Employment Law

An Ounce of Prevention May Be Worth a Pound of Cure: How Employers Can Prepare for an Ailing Workforce in the Event of an Avian Flu Outbreak

Much well-deserved attention has been paid to the prospect of an avian flu outbreak in the United States. According to the World Health Organization (WHO), the avian flu has not reached the United States. The only countries reporting human cases are China, Turkey, Indonesia, Cambodia, Thailand and Vietnam. Currently, the virus is transmitted from infected birds to humans. The virus has not mutated to a form that can be transmitted directly from human to human. However, the potential for mutation exists. This potential is at the epicenter of our greatest fears, considering the devastating consequences of a global pandemic. We can either be paralyzed by such fear or we can be proactive in addressing the issue. In situations such as this, the proverbial ounce of prevention may truly be worth a pound of cure.

The impact of an avian flu pandemic is of no small consequence to employers, as the prospect of a pandemic creates a panoply of labor and employment issues. This Alert is designed to highlight some of those issues and provide meaningful strategies for dealing with the issues should they arise.1

**OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)**

OSHA requires employers to provide a safe working environment for their employees. This will become a core issue if an outbreak occurs and could create OSHA claims on many different levels. First and foremost, those industries that inherently create a higher risk of exposure, such as the meat and poultry processing industries and the airline industry, could be particularly vulnerable to OSHA claims. Other industries also could be impacted in the event of an outbreak. For example, employees who are required to travel to high-risk countries could claim they are being subjected to an unsafe work environment. Co-workers of such traveling employees could lodge OSHA claims in the event a traveling employee returns to the primary work site after exposure, thereby putting his or her coworkers at risk. The general duty of providing a safe working environment makes every industry and every employer at risk of exposure to liability if an outbreak were to occur. See OSHA’s Guidance For Protecting Workers Against Avian Flu.2

**AMERICANS WITH DISABILITIES ACT & HIPAA**

In an effort to provide a safe working environment for their employees, employers may want to get medical information and even require medical exams (i.e., requiring medical exams of those employees who are returning from travel to high-risk areas). Yet doing so is not without risk. Medical testing carries with it the prospect of liability as such testing could run afoul of the Americans with Disabilities Act (ADA). Employers who desire to implement medical certifications or testing for “at-risk” employees must be cautioned to do so in only the most limited circumstances and for essential business purposes only, limiting the results to flu-specific indicators, and consistently applying the policies. Employers should consult legal counsel prior to taking this sort of action.

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1 There are numerous labor and employment issues related to the prospect of a global pandemic. This Alert serves to put employers on notice of some of the more common issues so they can begin the process of preventative planning. Consultation with legal counsel is recommended before any precise course of action is taken.

2 OSHA is planning a detailed update of its Guidance but has not committed to a date of issuance.
A related issue is that of preserving employees’ personal health information pursuant to the Health Insurance Portability and Accountability Act (HIPAA). In the event of an outbreak, employers must consider the health and safety of all their employees while at the same time balancing the privacy interests of employees who may have contracted the disease. Accessing and/or distributing medical information must be done with an eye towards employer obligations under HIPAA.

FAMILY AND MEDICAL LEAVE ACT & ERISA
The Family and Medical Leave Act (FMLA) most assuredly will be implicated in the event of an avian flu outbreak. The FMLA permits twelve (12) weeks of unpaid leave for employees who satisfy the following criteria: (1) they work for an employer at a site that has more than 50 employees, (2) they have worked at least 1,250 hours within the prior 12 months, and (3) they request leave to care for themselves or a family member who has a “serious health condition.” Considering the virulence of the avian flu, it is likely it will be considered a “serious health condition.” Therefore, employers should be adequately prepared to handle high levels of employee absences in the event of an outbreak. Employers can start preparedness planning now by taking the following steps: (1) analyze those job functions that are essential to business continuity, (2) begin cross-training employees where possible, (3) identify and consistently apply a protocol to confirm the need for and adequately track employees’ FMLA leave, and (4) identify and consistently apply a protocol for how to address situations where an employee on FMLA leave has exceeded his or her leave or is not eligible.

In analyzing current leave and benefits policies and any changes thereto, employers should not neglect ERISA implications of a prospective avian flu outbreak. Employers should distribute their most current Summary Plan Descriptions to their plan participants and their covered dependents. Those employers with self-administered plans should be mindful of the potential increase in claims.

FAIR LABOR STANDARDS ACT & TELECOMMUTING
In the event of an outbreak, it is conceivable that employers may permit, or even require, employees to work from home. While this may be a responsible option exercised by many employers, employers should be aware of the potential wage and hour claims that could arise in these scenarios. For example, an exempt employee who voluntarily opts not to report to work for fear of exposure typically would not be entitled to compensation. The Fair Labor Standards Act (FLSA) provides that exempt employees need not be paid for any workweek in which they perform no work. However, if exempt employees decide to periodically check email or voicemail from home, they could be engaged in compensable activity and the employer could be responsible for paying those employees for a full week’s worth of work. By way of further example, a non-exempt employee who is working from home is no longer able to record the hours he or she works by punching a clock or signing in and out at the work site. Without these objective mechanisms in place, the potential for claims for unpaid work time and for overtime abuse is ripe. The Department of Labor places the burden on the employer to accurately record hours worked and it will be the employer’s responsibility to disprove assertions regarding hours worked made by opportunistic employees. Thus, employers should consider developing telecommuting policies that take into consideration the following: (1) specify targeted times during which employees are permitted to check email and voicemail; (2) identify how employees should record their time and, where possible, require the use of remote time clocks; (3) require employees to request authorization to work overtime; and, (4) alert supervisors to risks of overlooking overtime work not required by the supervisor.

NATIONAL LABOR RELATIONS ACT
The National Labor Relations Act (NLRA) affords protection to union and non-union employees alike, who seek to engage in concerted activities related to their workplace. Even this relatively specialized law could be implicated in the event of an avian flu outbreak. Employees – even in a nonunion workplace – who collectively decide not to attend work due to concerns over exposure to the avian flu could be engaged in a protected activity under the NLRA. In these situations, employees could be shielded from adverse employment action. An employer’s best defense in these situations is to

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3 An employee out on company-sponsored sick leave may be entitled to pay.
implement contingency plans that include provisions for alternative working arrangements so as to minimize disruption to daily business operations.

Other employment issues could arise in the context of collective bargaining agreements with unionized workforces. To the extent employers are faced with running lean operations due to a high volume of employee absences, it is conceivable many employees will be forced to perform jobs that are not consistent with the terms of the collective bargaining agreement as it pertains to such things as seniority, wage rates, shifts, overtime and vacation. To avoid possible claims of being in violation of a collective bargaining agreement and even unfair labor practice charges, employers may want to consider keeping union representatives actively involved in all stages of contingency planning.

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT
Employers also should be cognizant of their obligations under USERRA. If there were to be an avian flu outbreak and accompanying quarantines, employees may be called to active duty to staff quarantine stations or to otherwise assist in pandemic-response operations. Thus, when developing a contingency plan, employers should anticipate military-related absences and should plan accordingly.

WORKERS' COMPENSATION
Employers also could be faced with an onslaught of workers’ compensation claims, depending on individual state laws. Employees who become sufficiently ill while performing their job duties, which could include business travel, may be in a position to file workers’ compensation claims. While often such ordinary diseases of life may be excluded from coverage, the unique risks and various exposure scenarios that may accompany an outbreak could create arguments for coverage in some states. Employers should coordinate with their workers’ compensation insurer to identify what steps should be taken in the event an employee reports a case of the avian flu.

STATE-SPECIFIC EMPLOYEE PROTECTIONS
Employers should recognize that all of the federal laws discussed above provide employees with minimum protections. State-specific laws oftentimes afford employees with additional protections. For example, in Texas employers may not discharge or in any other manner discriminate against an employee who leaves the employee’s place of employment to participate in a general public evacuation ordered under an emergency evacuation order. Employers also could face negligent retention or parallel claims by employees who become seriously ill as a result of coworker exposure. Similarly, employers could be subjected to premises liability claims filed by customers who are exposed to contaminated work sites or contagious workers.

The potential for legal exposure is endless. This Alert has discussed potential claims by employees, but that does not even account for breach of contract claims that could be lodged by customers whose contractual requirements were not met and claims by companies that sue suppliers for failing to satisfy contractual obligations. Prudent employers should implement proactive measures in an attempt to mitigate liability and keep their workforce safe. Employers should consider developing an Emergency Action Contingency Plan. Employers also should educate their workforce on how best to prevent transmission of the virus and should be ready to provide employees with respiratory protection and personal protective equipment, such as latex gloves, protective eye gear and anti-viral masks. Employers that require their employees to travel to affected countries should distribute to employees the Center for Disease Control’s (CDC) travel safety guidelines which can be found at www.osha.gov/dsg/guidance/avian-flu.

DEVELOPING A CONTINGENCY PLAN
Prudent employers will start developing contingency plans now that take into consideration all relevant state and federal laws. Other key components of a contingency plan should include:

1. Establishing a response team that is comprised of key individuals who will be responsible for monitoring the global status of the avian flu virus, disseminating critical information, establishing necessary IT infrastructures to accommodate business continuity outside of the work site, and managing communications with employees;

2. Identifying job functions that are critical to business operations;

Emergency Services personnel generally are excluded from these protections as their presence is necessary for public safety.
(3) Cross-training employees in an effort to mitigate disruptions to business operations resulting from high rates of employee absences;

(4) Establishing telecommuting policies, procedures and IT infrastructures;

(5) Educating employees on ways to minimize transmission of the flu;

(6) Providing employees with personal protective equipment such as antiviral masks, gloves and eye protective gear;

(7) Providing employees with ample information through the creation of a website or intranet;

(8) Discussing pandemic policies with insurance carriers;

(9) Reviewing current leave policies and modifying them as necessary, for example, by offering incentives for sick employees to stay home, thereby minimizing risk of spreading the flu;

(10) Developing policies regarding the closing of offices, including employees’ use of paid vacation and other compensation issues;

(11) Reviewing short and long term disability insurance policies; and,

(12) Posting in conspicuous areas a list of local hospitals, clinics, health agencies and emergency service personnel.

SPECIAL CONSIDERATION FOR HIGH-RISK INDUSTRIES

Airline Industry

Considering the global community in which we all live, work, and travel, the airline industry is one of the highest risk industries to be impacted by a potential avian flu outbreak. Indeed, the transmission of the virus could be facilitated by airline travel. Therefore, the airline industry should be vigilant in adopting contingency plans that aim to keep their employees and passengers safe. In addition to considering the aforementioned state and federal laws and contingency plan recommendations, the airline industry also should comply specifically with the guidelines promulgated by OSHA that identify precautionary measures that should be taken by airline flight crews:

1. Wash hands frequently with soap and water or use an alcohol-based hand rub if hands are not visibly soiled;

2. Personnel should wear disposable gloves for direct contact with blood or body fluids of any passenger.

3. Immediately after activities involving contact with body fluids, gloves should be carefully removed and discarded (gloves must never be washed or reused) and hands should be cleaned;

4. Consult the CDC’s specific guidance on the handling of sick passengers; and,

5. Comply with the CDC requirement that the captain of an airliner bound for the United States is required by law to report the illness to the nearest U.S. Quarantine Station prior to arrival or as soon as illness is noted.

The airline industry also should consider educating its passengers on ways to mitigate contracting or transmitting the flu by distributing to its passengers the CDC guidelines that are summarized below:

1. Prior to traveling, assemble a travel health kit containing basic first aid and medical supplies including a thermometer and alcohol-based hand rub for hand hygiene;

2. Educate yourself and others who may be traveling with you about influenza by consulting the CDC’s website on influenza at www.cdc.gov/flu/;

3. Be current with all your shots, and see your health care provider at least 4–6 weeks before travel to get any additional shots or information you may need;

4. Check your health insurance plan or get additional insurance that covers medical evacuation in the event of illness;

5. Identify in-country healthcare resources in advance of your trip;

6. If traveling to a country experiencing outbreaks of the avian flu, avoid areas with live poultry, such as live animal markets and poultry farms since large amounts of the virus are known to be present in the droppings from infected birds;

7. Practice careful and frequent hand hygiene;

8. Thoroughly cook all foods from poultry, including eggs;

9. If you develop respiratory symptoms or illnesses that require prompt medical attention while out of the country, a U.S. consular officer can assist
in locating appropriate medical services and informing family or friends;

10. Upon your return home, monitor your health for 10 days; and,

11. If you become ill with fever or respiratory symptoms during this 10-day period, consult a healthcare provider being sure to tell the provider in advance about your symptoms and recent travel so that he or she can be aware you have traveled to an area reporting avian influenza.

**Poultry Industry**

The poultry processing industry is another high-risk industry, particularly considering that human cases of avian flu have occurred through exposure to infected poultry. Although the United States has banned the import of all birds and bird products from infected countries, U.S. employers should heed precautionary warnings and take action now to keep their workers safe. To this end, employers should consider the aforementioned state and federal laws and contingency plan recommendations and also should comply specifically with the guidelines promulgated by the CDC and WHO which state the following:

1. All persons who have been in close contact with the infected animals, contact with contaminated surfaces, or after removing gloves, should wash their hands frequently – hand hygiene should consist of washing with soap and water for 15-20 seconds or the use of other standard hand-disinfection procedures as specified by state government, industry, or USDA outbreak-response guidelines;

2. All workers involved in the culling, transport, or disposal of avian influenza-infected poultry should be provided with appropriate personal protective equipment:
   — Protective clothing capable of being disinfected or disposed, preferably coveralls plus an impermeable apron or surgical gowns with long, cuffed sleeves plus an impermeable apron;
   — Gloves capable of being disinfected or disposed – gloves should be carefully removed and discarded or disinfected and hands should be cleaned;
   — Respirators: the minimum recommendation is a disposable particulate respirator (e.g., N95, N99 or N100) used as part of a comprehensive respiratory protection program – workers should be fit tested for the model and size respirator they wear and be trained to fit-check for face piece to face seal;
   — Goggles; and,
   — Boots or protective foot covers that can be disinfected or disposed;

3. Environmental cleanup should be carried out in areas of culling, using the same protective measures as above;

4. Unvaccinated workers should receive the current season’s influenza vaccine to reduce the possibility of dual infection with avian and human influenza viruses;

5. Workers should receive an influenza antiviral drug daily for the duration of time during which direct contact with infected poultry or contaminated surfaces occurs;

6. Potentially exposed workers should monitor their health for the development of fever, respiratory symptoms, and/or conjunctivitis (i.e., eye infections) for one week after their last exposure to avian influenza-infected or exposed birds or to potentially avian influenza-contaminated environmental surfaces; and,

7. Individuals who become ill should seek medical care and, prior to arrival, notify their health care provider that they may have been exposed to avian influenza.

**CONCLUSION**

The prospect of an avian flu outbreak is an area of deep concern to us all as citizens of the global community. Implementing a contingency plan, staying informed, practicing good hygiene, and adhering to the CDC’s recommendations are sound precautionary steps we all should take. It is our sincere hope none of us will have to face an avian flu pandemic. Yet, we recognize the possibility exists and therefore we stand ready to aid our clients in taking appropriate measures to address these difficult issues.

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