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## Preparing the Workplace for a Pandemic

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How should Florida 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?<sup>1</sup> What is the employer's role in promoting quarantine effectiveness, social distancing, or preventative hygiene? This article examines 1) the nature and threat of the pandemic occurrence of a disease; 2) pertinent federal and Florida state regulations and guidelines; and 3) some of the major legal and logistical issues on which counsel should advise business clients for a possible pandemic.

### **Pandemic: A Global Outbreak of Disease**

The U.S. Centers for Disease Control and Prevention (CDC) has set forth three conditions that must converge 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.<sup>2</sup>

We have experienced three influenza pandemics in the previous century: "Spanish influenza" in 1918, "Asian influenza" in 1957, and "Hong Kong influenza" in 1968.<sup>3</sup> The 1918 pandemic killed an estimated 40 to 50 million people worldwide.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> Transmission from birds to humans has been relatively rare, but 381 confirmed cases have resulted in 240 deaths in a wide geographic area including Asia, the Middle East, and Europe.<sup>8</sup>

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."<sup>9</sup> 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.<sup>10</sup> With such a genetic adaptation, H5N1 could become a new human influenza virus to which the human immune system would have no pre-existing immunity.<sup>11</sup>

### **The Threat of Pandemic Occurrence and Potential Business Disruption**

The emergence of a virus that meets the biological characteristics set forth by the CDC seems quite plausible given both the rapidity with which viruses develop and change and the reality of a truly global economy. 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;<sup>12</sup> 2) significant portions of the world's population would require medical care; and 3) medical supplies will be inadequate in all countries due to limited supplies of vaccines and antiviral drugs.<sup>13</sup> Based on the comparatively mild 1957 influenza pandemic, the WHO projects approximately two million to 7.4 million deaths worldwide.<sup>14</sup> 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.<sup>15</sup> Thus, employers may face various stages of disruption caused by a pandemic — from limitations on travel to high but manageable absenteeism, to near total absenteeism and possible quarantines.

### **Pertinent Federal Government Regulations and Guidelines**

Existing federal regulations and guidelines issued by the Occupational Safety and Health Administration (OSHA), the U.S. Department of Agriculture (USDA), 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<sup>16</sup> in developing new regulations in response to an emerging disease threat. In a pandemic, OSHA's bloodborne pathogens standard and respiratory protection standard<sup>17</sup> may come into play. Additionally, the "general duty" clause of the Occupational Safety and Health Act requires employers to provide a safe and healthy work environment for employees, thus, giving OSHA broad statutory authority to issue regulations and guidelines.<sup>18</sup>

In February 2007, the CDC issued community standards for mitigating an avian flu pandemic.<sup>19</sup> These mitigation guidelines include social-distancing strategies, such as closing schools and daycares, canceling public gatherings, planning for liberal work-leave policies and telecommuting strategies, and voluntary isolation and quarantine.

### **Pertinent Florida Guidelines**

The state of Florida coordinates 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 February 16, 2006, the HHS and other federal agencies held a summit with Florida public health and emergency management and response leaders to formulate a planning resolution detailing the HHS's and Florida's shared and independent responsibilities for pandemic planning.<sup>20</sup>

In October 2006, Florida published the Pandemic Influenza Annex to the State's Emergency Operational Plan, which addresses the state's preparation for, and anticipated response to, a severe influenza pandemic, including social distancing.<sup>21</sup> Florida's risk assessment recognizes the state's unique vulnerability to a pandemic, due to its demographic and population density, position as a major tourist destination, vast natural resources and robust agricultural economy.<sup>22</sup> The Florida Department of Health has estimated that an influenza pandemic could result in up to 6.4 million cases.<sup>23</sup> Additionally, in the absence of antiviral medications, the Department of Health estimates a case fatality rate of two percent; however, this number decreases somewhat in the event that antiviral medications exist and are dispensed to a percentage of the population.<sup>24</sup> In response to a severe communicable disease outbreak, Florida's plan addresses possible uses of monitoring, isolation, and quarantine as case-based and community-based response measures.<sup>25</sup> The possibility of working quarantines is specifically addressed as part of the state's community-based containment plan.<sup>26</sup>

### **Communicable Disease Policy**

As a preliminary planning measure, employers should consider adopting a communicable disease policy that requires employees to notify the employer of their possible exposure to certain communicable diseases so that the employer can reasonably respond proactively with workplace preventative steps where appropriate. Because employment medical disclosures are governed by the Americans with Disabilities Act (ADA), employers need to make sure their policy is carefully crafted to meet the business necessity tests of the ADA.

### **Travel and Quarantine Policies**

Employer travel policies should state that all business 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 follow recommended health precautions. If an employee travels for work reasons to a region for which quarantine upon return home is required or advisable, the employer should require immediate notification so that telecommuting or paid administrative leave can be arranged.

### **Leave Policies**

In response to a communicable disease outbreak, businesses may initially be concerned with ensuring employees' continuing attendance. However, as a pandemic progresses, social distancing may be of paramount importance. Employees who have traveled may be subject to quarantine but able to work from home. Employers may wish for sick employees, or employees caring for sick family members, to remain at home in order to reduce the risk of infection to others.<sup>27</sup> Similarly, sick employees who come to work may need to be sent home to avoid the spread of infection. Additionally, as a result of the CDC's social distancing policies, schools and daycares may be closed and employees may be without childcare alternatives. Finally, some employees may fear contracting the illness and stop reporting for work. A business' pandemic response plan should ensure that leave policies address these issues.

In some or all of these situations, both the CDC's and Florida's response plans emphasize 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. How the employer's plan addresses these concerns will be critical, given that the ability of managers and staff to work independently and cope financially may differ greatly.

Leave plans should be developed and implemented to limit unnecessary social interaction yet minimize the more troubling effects of employee absenteeism on the business operations and on its employees' financial wellbeing. Paid leave, or unpaid leave with health benefits, can mean the difference in maintaining key personnel or experiencing significant employee turnover.

Of course, businesses must also ensure that their leave policies continue to comply with existing laws, such as the recently expanded Family and Medical Leave Act (FMLA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA). Leave policies should clearly address 1) how an employee requests leave; 2) any requirements for regularly reporting his or her medical condition; 3) whether the leave is paid or unpaid; 4) whether any benefits (such as health insurance, matching 401(k) 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. Ensuring that an effective leave plan is in place and 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.

### **Pay and Telecommuting Rules**

A pandemic may lead to many employees working remotely or from home. Telecommuting employees who are nonexempt under the Fair Labor Standards Act or the Florida Minimum Wage Act can create off-the-clock and overtime issues for employers.<sup>28</sup> In order to avoid such problems, businesses may consider requiring that employees check e-mail or perform work only during specified hours of each day, carefully record and submit documentation of the time worked, and request permission prior to working over 40 hours in a week.

### **Impact of Other Laws on Workplace Preparedness**

The Privacy Rules under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) require employers to protect the privacy of their employees' medical

information.<sup>29</sup> Employers should carefully examine what diseases its employees must disclose, who will have access to this information, and whether reporting to public health authorities may be required.<sup>30</sup> 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.<sup>31</sup> Florida employers should also be aware of possible exposure to ADA claims or creative tort claims premised upon the disclosure of medical information (inadvertent or intentional) or alleged invasions of employees' privacy.<sup>32</sup>

Employers should ensure that their workers' compensation insurance is current. Without this remedy for workplace injuries, employers may be liable for tort claims for negligence, wrongful death, etc. Notably, under certain conditions, "occupational disease" and "repetitive exposure" are covered by Florida workers' compensation laws.<sup>33</sup>

FMLA policies are also a consideration in addressing communicable illness.<sup>34</sup> Where an employer employs 50 or more employees within a 75-mile radius, an employee who has worked for the business for a year and has worked at least 1,250 hours within the last 12 months is entitled to up to 12 weeks of unpaid leave due to a "serious health condition" under the FMLA.<sup>35</sup> An illness requiring continuing treatment by a physician and a three-day incapacity (such as tuberculosis or pandemic influenza) will likely be considered a protected "serious health condition" that triggers FMLA leave and the right to return to a substantially equivalent job when the leave ends.<sup>36</sup>

Similarly, those employees who suffer permanent health problems affecting a major life activity like breathing may be entitled to protection under the ADA and the Florida Civil Rights Act (FCRA).<sup>37</sup> Employers should anticipate working with any disabled employees to determine whether they need a reasonable accommodation to perform the essential functions of their job.<sup>38</sup>

In examining leave and benefit policies, employers must remember to comply with the Employee Retirement Income Security Act of 1974 (ERISA), which governs certain types of employee benefit plans.<sup>39</sup> 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.<sup>40</sup> 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.<sup>41</sup>

### **Developing and Communicating a Pandemic Response Plan**

Before employers present a pandemic response plan to their employees, they should ensure that its contents are compliant with local, state, and federal guidelines for pandemic response. Employers should ensure that their plan covers the basic aspects of emergency planning in a concise, easily understandable policy, including:

- 1) Designating the responsible pandemic contingency planner and emergency contact person;
- 2) Communicating the company'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;
- 3) Developing a protocol and thresholds for reduced operations staged at set absenteeism levels;
- 4) 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;

5) Developing social distancing strategies appropriate to the workplace to limit transmission risks including cough etiquette, sanitation practices, limiting group meetings and employee assembly opportunities at time clocks and cafeterias, etc.

Once approved, the pandemic response plan should be distributed to all employees either via an employee handbook or special publication. Employers should also maintain a copy of the response plan on their premises for reference.

### **Conclusion**

In the very worst of pandemic scenarios, employers' creativity and flexibility will be taxed in order to continue to serve their clients, assist their employees, and maintain a stable workforce.<sup>42</sup> Expanded employee assistance as well as leave and attendance policies, extra efforts to communicate regarding benefits, and advance arrangements for the continued payment of wages during business closures can be instrumental steps in maintaining not only a loyal workforce, but also a loyal clientele. As Florida businesses become more attuned to the significant risks of pandemic illness, prudent planning for such contingencies will become a routine part of their overall emergency preparedness planning.

<sup>1</sup> Seth Mydans, *Indonesian Chickens and People, Hard Hit by Bird Flu*, N.Y. Times, February 1, 2008, available at [www.nytimes.com/2008/02/01/world/asia/01flu.html?scp=1&sq=avian%20flu%20indonesian%20chickens&st=cse](http://www.nytimes.com/2008/02/01/world/asia/01flu.html?scp=1&sq=avian%20flu%20indonesian%20chickens&st=cse).

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

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

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> U.S. Dept. of Health & Human Servs., Centers For Disease Control & Prevention, Avian Influenza: Current Situation (2007), [www.cdc.gov/flu/avian/outbreaks/current.htm](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 WKLY. Epidemiol REC. 249 (2006), available at [www.who.int/wer/2006/wer8126/en/index.html](http://www.who.int/wer/2006/wer8126/en/index.html).

<sup>8</sup> World Health Org., Cumulative Number of Confirmed Cases of Avian Influenza A/(H5n1) Reported to WHO (2008), Week of April 17, 2008, [www.who.int/csr/disease/avian\\_influenza/country/en/](http://www.who.int/csr/disease/avian_influenza/country/en/).

<sup>9</sup> World Health Org., Ten Things You Need to Know About Pandemic Influenza (2005), [www.who.int/csr/disease/influenza/pandemic10things/en/index.html](http://www.who.int/csr/disease/influenza/pandemic10things/en/index.html).

<sup>10</sup> U.S. Dep't of Health and Human Servs., Centers for Disease Control & Prevention, Questions and Answers About Avian Influenza (Bird Flu) and Avian Influenza A (H5N1) virus (2006), [www.cdc.gov/flu/avian/gen-info/qa.htm](http://www.cdc.gov/flu/avian/gen-info/qa.htm).

<sup>11</sup> World Health Org., Ten Things You Need to Know About Pandemic Influenza (2005), [www.who.int/csr/disease/influenza/pandemic10things/en/index.html](http://www.who.int/csr/disease/influenza/pandemic10things/en/index.html).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 29 C.F.R. §1910.1030 (a)-(i) (2008).

<sup>17</sup> 29 C.F.R. §1910.134 (a)-(o).

<sup>18</sup> 29 C.F.R. §654(a).

<sup>19</sup> U.S. Dep't of Health and Human Servs., Centers 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), [www.pandemicflu.gov/plan/community/mitigation.html](http://www.pandemicflu.gov/plan/community/mitigation.html).

<sup>20</sup> U.S. Dep't of Health and Human Servs., Centers for Disease Control & Prevention, Planning Resolution Between Secretary of Health and Human Services Michael O. Leavitt and Gov. Jeb Bush of Florida (2006), [www.pandemicflu.gov/plan/states/florida.html](http://www.pandemicflu.gov/plan/states/florida.html).

<sup>21</sup> Florida Pandemic Influenza Annex to the Emergency Operations Plan (2006), [www.pandemicflu.gov/plan/states/florida.html](http://www.pandemicflu.gov/plan/states/florida.html).

<sup>22</sup> *Id.* at 4.

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.*

<sup>25</sup> Florida Pandemic Influenza Annex to the Emergency Operations Plan (2006), Appendix 9, *Monitoring, Isolation and Quarantine Protocols*, available at [www.pandemicflu.gov/plan/states/florida.html](http://www.pandemicflu.gov/plan/states/florida.html).

<sup>26</sup> *Id.* at 11.

<sup>27</sup> 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.

<sup>28</sup> 29 U.S.C. §§201-219 (2008); Fla. Stat. §448.110 (2008) (as amended).

<sup>29</sup> 45 C.F.R. §§160, 164 (2008).

<sup>30</sup> *See* 45 C.F.R. §164.512(b).

<sup>31</sup> *See id.*

<sup>32</sup> *See, e.g., Fla. Dep't of Corrections v. Abril*, 969 So. 2d 201 (Fla. 2007) (creating exception to impact rule for negligent disclosure of the results of an employee's HIV test, where employee's false-positive HIV test results were faxed to an unsecure office fax machine).

<sup>33</sup> *See* Fla. Stat. §440.09(1) ("In cases involving occupational disease or repetitive exposure, both causation and sufficient exposure to support causation must be proven by clear and convincing evidence.").

<sup>34</sup> 29 U.S.C. §§2601-2654 (2005); 29 C.F.R. §§825.100 – 825.800 (2005).

<sup>35</sup> The term “serious health condition” is defined at 29 U.S.C. §2611(11) (2005).

<sup>36</sup> See 29 C.F.R. §825.114(a)(2)(i); see also DOL Opinion Letter FMLA-86 (December 12, 1996), 71 Federal Register 69,506 (December 1, 2006); and *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).

<sup>37</sup> Firms that have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar years are covered by the ADA. 42 U.S.C. §12111(5)(A). Pursuant to the Florida Civil Rights Act, an “employer” means “any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” Fla. Stat. §760.02(7).

<sup>38</sup> 29 C.F.R. §1630.9 (2005).

<sup>39</sup> 29 U.S.C. §§1001-1461 (2005).

<sup>40</sup> 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).

<sup>41</sup> *Id.*

<sup>42</sup> 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), available at [www.nfpa.org/assets/files/PDF/NFPA1600.pdf](http://www.nfpa.org/assets/files/PDF/NFPA1600.pdf). This standard has been endorsed by the United States Department of Homeland Security.

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