Administration (OSHA) and the CDC play a key role in shaping how employers in the United States respond to a pandemic.

In a pandemic scenario, OSHA’s blood-borne pathogens standard and respiratory protection standard⁶ may trigger obligations applicable to employers. In addition, the “general duty” clause of the Occupational Safety and Health Act⁷ requires employers to provide a safe and healthy work environment for employees free of known hazards, giving OSHA broad statutory authority for issuing new regulations. In November 2006, OSHA issued new guidelines for various types of persons who may be affected by an avian influenza pandemic, such as those who clean areas affected by the virus, airline personnel and citizens living abroad.⁸

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? The answer is “yes.”

In February 2007, the CDC issued new community standards for mitigating an avian flu pandemic.⁹ These mitigation guidelines include social distancing strategies, such as telecommuting and liberalized leave policies, to reduce contact between people during the outset of a pandemic. The CDC also issued “Proposed Considerations for Antiviral Drug Stockpiling by Employers in Preparation for an Influenza Pandemic.”¹⁰

In addition to and in conjunction with federal regulations and guidelines, New York state and city officials have been working with the U.S. Department of Health and Human Services to promulgate regulations and guidelines to manage

pandemic conditions within New York. In February 2006, the New York State Department of Health issued a Pandemic Influenza Plan, and in July 2006 the New York City Department of Health and Mental Hygiene (NYC DOHMH) issued its own Pandemic Influenza Preparedness and Response Plan. These plans are intended to provide a systematic and coordinated response to a pandemic influenza event.¹¹

Preparation in the Workplace

Communicable Disease Policy. As one of the first planning measures, employers should consider adopting a communicable disease policy. Such a policy should require employees to disclose when they have been exposed to an infected person, diagnosed with a serious communicable illness or visited a location with an outbreak, while also promising to protect individual privacy where possible and prohibiting harassment and retaliation.

Travel and Quarantine Policies. Company policies should state that foreign travel must comply with advisories issued by the CDC and the U.S. 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.

Compliance with HIPAA. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires the maintenance of a privacy regimen in connection with “protected health information” (i.e., medical information provided for health plan administration purposes and for the payment of claims, but not for any related employment purpose). Employers should consult with legal counsel to determine what HIPAA’s impact will be prior to requesting health information from an employee, or before utilizing such information after it has been procured.

Workers’ Compensation. Employers should ensure that their Workers’ Compensation (W.C.) insurance premiums are paid in full. Without the protection of W.C. exclusivity, employers may be liable under all sorts of creative tort claims for negligence, wrongful death, etc.

New York’s Workers’ Compensation law coverage includes “accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.” Thus, some workplace exposures to communicable diseases may be covered.¹² 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 outside sales representatives are based. Employers should also ensure that their W.C. insurance adequately covers employees who telecommute.

Leave Policies. While employers may initially be concerned with ensuring that employees remain at work, as a pandemic develops, they may want sick employees to stay home rather than come to work and risk infecting others. Leave policies should clearly spell out: (1) how the employees should request leave; (2) any requirements for regularly reporting their medical condition; (3) whether the leave is paid or unpaid; (4) whether any benefits 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 Affecting Leave

Family and Medical Leave Act. The federal Family and Medical Leave Act of 1993 (FMLA) and implementing regulations¹³ provide that, if the employer has more than 50 employees at a location, and if an employee who has requested leave has worked for that employer at least 1,250 hours within the preceding 12 months, then the employee can elect to take up to 12 weeks of unpaid leave in a 12-month period due to a "serious health condition."¹⁴

Influenza that requires continuing treatment by a physician over a three-day period will likely be considered a protected "serious health condition," triggering the FMLA right to return to a substantially equivalent job when the leave ends.¹⁵ Employees must be informed when they exhaust their available FMLA leave, so as to limit the employer's obligation to reinstate the employees.¹⁶

Anti-Discrimination Laws. Employees who are deemed disabled under the Americans with Disabilities Act of 1990 (ADA), or under the New York State Human Rights Law (NYSHRL) or New York City Human Rights Law (NYCHRL), which have broader definitions of a "disability" than the ADA, even as recently amended,¹⁷ may be entitled to additional protections.¹⁸

Once a protected employee returns to work, the employer will likely need to engage in the mandated process for determining whether any reasonable accommodation must be provided to help the employee perform the essential functions of his or her prior position.¹⁹ Employers must also ensure that employees who return to work after a leave of absence are not singled out or treated differently than other employees, because employees who are "regarded as disabled" despite having no actual disability are also protected.

ERISA and Accrued Leave and Benefit Policies. Employers should examine any contractual promises contained in handbooks and other leave policies. These policies may allow employees to accrue large amounts of paid leave from year to year. Employers must consider whether to include an exception clause for disasters, emergencies and epidemics that limits 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 a time when they can least afford it.

The federal Employee Retirement Income Security Act of 1974 (ERISA), which governs certain types of employee benefit plans, must also be considered.²⁰ Prudent employers should confirm that the proper, updated Summary Plan Descriptions

(SPD) of their benefit plans ("Plan") are distributed to Plan participants and their covered dependents. Otherwise, Plan provisions allowing it to be changed may not be enforceable.²¹ Worse, the employer may be required to provide higher benefits according to some previous, and more generous, versions of the Plan.²²

Telecommuting Rules. Many employees may want to work, or be asked to work, from home during a pandemic. Those telecommuting employees who are nonexempt under the Fair Labor Standards Act of 1938 (FLSA)²³ or New York's wage and hour laws,²⁴ can create off-the-clock and overtime issues for employers.

Employees working from home may be working substantial additional time without management's knowledge, supervision or approval. To prevent such problems, employers can require employees to check e-mails or to perform work only during specified hours each day, to carefully record and submit documentation of their time worked, and to ask for and receive permission prior to working in excess of 40 hours per week. Home working arrangements at the behest of the employer can also raise safety issues that are regulated under OSHA.

Before employers present a pandemic response plan to their employees, they should ensure that its contents comply with local, state and federal laws and that the plan is as consistent with current federal, state and local guidelines for pandemic response as possible.

Communicating the Plan

Before employers present a pandemic response plan to their employees, they should ensure that its contents comply with local, state and federal laws and that the plan is as consistent with current federal, state and local guidelines for pandemic response as possible. Employers should ensure that their pandemic response plan covers the basic aspects of the emergency plan, which includes:

- (1) Designating responsible contingency planners and emergency contact persons;
- (2) Communicating the policies and required steps for requesting leave and benefits;
- (3) Developing a protocol for reduced operations, including designating key employees, establishing cross-training initiatives and alternative work options, such as telecommuting, and determining conditions and procedures for business closure and reopening;
- (4) Developing monitoring systems to ensure that employees do not return to work while they are still ill and/or contagious; and
- (5) Developing social-distancing strategies and sanitary practices that are appropriate to the workplace.

Once a pandemic response plan is approved, it should be distributed to all employees. Each employer should also maintain a copy of the response plan on each of its premises for easy access.

1. On Feb. 26, 2009, the U.S. Government Accountability Office issued a report, GAO-09-334, "Sustaining Focus on the Nation's Planning and Preparedness Efforts," addressing the additional steps needed to prepare for a pandemic influenza outbreak.

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

3. *Id.*

4. World Health Organization, "Cumulative Number of Confirmed Cases of Avian Influenza A (H5N1) Reported to WHO" (March 23, 2009), available at http://www.who.int/csr/disease/avian_influenza/country/en/.

5. World Health Organization, *supra* note 2.

6. 29 CFR §1910.134 (a)-(o).

7. 29 USC §654(a).

8. U.S. Department of Labor, Occupational Safety and Health Administration, "OSHA Guidance Update on Protecting Employees From Avian Flu (Avian Influenza) Viruses" (2006), available at <http://www.osha.gov/dsg/guidance/avian-flu.html>.

9. U.S. Department of Health and Human Services, Centers for Disease Control and 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>.

10. <http://aspe.hhs.gov/panflu/stockpiling.html>. Before stockpiling or administering antiviral drugs to employees, employers should consult their state pharmacy boards and review state laws with the guidance of legal counsel, health insurance companies and other insurance carriers.

11. U.S. Department of Health & Human Services, New York State & Local Planning & Response Activities, available at <http://www.pandemicflu.gov/plan/states/newyork.html>.

12. N.Y. Work. Comp. Law §82, 11; see *Lauria v. Donahue*, 438 F.Supp.2d 131 (E.D.N.Y. 2006) (tort claim against employer for negligent exposure of employee to tuberculosis barred by exclusivity provisions of NY Workers' Compensation Law).

13. 29 USC §§2601-2654 (2008); 29 CFR §§825.100-800 (2008).

14. The term "serious health condition" is defined at 29 USC §2611(11) (2008) and 29 CFR §825.114 (2008).

15. 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).

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

17. 42 USC §§12101-12213 (2008)

18. Under the NYSHRL, the term "disability" means (a) a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, or (b) a record of such an impairment, or (c) a condition regarded by others as such an impairment. N.Y. Exec. Law §§292, 296, et seq. (2008). Under the NYCHRL, the term "disability" means "any physical, medical, mental or psychological impairment, or a history or record of such impairment." N.Y. City Admin. Code §§8-102(16), 8-107 (2007).

19. See 29 CFR §1630.9 (2005).

20. 29 USC §§1001-1461 (2005).

21. 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).

22. *Id.*

23. 29 USC §§201-219 (2005).

24. N.Y. LAB. LAW. §190 et seq. (2008).

DAVID WIRTZ is a shareholder in Littler Mendelson's New York City office. He may be contacted at dwirtz@littler.com. DONALD BENSON, a senior litigator in the Atlanta office of the firm, contributed to this article. RONIT GURTMAN, an associate in the firm's New York office, assisted in the preparation of this article.