

## Client Alert

North America

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### Employer Response to Pandemic Flu Warnings

With the formal notice of a U.S. public health emergency due to reported outbreaks of swine flu in Mexico and in areas of the U.S., employers again face the prospect of dealing with widespread voluntary and involuntary absences that will materially affect their business operations. Already, the European Union has advised against nonessential travel to the U.S. From an employer's standpoint, the prospect of a pandemic raises the frightening possibility of a loss of significant numbers of employees over a short period of time due to illness, and the possibility of an even greater loss of employees in a similar time frame, due to fear of infection.

All of this should sound depressingly familiar. The world was confronting a similar situation less than a decade ago, with the outbreak of SARS in Asia, followed by what appeared to be the evolution of a deadly form of avian flu. Major international corporations at that time began reviewing their disaster preparedness plans, modifying them to adapt to the circumstances where a substantial portion of the workforce, including top management, would be unavailable either because of illness, illness of a family member, or fear of infection at work. It's worth looking at those policies again, because even though the swine flu is not yet considered a full-fledged pandemic, the fear of an outbreak could prove just as debilitating to business as an actual pandemic itself. Employers can reduce the risk of significant disruptions through planning and preparedness.

A useful way of looking at employer preparations is to break down actions into one of two categories based on the harm the preparations are designed to prevent. Companies should take certain steps: (1) to secure the health of their workforce, and other steps (2) to ensure continuing operation in the event a widespread quarantine becomes necessary. These plans should be tailored to a company's particular business needs, including potential high-risk employees and international travel, for example.

With respect to the first priority -- protecting the health of the workforce -- employers should plan certain steps to reduce employee exposure to the disease, and to minimize the likelihood of its spread. This may involve appointing a coordinator who will be responsible for tracking the latest developments, reviewing guidance from and reporting any serious illness at the place of employment to the Centers for Disease Control, the Occupational

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Safety and Health Administration and other Federal and State agencies, and acting as a point of contact for concerned employees. Human resources staffs should work with the health care benefits providers and employee assistance programs to assist with preventative services, such as distribution of basic prophylactic measures such as vaccinations or approved prescription drugs such as Tamiflu or other approved medication, and even on-site wellness checks to make it easier for people to assess their medical condition.

Work functions should be reviewed to reduce unnecessary face-to-face contact with employees or third parties who may be contagious. Employers should consider introducing frequent breaks or reminders via computer workstation or announcements encouraging or reminding employees to wash their hands, use tissues, or undertake other preventative activities designed to stop the spread of the virus. Employers may supplement these notices with training to the workforce on proper sanitation, as well as recognition of symptoms. The employer may even go as far as advising employees as to when they should not report to work, e.g. the development of any type of fever, sustained coughing or sneezing, and consider cross-training employees to ensure that coverage can be provided to essential functions. In conjunction, employers should revisit and perhaps extend their telecommuting policies. Businesses should also review the sanitation of their facilities, including proper ventilation, adequate cleaning and availability of trash receptacles. The employer should maintain a secure Internet site or voicemail notice system to provide information to the workforce about steps the employer is taking, as well as any announcements the employees need to hear concerning shutdowns, shortened hours, etc.

Employers should plan to increase the flexibility of their paid and unpaid time off policies, so that employees who don't or can't work because of illness or illness for a family member can do so without fear of penalty. Employers might consider advancing pay under certain circumstances or providing additional child care services, again as an incentive to potentially ill employees to stay home rather than come into the workplace. In addition, affected employees may be entitled to leave under the Family and Medical Leave Act or state equivalents if their symptoms present a "serious health condition."

Companies whose business involves travel by its workforce into areas where the disease is particularly active should immediately try to establish customer contact or business contact through other means, e.g. teleconference, webinar, or videoconference. Businesses with employees who are working overseas or who are traveling should track travel and health restrictions to allow the company to move quickly in response to concerns these employees may have. Employers also should give thought to requiring employees returning from high threat areas to work from home during known incubation periods to ensure that the employees are not contagious.

These unilateral actions by employers can be done, in most cases, without fear of violating U.S. employment laws (however, employers with unionized workforces should be coordinating with the union before implementing any of these suggestions). With that said, additional considerations may arise such as federal and state leave law requirements, wage and hour compliance, shut down procedures, etc. More intrusive actions by the employer, such as requiring employees to self test for symptoms, utilizing infrared testing devices, obtaining medical information about employees, attempting to trace the source of illness within the workplace, or segregating employees based on their contact with people of a particular ethnic or national origin (e.g.

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Hispanic or Asian employees) are likely to trigger potential liability under the Americans with Disabilities Act, the 1964 Civil Rights Act, or other Federal or State employment discrimination laws. Further, overbroad inquiries about personal travel or family travel or the development of the symptoms in a family member could raise concerns about personal autonomy / privacy, as well as associational and national origin discrimination.

Of course, companies with employees in countries outside the US must be careful when imposing any type of unilateral requirements. In many countries employee consent and/or employee works council or union consultation will have to be completed before undertaking any workplace preventive measures. Additionally, US employers may find significant constraints on the level of inquiry that is permissible in those jurisdictions with stringent data privacy laws. Further, employers may find unexpected costs associated with asking employees not to come to work, as many jurisdictions will require that the employees receive full pay during their absence and may allow an employee to assert a claim for damages if the employer unilaterally forces the employee to stay home from work.

With regard to the second priority -- maintaining operations in the face of a pandemic -- the employer must plan for a business operation with a greatly reduced or limited workforce. Most large companies have contingency plans to deal with emergencies such as loss of electricity, utilities, or transportation access to their facility. In the case of a bona fide pandemic, the employer may be faced with problems that literally stretch across the business spectrum. Utilities may shut down or reduce operation, the workforce may be unable or unwilling to enter a facility, and local or national government actions may greatly restrict business options to maintain operations. If it has not done so already, the employer must identify the key positions and functions essential to sustain business continuity. The employer should have contact information for its key suppliers, utilities, and local and national governments so that it can both advise them of steps it is taking to mitigate the effects of a pandemic, as well as make requests for assistance, if necessary.

Because of the unpredictable nature of contagious disease, and, particularly, the unpredictable nature of government response, companies must maintain flexibility throughout an emergency. Understanding the legal obligations in the jurisdictions where a company operates is imperative to respond to such global emergencies. This means proactively taking appropriate action within legal boundaries to keep the workforce healthy and productive, and to sustain key operations so that recovery time is minimal. To the extent possible, the employer should publicize its efforts to its workforce and its business customers and contributors. Mutual support between businesses, and between employers and their workforces, is absolutely essential in minimizing disruption and maximizing the chance for a full and complete recovery

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