

H1N1 Preparation For Virginia Lawyers and Employers

By Susan Wiltsie

H1N1 has infected hundreds of people in 21 countries and continues to spread. Although the mortality rate remains relatively low, the World Health Organization's Pandemic Alert Level has been raised to "Phase 5," which is described as "a strong signal that a pandemic is imminent and that the time to finalize the organization, communication and implementation of planned mitigation measures is short."¹ Just as health officials around the world are working to address H1N1, Virginia lawyers, in their role as employers and as counsel to employers, also should be taking steps to prepare for and reduce the potential risks of a full-blown pandemic. This alert outlines some of the issues that should be addressed.

THE BASICS.

The H1N1 virus is spread by human-to-human contact in the same manner as seasonal flu or the common cold. The media's label for this virus is a misnomer, as the virus contains a combination of mammal and avian viruses. It is not spread by eating pork or pork products. The incubation period is approximately 1-4 days, so if a week has gone by since a known exposure, sickness is unlikely.² However, the CDC provides that flu may be contagious from one day before symptoms arise to seven days after.³

PANDEMIC PLANNING

Secretary of Homeland Security Janet Napolitano said on May 4, that health officials "are cautiously

1 Source: Current WHO Phase of Pandemic Alert, WHO website (http://www.who.int/csr/disease/avian_influenza/phase/en/index.html) (May 5, 2009).

2 Source: Swine Flue FAQs, Virginia Department of Health website (<http://www.vdh.virginia.gov/news/Alerts/SwineFlu/FAQs.htm>) (updated as of May 4, 2009).

3 Source: What To Do If You Get Flu Symptoms, CDC Website (<http://www.cdc.gov/h1n1flu/sick.htm>) (updated as of May 5, 2009).

optimistic that this particular strain will not be more severe than a normal seasonal flu outbreak"⁴ Ideally, this optimistic statement will prove true. However, for those employers who did not have a pandemic plan in place before this most recent health emergency, the last few weeks should be viewed as a wake up call. Employers should have a plan in place in the event that H1N1, or any other widespread communicable disease, impacts their workforce.

Task Force. First, they should establish a task force to manage pandemic issues. One person in this task force should monitor the progress of the disease globally and keep key staff informed. Someone also should develop training materials that address the nature of the disease, its transmission and the means by which individuals can limit their risk of exposure. The task force should make decisions in advance, so that if the worst happens these decisions will not be made piecemeal. Advance planning and consistent application will prevent employers from compounding a terrible situation with follow-on employment liability due to inconsistent or inaccurate application of policies or legal obligations.

The task force should evaluate benefits/insurance issues, review vendor/supplier contacts and evaluate travel needs so that decisions can be made in advance regarding these issues.

Policy and Benefits Review. Attendance and pay create specific problems. Employers must determine in advance which job skills are critical, which jobs require on-site work, which jobs can be done via telecommuting and which jobs are not critical. For critical jobs, employers who have no "bench" in

4 Source: Remarks by Secretary Napolitano at Today's Media Briefing on the H1N1 Flu Outbreak, DHS website (http://www.dhs.gov/ynews/releases/pr_1241530553980.shtm) (May 4, 2009)

these critical skills should consider cross-training to increase flexibility. Employers also should consider a quarantine area where critical-skills employees who may have been exposed to illness could still work without interaction with others. For jobs that can be handled by telecommuting, employers should evaluate whether the necessary equipment and training are in place for work to continue from home or from remote locations.

Employers must determine in advance who will be paid in the event of widespread absenteeism. Most employers will not be able to afford to pay employees who cannot work and who have exhausted sick leave. These difficult decisions must be made up-front, so that management does not treat people differently and expose the company to claims of discrimination or favoritism. These plans must be carefully developed so that there is no incentive for employees to come to work sick, nor is there an incentive for able-bodied workers to stay home. This is a delicate balance that will be different for every employer.

Some employers may desire to enhance their benefits offerings so that employees can have insured (either at their own group-rate cost or subsidized) income continuation when sick or have greater life insurance benefits. Mental health benefits also will be important. Employers should know how many individuals their current EAP provider can serve and what their provider's staffing plans are in the event of widespread illness.

Emergency Information. Employers also should make certain that emergency contact lists, beneficiary lists and other insurance matters are all up-to-date. If someone becomes ill at work, the company will not want to be responsible for transport of that person home or to medical care. Make sure that there is a list of contact people who would be able to come on-site to pick up the employee and/or transport them to medical care.

Travel and Leave. For each pandemic risk, travel issues must be evaluated. Travel should be prioritized. Employers should not require employees to travel to high-risk areas until the present risk has decreased. If such travel cannot be avoided,

employees required to travel should be carefully trained regarding precautions to avoid infection. If a pandemic occurs, commercial travel will not be available for sick individuals. Also, in case the disease progresses internationally as anticipated, companies whose workers travel internationally should consider establishing a relationship with an international medical transport company. If a worker becomes ill in a country with substandard medical care, medical transport may be necessary to get that worker access to anti-viral medications and effective care.

SPECIFIC ISSUES WITH THIS H1N1 OUTBREAK

Leave Issues. In addition to the pandemic planning issues that all employers should address, this stage of the H1N1 outbreak has created specific legal issues for employers. First, many employers had one or more employees who traveled to Mexico in April. Employers may be tempted to forbid employees who have traveled to infected areas from returning to work until it is clear that such employees are not infected. Taking the most conservative information from the CDC website, the incubation period for H1N1 can be anywhere from one to seven days. Thus, to be effective, such a policy would have to prevent travelers from returning to work for seven days. Employees are unlikely to protest if employers provide paid administrative leave for this period of time. However, if the employer requires employees to use sick or vacation leave or be deprived of pay, this approach could create legal risk.

For example, a policy that prohibits symptom-free travelers returning from Mexico from working may have a disproportionate impact on workers of Mexican origin and create a risk of discrimination claims. Also, the salary basis test for exempt employees under the Fair Labor Standards Act restricts employers' ability to deprive exempt employees of pay in less than full-week increments. The employers' own policies may prevent them from mandating the use of paid leave. Finally, any requirement that symptom-free nonexempt employees stay home must be done in consideration of FLSA obligations and state wage and hour laws.

The spread of this flu may understandably prompt consideration of delaying the return to work of traveling employees. If you choose to do so on an unpaid basis, you need to recognize the risks and you should probably consult with counsel.

The legal risk analysis changes for the employees who exhibit flu symptoms. The OSHA general duty clause requires employers to maintain workplaces free from recognized hazards that are causing or likely to cause death or serious physical harm to employees. An employer may have a general duty clause obligation to prevent infected workers from coming to work. Typically, that risk is balanced against risks under the Americans With Disabilities Act not to discriminate against individuals with disabilities. However, employees with flu symptoms are unlikely to be considered disabled under the ADA and, in any event, such legal risk would be outweighed by the risk to the workforce if a symptomatic employee is present. Ultimately, this issue may be taken out of employers' hands. Public health authorities have the legal right to order quarantine and, if the disease progresses, may order travelers returning from high-impact areas to remain isolated until it is clear they are symptom free.

A related issue is how to manage employees who have not been exposed but are afraid to come to work. Employers should decide in advance how they will manage such issues so policies are consistently and legally applied. A flexible nonpunitive leave policy creates the least legal risk, but could leave employers short-handed and unable to operate. Employers who take a more aggressive approach and require employees to come to work if they are symptom free should be certain that these policies are in compliance with OSHA and the National Labor Relations Act. OSHA provides very limited rights for employees to refuse to work. The NLRA protects employees from retaliation for exercising Section 7 rights to engage in "protected concerted activity." In some circumstances, employees' refusal to come to work may constitute NLRA-protected concerted activity. The OSHA and NLRA issues are individualized and should be handled

based on the specific circumstances in consultation with counsel.

Health Precautions at Work. Employers should provide information to employees regarding H1N1 to be certain that their workforce is getting accurate, nonsensational information. The CDC website has continually updated accurate information. Also, employers should provide posters and training regarding universal precautions. Universal precautions include cough/sneeze hygiene, social distancing and proper hand-washing techniques. Common guidance is that hands should be washed for as long as "Happy Birthday" twice. The interlude section of Queen's "Bohemian Rhapsody," also is the proper length.⁵

Employers are also wondering whether they should provide surgical face masks to the workforce. Surgical masks provide some protection from breathing in infected respiratory droplets and retard dispersal of respiratory droplets from an infected person's sneeze or cough. In workplaces with medium to high exposure, surgical masks may be beneficial, but they do not prevent the spray of all respiratory droplets.⁶ If employers elect to provide such masks, they should be aware that they should use only masks the FDA has approved for occupational use. Also, employers should know that the use of double-strap masks or any other NIOSH approved mask will require compliance with the substantial regulatory requirements of OSHA's respirator standard.⁷

Hunton & Williams has developed a training program on the employment issues associated with pandemic flu, which can be provided either over the phone or in person.

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⁵ Source: "Bohemian Rhapsody" National Public Radio website (<http://www.npr.org/templates/story/story.php?saId=103599330>)(May 5 2009)

⁶ Source: "Proposed Guidance on Workplace Stockpiling of Respirators and Facemasks for Pandemic Influenza" OSHA website (<http://www.osha.gov/dsg/guidance/stockpiling-facemasks-respirators.html>) (2007)

⁷ Id.