

Employment Edge 100th Edition—Preparing Your Workplace for a Possible Flu Pandemic

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After years of worry about a possible Avian flu pandemic, the world is facing a swine flu outbreak that has spread from Mexico to numerous countries, including the United States. While cautioning U.S. residents not to panic, the U.S. has declared a public health emergency and pandemic preparation is underway and ramping up at all levels. In the U.S., there have already been some school closings, and some businesses have restricted nonessential travel to Mexico and have started implementing remote work arrangements in impacted areas. It is still unknown whether the swine flu outbreak will become a widespread and serious pandemic, but history is replete with periodic pandemics. Given the growing number of countries with confirmed swine flu cases, employers should give serious consideration to embarking on or updating their pandemic planning efforts. Employers are legally obligated to provide a safe workplace, and it is usually difficult to plan for and respond thoughtfully to a crisis in its midst. At a minimum, employers should stay informed so they can act quickly should the need arise.

Because each business is unique, a pandemic plan must be customized to each business' workforce and business continuity needs. Helpful information on pandemic risks and business planning can be found online from numerous governmental and other sources, including at the following sites: <http://www.pandemicflu.gov> and <http://www.osha.gov/Publications/OSHA3327pandemic.pdf>.

In addition, in embarking on or updating pandemic planning, there are a number of practical and legal considerations that many employers may face, including, for example, the following:

Dealing with Large Levels of Absenteeism.

Experts predict that, in the face of a pandemic, up to 35-40 percent of workers may be absent. Some employees may be unable to work for health reasons, due to a quarantine or changes in public transportation, or due to the closing of their children's schools or care centers. Others may stay away from work out of fear of exposure. Employers will need to address the practical fall-out of high absenteeism and may need to temporarily reassign workers and engage in more cross-training. In changing job duties, employers should be mindful of wage and hour requirements applicable to the duties of employees exempt from minimum wage and overtime pay requirements. In addition, employers may be legally obligated under leave or disability laws to provide leaves and job restoration rights to absent workers. Employees may also

be entitled, in some circumstances, to workers' compensation benefits, paid time off, disability or other benefits, continued health insurance, or unemployment benefits.

Balancing Safe Workplace Efforts with Individual Rights.

In the face of a pandemic, employers should be mindful of the legal obligation to maintain a safe workplace. An employer may be liable for dangers such as infected employees spreading disease to others. An employer's best defenses will likely include its preventive and response measures, such as (1) preparedness and response planning; (2) educating employees on the risks, on good hygiene, and on the employer's prevention and response measures; and (3) implementing measures to, as much as possible, prevent the spread of disease at work. While not exhaustive, examples of measures that an employer might take to reduce the risk of workplace infection include:

- Providing air ventilation and purifying systems or equipment and/or extra hygiene supplies or equipment, such as hand sanitizer, wipes, tissue, and/or face masks
- Arranging for periodic cleaning of furniture and equipment, particularly shared furniture or equipment
- Restricting or eliminating travel
- Implementing social distancing policies for employees and visitors
- Implementing remote or other alternative work arrangements and increasing the use of telephone conference, video-conference, or Webcam meetings
- Encouraging or requiring contagious workers to stay home

There is, of course, no way to anticipate all contingencies, but an employer's reasonableness often plays a key role in defending against legal claims. As such, employers should stay abreast of developments and strive to take the steps that a reasonable and responsible employer would take. Employers must, however, balance their workplace safety obligations with other legal obligations. While keeping sick or contagious workers out of the workplace is one way to reduce the spread of disease, disability laws may limit an employer's right to make medical inquiries or require medical exams of applicants or employees. In addition, to the extent that the law may permit a forced leave or medical exam in a particular situation, such measures must be implemented carefully and lawfully. Employers must also consider individuals' possible privacy rights and whether falsely accusing someone of having a pandemic flu could be defamatory.

Keeping Sick Workers Home.

In addition to the above legal considerations, employers may face the practical reality that some sick or contagious workers may come to work even when they should stay home to continue earning their compensation and benefits or for other reasons. As such, even when not legally required, an employer may want or need to consider implementing voluntary special pay policies designed to induce sick or contagious workers to stay home. Another practical issue that employers should consider is that some employees may



fail to seek health care for financial reasons or out of fear of exposure at the doctor's office. An employer may want to remind employees of any paid benefits or health insurance already available to them and consider whether it might adopt any other special assistance policies during a pandemic. Any special policies or programs should be reviewed by legal counsel to ensure that they are lawful.

Refusal to Work or to Perform Duties.

Another practical problem during a pandemic is that some employees may refuse to work at all or to perform their regular duties, such as travel or attending meetings, out of fear of possible exposure. If an employer has not implemented any official change in the employee's duties, the employer will need to decide whether it is legally obligated to or will otherwise accommodate the employee, or whether it will consider discipline or termination. Depending on the circumstances, the employee may or may not be entitled to accommodation under a leave, disability, or some other law. In addition, federal OSHA law protects an employee from retaliation if the refusal to work is based on a good faith concern about workplace safety.

Identifying Key Employees; Special Assistance Policies.

Given the potential for high absenteeism, employers will likely want to identify key employees to perform core, essential functions during a pandemic. Having back-ups assigned to each key employee could also be important should a key employee become unable to work. In addition, employers may need to consider whether key employees should be sequestered at some point, and whether any special pay or assistance policies are needed to permit key employees to remain available for work. During a pandemic, some employees may need or expect personal assistance, such as with care for a sick relative or obtaining food, water, cash, or transportation during a quarantine. In addition, some employees may be unable to focus or to work at all due to the emotional fall-out of the crisis, and such employees may need time off, counseling, or other assistance and support.

It may seem easiest, particularly during tough economic times when resources are limited, to defer planning for a pandemic that no one is yet certain will, in fact, occur. Given the human stakes and the complexities involved in an actual pandemic, however, employers should consider advance planning now to ensure a careful, thoughtful response should a pandemic occur.

If you have any questions about pandemic planning or other employment law issues, please contact Megan Anderson or another member of the Gray Plant Mooty Employment and Labor Law practice group.

This article is provided for general informational purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. You are urged to consult a lawyer concerning any specific legal questions you may have.