

PANDEMIC: HOW EMPLOYERS CAN PREPARE AND RESPOND

Labor & Employment Alert
May 8, 2009

Practices & Industries

Labor & Employment

"We don't know the timing of the next pandemic, how severe it will be. We don't know what drugs will work. We don't have a vaccine. Yet we are telling everyone to prepare for a pandemic. It's tricky . . . This is scary and we don't know . . . That's the message."

— Dick Thompson, World Health Organization, December 2005

Several years ago, the Centers for Disease Control and the World Health Organization issued urgent warnings about threats posed by an outbreak of the H5N1 virus, or the avian flu. More recently, front pages tracked the swine flu (H1N1) as it spread around the globe.

Experts estimate that a flu pandemic could result in an absenteeism rate of up to 40 percent of the workforce. Even if this virus does not balloon into pandemic proportions, there are many catastrophic risks to employers. Whether a workplace threat is disease, natural disaster, or bioterrorism, disaster planning and preparedness is a fundamental requirement of good business practice. Detailed forethought is necessary to ensure both the health and safety of employees and business continuity.

Planning Considerations

- Appoint a team responsible for coordinating planning
- Contact your Employee Assistance Plan and assess its ability to respond to employees during a pandemic crisis
- Determine essential and non-essential functions; cross-train employees on essential functions
- Discuss with vendors the availability of essential supplies
- Ensure that both the company's electronic communications systems and those of employees can handle remote working arrangements
- Ensure updated contact and emergency contact information for all employees

PANDEMIC: HOW EMPLOYERS CAN PREPARE AND RESPOND

- Evaluate remote working options and update policies accordingly
- Update policies for notifying employees about emergencies and facility closings; consider creating a telephone tree or use company intranets and extranets
- Update policies regarding sick leave and other time off
- If necessary, engage in discussions with union representatives to establish operating procedures during a disaster

Managing During a Crisis

Communicate

- Educate employees about personal hygiene, such as hand washing
- Provide employees with ways to keep the company updated about their health and availability for work
- Provide hand sanitizers and other personal protective equipment, such as masks or flu vaccines, if appropriate
- Use tools such as phone trees, intranets, and extranets to update employees on the company's status and response

Avoid Spreading Infection

- Eliminate non-essential travel, and ensure that foreign travel complies with Center for Disease Control (CDC) and U.S. Department of State guidelines
- Ensure that sick leave and attendance policies are updated to address a pandemic and have been distributed to all employees
- Require employees with flu symptoms to stay at home
- Restrict hand-shaking and hugging
- Shut down non-essential functions and facilities
- Split teams into different work locations and use telecommuting options as much as possible
- Stagger shifts changes, breaks, and meal periods to allow for worksite sanitization and to minimize contact
- Use technology for meetings rather than requiring attendance in person, and cancel non-essential meetings

PANDEMIC: HOW EMPLOYERS CAN PREPARE AND RESPOND

Stay Up to Date

Regularly monitor the advice issued by the CDC and other government agencies about the pandemic and best practices for limiting its transmission.

Legal Implications

Occupational Safety and Health Act

OSHA requires all employers provide a safe and healthy work environment that is free from known hazards. OSHA has broad authority for issuing regulations that govern workplace safety, including those that may apply during a pandemic.

Americans With Disabilities Act, New York Human Rights Law

The ADA and NYHRL prohibit discrimination against individuals with disabilities. The definition of “disability” under the federal law, and even more so under state law, may apply to employees suffering from severe flu symptoms. This means that employers may be required to provide reasonable accommodations to flu sufferers, as well as to ensure that employees with the flu are not treated differently because of an actual flu-related disability, a record of such a disability, or because they are perceived as having a disability. Further, the Equal Employment Opportunity Commission has also issued guidance indicating that both Title VII of the Civil Rights Act and the ADA protect employees with care-giving responsibilities from disparate impact discrimination.

Family and Medical Leave Act

This federal law requires employers with 50 or more employees to provide up to 12 weeks of unpaid leave to care for themselves or a family member with a “serious health condition.” All employees who have worked at least 1,250 hours in the preceding 12-month period are entitled to the leave, regardless of the impact on the employers’ workforce or ability to maintain business continuity. In words, there is no “undue hardship” exception in the FMLA.

National Labor Relations Act

The NLRA protects employees’ rights to engage in group activities — two or more employees acting together — attempting to improve working conditions, such as wages and benefits. It is possible that employees’ actions in response to pandemic flu conditions or preparation could be deemed concerted activity protected by the NLRA.