
LEGAL ALERT

Practical Pandemic Preparation

Health experts have long warned that the question is not whether we will have a pandemic, but when one will strike. Now, world governments and health organizations are closely monitoring outbreaks of swine flu that have reportedly killed more than 150 people and sickened more than 1,600 across Mexico. As of April 29, confirmed U.S. cases of Swine Influenza A (H1N1) reportedly numbered over 60 in California, Kansas, Indiana, New York City, Ohio, and Texas which includes one death.

The US Government including officials with the White House, the Department of Homeland Security (DHS), the Department of Health and Human Services (DHH), the Center for Disease Control and Prevention (CDC) and others agencies are working closely with officials in states where human cases have been identified, as well as with health officials in Mexico, Canada, and the World Health Organization.

On April 26, the Secretary of DHS, Janet Napolitano, declared a public health emergency in the United States, which allows funds to be released to support the public health response. In addition, the CDC's Division of the Strategic National Stockpile (SNS) is releasing one-quarter of its antiviral drugs, personal protective equipment, and respiratory protection devices to help States respond to the outbreak.

Background on Swine Flu

Employers should monitor CDC and other sources and remain knowledgeable about the influenza, as well as inaccurate concerns which can fan public hysteria. Swine Influenza (swine flu) is a well known respiratory disease among pigs caused by type A influenza viruses. People do not normally get swine flu, but swine flu viruses have been reported to spread from person-to-person on a limited basis.

Healthcare professionals have determined that the swine influenza A (H1N1) virus is spreading from human to human, although it not yet known how easily the virus spreads between people. The symptoms of swine flu in people are similar to the symptoms of regular human flu and may include fever, cough, sore throat, body aches, headache, chills and fatigue. Some people have reported diarrhea and vomiting associated with swine flu. In the past, severe illness (pneumonia and respiratory failure) and resultant deaths have been reported. Like seasonal flu, swine flu may cause a worsening of underlying chronic medical conditions.



Spread of this swine influenza A (H1N1) virus is thought to be happening in the same way that seasonal flu spreads largely through coughing or sneezing. Sometimes people may become infected by touching something with flu viruses on it and then touching their mouth or nose. Infected individuals may be able to infect others beginning one day before symptoms develop and up to seven or more days after becoming sick. Health professionals agree that the first and most important step to avoid getting the swine flu is simply to wash one's hands. In addition, one should try to stay in good general health, get plenty of sleep, be

physically active, manage stress, drink plenty of fluids, and eat nutritious food; goals which have been made more difficult by the current economic conditions. It is also essential to not touch surfaces that may be contaminated with the flu virus, as well as to avoid close contact with people who are sick.

Addressing Workplace Influenza Pandemic Issues

For most employers, protecting their employees during an influenza pandemic will depend on two basic approaches: emphasizing "common sense" hygiene (cleaning hands and decontaminating surfaces) and

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practicing “social distancing.” Social distancing means reducing the frequency, proximity, and duration of contact between people (both employees and customers) to reduce the chances of spreading pandemic influenza virus from person-to-person. Employers may take additional protective measures, including engineering changes, procedure changes, and requiring the use of personal protective equipment, based upon the specific occupational exposure risk of their job tasks and work place. Use of respiratory protection (respirators) and barrier protection (facemasks) may be components of a comprehensive plan to prepare workplaces for an influenza pandemic, but employers must comply with applicable OSHA standards.

To assist employers in preparing for a pandemic, the Department of Labor (DOL) and HHS have issued [*Guidance on Preparing Workplaces for an Influenza Pandemic*](#). DOL has also developed a guidance document to help healthcare employers protect their employees during an influenza pandemic entitled [*Pandemic Influenza Preparedness and Response Guidance for Healthcare Workers and Healthcare Employers*](#). In this planning, employers should consider “non-occupational exposure risks,” such as commuting to and from work on public transportation (e.g., bus or train) or other community exposures, such as shopping. Additional information can be found on www.pandemicflu.gov.

Critical employers, such as law enforcement, emergency response, or public utility employees should consider upgrading protective measures for their employees due to the urgent necessity of their services and their difficulty in replacing them due to extensive training or licensing requirements.

Pro-active Workplace Pandemic Strategy and Checklist

The pandemic potential raises many questions and no easy answers. However, all employers should emphasize certain communication points in responding to the current swine flu outbreak. First, you should immediately communicate with employees regarding the effect, if any, of swine flu in their workplace, emphasizing that company’s willingness to take steps to protect their health. Second, employers need to reassure their employees that there is no need to panic based on a non-specific fear of swine flu exposure in the workplace. Legal problems flow from knee-jerk responses by employees and employers alike.

Part of every employers’ strategy in dealing with the swine flu and a potential pandemic should include: (a) following the guidance from the CDC and other public health services, (b) designating specific individuals to answer all questions involving the swine flu (after consultation with medical and legal counsel) so that the company will act in a consistent and thoughtful fashion, and (c) plan ahead for potential disruption, reassignment of employees, and response to their concerns.

The following is a checklist outlining actions employers should consider in preparing for a potential influenza pandemic.

1) Develop An Emergency Response Plan: A company’s emergency response plan should deal with both natural and man-made disasters. The primary goals of the plan are to protect the employees and ensure continued operations at the

facility. Part of the plan will identify business-essential positions and the people required to sustain business-necessary functions and operations. Establish ways to manage and control operations and communication in the event the Company is denied use of its main facility or corporate headquarters, or communications are disrupted.

- 2) Analyze Business Activities:** Certain activities may require revised written “Guidelines,” including procedures for (a) employees who must travel to affected areas such as Mexico, (b) response to employees returning from business or other travel to affected areas, (c) meetings, trade shows, and events scheduled in affected areas, (d) responding to employee concerns about traveling to affected areas, (e) a need to respond to co-workers who may worry about an individual who has traveled to affected areas or to individuals who may show symptoms associated with swine flu.
- 3) Review Safety Policies and Practices:** More than ever, employers should strive to develop “best practices” which go beyond legal requirements. Immediate changes to prepare for a pandemic may include, education and communication programs, installation of additional hand-washing stations, eliminating or rescheduling meetings, or even spreading out employee workstations or other efforts to accomplish social distancing.
- 4) Maintain and Test a Disaster Communications Policy and System:** An employer must maintain a plan for communicating with employees in the event of an emergency. The exact communications system will depend upon the nature of the business and other factors, but should at a minimum have backup storage and communications systems, and alternative means of communicating with employees if it is not possible for them to come to work. Consider maintaining an alternative website and phone blasts ready to activate in the event of an emergency. Test the system just as you would an evacuation plan.
- 5) Engage an Employee Assistance Program:** In addition to their normal services, EAPs can be especially helpful providing employees with professional counseling services and steering them to other community resources in the event of a pandemic or other crisis. Both the EAP and local public health departments can be useful to deal with unreasonable fears about co-workers and risks associated with infectious diseases.
- 6) Revise Telecommuting Policies:** Telecommuting will become a more attractive option. Employers should start to lay the foundation for telecommuting and teleconferencing by investing in hardware and software systems, as well as

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implementing necessary policies. It is essential that employees consider the heightened wage-hour exposure associated with telecommuting and remote work, and ensure that employees strictly follow procedures for recording all hours worked. Employers should also take steps to protect company confidential and trade secret materials.

- 7) **Revise Attendance and Leave Policies:** Traditional attendance policies are designed to penalize employees who are absent or tardy. However, if there is a medical or biological crisis, employers may not want sick or infected employees reporting to work or they may not have the luxury of terminating employees who are absent, even for an extended period. Employers will need to revise their policies to anticipate such crises and to provide practical solutions to these unique problems.
- 8) **Revise Vacation or Paid Time Off Policies:** Employers may consider adopting vacation or paid time off policies that allow employees to get advances of paid time off or to borrow against expected future benefits. Developing programs that allow employees to donate paid time off to other employees may prove beneficial in a pandemic. Revising the notice required before an employee takes vacation or paid time off may also be appropriate. Employers should also consider the financial effect if a large percentage of the work force simultaneously seeks paid time off. Employers may need to revise policies to allow employers more discretion in times of crisis. Most PTO policies are unfunded and depending on state law may constitute a contract. Funded plans may be governed by ERISA.
- 9) **Revise “No Loans” and “No Pay Advances” Policies:** Historically, employers had policies expressly prohibiting loans and pay advances to employees. Policies relaxing these prohibitions and setting specific limits and conditions on loans and pay advances may also be helpful.
- 10) **Revise Travel Policies:** The experience with the SARS outbreak a few years ago taught that in the event of biological outbreaks, employees may be prevented from entering or leaving a particular region. They may be stranded away from home. Employers should have policies and contingency plans in place to address the predictable travel restrictions and related issues that may arise in a pandemic.
- 11) **Prepare for how to handle employees who refuse to travel or to come to work:** Educate supervisors as to when such refusals may constitute a protected refusal to engage in an unsafe activity, or may be treated as protected concerned activity under the National Labor Relations Act.
- 12) **Develop a Relationship with a Occupational Healthcare Provider, or Consider Hiring a Company Physician or Nurse:** Having a continuing relationship with a healthcare professional, such as a physician or nurse, or even having such a person on staff, can be helpful in dealing with all sorts of day to day issues. But, having such a professional up to speed with the employer’s business and available in a pandemic can be invaluable.
- 13) **Contact Vendors and Suppliers:** It is important to know what your business partners are doing in the event of a pandemic. You need to know if they will be available. Maintain communications and be prepared to seek other suppliers. Similarly, communicate with your clients and ensure that they know that you are taking steps to maintain service.
- 14) **Allow for Loans and Hardship Withdrawals from 401(k) Plans:** When out of work due to crises, employees may need to draw upon their retirement savings to pay their day-to-day expenses. To prepare for this contingency, employers should ensure that their plans allow for loans and even hardship distributions, and that employees know of these options.
- 15) **Buy an Insurance Policy for Short-Term Disability and Salary Continuation Programs:** Many employers maintain short-term disability or salary continuation programs that are funded completely out of current assets. If 40 percent of the work force is absent for an extended period, the drain on these programs will be significant and companies may not be able to fund these benefits. Employers can transfer this risk by adopting insured short-term disability benefit programs.
- 16) **Provide Employees with Free or Discounted Flu Shots:** Flu vaccines are intended to help people keep from getting sick. An additional benefit of giving flu vaccines is that, by keeping flu outbreaks to a minimum, we reduce the possibility that a normal flu virus that is not very virulent, but that is easily transmitted between humans, will mutate with a highly contagious, virulent strain of flu and cause a pandemic.
- 17) **Provide Employees with Free or Discounted Tetanus Shots:** Unhealthy conditions caused by past natural disasters emphasized the need for employers in high risk areas or industries to provide employees with free or discounted tetanus shots.
- 18) **Stockpile essential items, but do so prudently and lawfully:** As an example, people will frantically buy dust masks and other items normally required for a host of company functions, so stock-up so as to avoid disruption. Should an employer obtain flu remedies and other medications, do so through a licensed

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medical professional and follow steps to insulate the employer from additional legal exposure.

19) Review Policy Statements, Handbooks, Contracts, Insurance-Related Documents and Collective Bargaining Agreements for Force Majeure Clauses:

Force majeure clauses relieve parties to a contract from the requirements of the contract in the event of an “act of God.” By way of example, an insurance policy may relieve the insurer of the obligation to cover an incident if it could be labeled an “act of God.” Such provisions could then be used to deny coverage to business or medical losses caused by a pandemic. Similarly, an employer with such a clause in its union contract may have the right to deviate from the contract or to make unilateral changes in the terms and conditions of employment. These clauses and the

rights of the parties vary with each situation, but the bottom line is that responsible employers will review all documents to see whether such a clause should be included, deleted or revised.

Conclusion

These suggestions are just a few actions that employers should consider taking to prepare for a pandemic or similar crisis. This above information is not intended to be all-inclusive and there may be other appropriate actions that particular employers should consider. We encourage you to contact your Fisher & Phillips attorney about developing procedures for responding to potential swine flu and pandemic situations in the workplace. We encourage all employers to act in a measured fashion which reflects the needs of your company and industry.

This Legal Alert provides general information only. It is not intended to be, and should not be construed as, legal advice concerning any particular fact situation.