Pandemic Planning: Are You Prepared?  
*Legal and Practical Issues*

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I. **Background on Swine Flu/H1N1**

After dealing with the economic downturn and the new FMLA regulations, amended ADA obligations, and new COBRA requirements, HR and legal professionals now move on (or perhaps return) to pandemic planning. The media attention and public interest are intense, especially after the World Health Organization (WHO) raised the level of influenza pandemic alert from phase 4 to phase 5. As WHO Director-General Dr. Margaret Chan said, "[C]ertain actions should now be undertaken with increased urgency, and at an accelerated pace."

The strain of influenza which has prompted the latest preparedness initiative is influenza A (H1N1). As of the date of this writing (April 30, 2009), there have been 257 cases of H1N1 in 11 countries. The United States has reported 109 laboratory confirmed cases, including one death. Mexico has reported 97 laboratory confirmed cases, including seven deaths. The following countries have reported laboratory confirmed cases with no deaths: Austria (1); Canada (19); Germany (3); Israel (2); Netherlands (1); New Zealand (3); Spain (13); Switzerland (1); and the United Kingdom (8).

The WHO has developed pandemic "phases" to aid in pandemic preparedness and response planning:

<table>
<thead>
<tr>
<th>Estimated Probability of Pandemic</th>
<th>Description</th>
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<tbody>
<tr>
<td>Phase 1</td>
<td>Uncertain</td>
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<tr>
<td>Phase 2</td>
<td>Uncertain</td>
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Because "swine flu" improperly suggests a problem with pork products (*i.e.*, it is not foodborne from pork products), we call this strain of influenza by its technical name – "H1N1."
<table>
<thead>
<tr>
<th>Phase</th>
<th>Description</th>
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<tbody>
<tr>
<td>Phase 3</td>
<td>An animal or human-animal influenza reassortant virus has caused sporadic cases or small clusters of disease in people, but has not resulted in human-to-human transmission sufficient to sustain community-level outbreaks.</td>
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<tr>
<td>Phase 4</td>
<td>Medium to high</td>
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<tr>
<td>Phase 5</td>
<td>The same identified virus has caused sustained community-level outbreaks in at least two countries in one WHO region.</td>
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<tr>
<td>Phase 6</td>
<td>Pandemic in progress</td>
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<td>In addition to the criteria defined in Phase 5, the same virus has caused sustained community-level outbreaks in at least one other country in another WHO region.</td>
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The Centers for Disease Control and Prevention (CDC) recommends the use of two medications – oseltamivir (Tamiflu®) and zanamivir (Relenza®) – for the treatment and/or prevention of infection. These antiviral medications fight against influenza by keeping flu viruses from reproducing. If someone gets sick, antiviral medications can make the illness milder and make the individual feel better faster. The medications may also prevent serious flu complications. For treatment, antiviral medications work best if started soon after getting sick (within two days of symptoms).

The Federal Drug Administration has issued Emergency Use Authorizations (EUAs) for the use of Tamiflu and Relenza antiviral products and for the rRT-PCR Swine Flu Panel diagnostic test. The EUAs allow for the antiviral medications to be distributed to large segments of the population without complying with the label requirements otherwise applicable to dispensed drugs, as long as they are accompanied by written information pertaining to the emergency use. The drugs also may be distributed by a broader range of healthcare workers.

There have been three other pandemics in the last 100 years: the first in 1918/19 (the Spanish Flu); (2) another in 1957/58; and (3) a third in 1968/69 (the Hong Kong Flu). The 1957/58 and 1968/69 strains were relatively mild. The 1918/19 Spanish Flu version, on the other hand, was very severe and resulted in millions of deaths.

It is the unknown which makes the projected infection rate and complications so difficult to predict. If there is an outbreak of the flu comparable to the Hong Kong flu or the 1957/58 flu and 30% of the population (or about 92 million people) in the United States are infected, approximately 884,000 of those would require hospitalization, and there would be approximately 214,000 deaths. If, on the other hand, this same 30% of the population was infected with a strain of the flu more comparable with the deadly Spanish flu, there would be 10.1 million hospitalizations and 1.95 million deaths. Although there is a broad range between the two possible models for H1N1, experts indicate that employers should plan for between 30% and 50% absenteeism, for up to six weeks.

II. OSHA Issues

The federal Occupational Safety and Health Act (OSH Act) requires employers to maintain a workplace that is “free from recognized hazards” that may cause serious injury or death. This provision is referred to as the “General Duty Clause.” To prove a General Duty Clause violation, OSHA would have to prove that the H1N1 virus was actually present in the workplace and that the efforts undertaken by the employer to control exposure were insufficient. The scope of an employer’s obligations under the
General Duty Clause depend upon the circumstances. For example, the obligations of a hospital treating patients infected with H1N1 will be very different than the obligations for a typical office. OSHA has issued a document entitled “Guidance on Preparing Workplaces for an Influenza Pandemic (link: http://www.osha.gov/Publications/influenza_pandemic.html) that sets out OSHA’s view of actions “low,” “medium” and “high-risk” facilities should take. (See also: http://www.osha.gov/dsg/topics/pandemicflu/index.html). Also, an employer’s duty now may be different than it is a week or month from now if the virus becomes more prevalent in the United States or demonstrates a greater ability to be transmitted from one human to another.

Employers should also be aware of other OSHA requirements that may relate to the H1N1 virus. Specifically, OSHA’s recordkeeping regulation (29 C.F.R. Part 1904) requires employers to record work-related injuries and illnesses that meet one of the recording criteria on their OSHA 300 Logs. For example, if an employee transmits the H1N1 virus to another employee and time-off or medical treatment is necessary, then the employer must record the illness on the OSHA 300 Log. The recordkeeping regulation does not require employers to record cases of the “common cold or flu” that are transmitted in the workplace, but does require work-related cases of tuberculosis and “other contagious diseases” to be recorded if they meet the recording criteria. It is not clear whether OSHA would characterize the H1N1 virus as the “flu.” Also, if employers provide respirators or dust masks to employees, OSHA’s Respiratory Protection standard, 29 C.F.R. Section 1910.134, applies.

Can an employee refuse to come to work because of a concern that he or she may be infected by H1N1? The answer depends on the circumstances. According to OSHA’s regulations, if the employee has no “reasonable alternative” and “refuses in good faith to expose himself to the dangerous condition,” then the employer is prohibited from discriminating against the employee. The condition “causing the employee’s apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels.” 29 CFR § 1977.12(b)(2).

III. Workers’ Compensation, Privacy Law, FMLA, and ADA Issues

In addition to the OSH Act, H1N1 raises other legal issues related to the workplace. For example, state workers’ compensation laws cover illnesses that are contracted in the course of employment, and in the event of a pandemic, how a worker contracted the virus will be an important question. Moreover, privacy laws protect workers from undue intrusion into the medical information related to employees, and generally employers are entitled to discover only information that bears on the employee’s ability to perform essential functions and that could increase the risk to others. H1N1 will also most likely qualify as a “serious health condition,” entitling an employee to leave under the Family and Medical Leave Act (FMLA), if the employee is otherwise eligible for FMLA. The new, lower thresholds for disability coverage under the Americans with Disabilities Act (ADA) also come into play. Returns to work are subject to guidance from, as applicable, the FMLA and the ADA.

IV. Labor Law Issues

Additionally, H1N1 creates issues under the National Labor Relations Act (NLRA). To be covered by the NLRA, an individual’s refusal to work based on employee concerns about safety and health (i.e., the strike) must be "concerted protected activity."

There is a fairly low threshold to satisfy the NLRA’s "concerted" requirement for safety and health concerns, although employers would be wise to consult with labor and employment counsel before deciding that an employee statement or activity is "concerted."
The strike also must be "protected." Unlike the OSH Act, the NLRA does not require an individual to have a "reasonable" belief that a situation is unsafe in order to refuse to work (i.e., there is no mandatory "reasonableness" requirement for a strike based on safety issues or concerns). *NLRB v. Washington Aluminum*, 370 U.S. 9, 16 (1962) (“It has long been settled that the reasonableness of workers’ decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not.”); *Odyssey Capital Group, LP, III*, 337 N.L.R.B. 1110, 1111 (2002) (quoting *Tamara Foods, Inc.*, 258 N.L.R.B. 1307, 1308 (1981) (“[i]nquiry into the objective reasonableness of employees’ concerted activity is neither necessary nor proper in determining whether that activity is protected . . . . Whether the protested working condition was actually as objectionable as the employees believed to be . . . is irrelevant to whether their concerted activity is protected by the Act”).

The NLRA does include a reasonableness "option" (though not a requirement). If the employee's belief is reasonable, there are additional restrictions on employers – in particular, employers cannot replace strikers who satisfy this "reasonable belief" element. Section 502 of the Labor-Management Relations Act (LMRA), a 1947 law that amended the NLRA, states, "[N]or shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." Under Section 502, employees do not have to prove the actual existence of abnormally dangerous working conditions; they need only prove that they have a good faith belief – supported by ascertainable, objective evidence – that their working conditions are abnormally dangerous. If an individual satisfies this Section 502 "reasonable belief" element, the striking employee may not be replaced.

A bit of good news for employers, however: If there is no immediate danger to employees based on the Section 502 "reasonable good faith belief" standard outlined above, employers generally can bring in replacements and permanently replace a striker who refuses to work because of safety concerns or issues.

As with all protected, concerted activity, employees may not be disciplined for engaging in the protected, concerted activity. Employers can refuse to pay strikers, although employers should beware of FLSA wage-hour guidelines regarding exempt non-supervisors.3

V. WARN Issues

H1N1 also may bring up issues under the Worker Adjustment and Retraining Notification (WARN) Act. A plant closing or mass layoff (as defined in WARN, generally exceeding six months) because H1N1 still requires 60 days' advance notice. There are two exceptions to WARN which allow for a shorter notice – the "national disaster" exception and the "unforeseeable businesses circumstances" exception. A plant closure or mass layoff because of H1N1 would not satisfy the current definition of the "national disaster" exception but might satisfy the "unforeseeable business circumstances" exception.

VI. Practical Advice

There are steps an employer can take to deal with H1N1:

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2 Formerly, the general rule was that Section 502 applied only in a unionized context (e.g., when an employer has an expired, to-be-negotiated, or current collective bargaining agreement with a union). However, the National Labor Relations Board (NLRB) and at least one federal circuit court have held that Section 502 applies to all employers, whether unionized or not. *TNS, Inc.*, 329 N.L.R.B. 602 (1999), vacated on other grounds, *TNS, Inc. v. NLRB*, 296 F.3d 384 (6th Cir. 2002).

3 NLRA Section 7 rights are not applicable to "supervisors," as defined by the NLRA and interpretive case law.
Get and stay informed. Though we appreciate your willingness to read this article, it is not enough! It is one thing to understand the risks of the pandemic, and another to monitor its progress so that appropriate steps may be taken in light of the risk involved. The government has various organizations involved in educating the public both on the pandemic risks and the progress of the disease. One of the most informative websites about the H1N1 virus is www.pandemicflu.gov. The CDC, the National Institute for Occupational Safety and Health (NIOSH), and other organizations have helpful information on their websites as well. Also keep informed on efforts on the development of a vaccine, development and production of antiviral medications, and pandemic preparedness plans discussed by other companies and organizations.

Create a pandemic contingency planning group. Include in your task force representatives of departments which would play a large role in the event that the pandemic becomes a reality: human resources (HR), information technology (IT), executive management, and other critical parts of the business.

Assess your industry's vulnerability. Animal handlers, healthcare practitioners, transportation workers, and employers with large footprints in the countries where larger outbreaks are confirmed are all at greater risk than the general public.

Assess your operations. How well positioned are you to respond to evolving, unpredictable threats? Good qualities in a business to respond to such a threat is a networked authority structure, distributed leadership, a dispersed workforce, cross-trained generalists, and simple yet flexible rules.

Identify essential operations/employees. Business continuity is the primary goal in the event of a pandemic. Identify suppliers, shippers, resources and other businesses with which you must interact on a daily basis to reduce the risk of disruptions in your supply chain and distribution network. Evaluate plans if any of these providers were to be shut down or restricted in a pandemic.

Run hypotheticals. Ask questions like the following: Which employees can work at home? Who needs IT upgrades in advance to make that possible? Who needs to come in? What lines of production or service can be shut down without jeopardizing the entire enterprise?

Think about where your replacement employees will come from. Finding replacements will be impossible if you wait until the pandemic hits. Cross-train employees, form alliances with temporary employment firms, and consider partnering with companies in industries that are likely to be hard hit by a pandemic (such as the hospitality and travel industries).

Assess the feasibility of telecommuting or expanding your telecommuting program. Many, if not all, of your employees are going to be interested in telecommuting if a serious H1N1 threat exists. Assess whether your business could function with widespread telecommuting, and make sure you have a proper telecommuting agreement in place with those employees who do telecommute. If you determine that you can create or expand telecommuting options, simulate it by having many employees attempting to log in and work at the same time.
Establish availability and redundancy of critical communications systems. In the event that you are required to have your employees stay at home and work, make sure you will be able to communicate with them. Password-protected company intranets are perfect for this purpose.

Develop policies. In the event of a pandemic, the following policies will be essential, and even before such a calamity, such policies would help prevent the spread of a virus:

- Isolating and excusing employees who become ill at work.
- Allowing unscheduled and non-punitive leave for employees with ill household contacts.
- Establishing guidelines for when employees who have become ill can return to work. Experts believe that infected people will be contagious for up to two days before symptoms develop, ill for five to eight days, and contagious for seven days or more after symptoms go away.
- Reporting infection and providing medical surveillance for employees who contract the disease.

Keep records. Recordkeeping on the following is recommended:

- Employees who have taken sick leave.
- Each employee’s up-to-date emergency contact information.
- A log of all persons who visit the worksite in event of infection.

Form a relationship with local healthcare facilities. Healthcare providers are acutely aware of H1N1 risks and are making plans now for the possibility. Those employers that are proactive and form relationships with such providers have a better chance to be at the “front of the line” for help if and when such a pandemic hits.

Get flu shots for your employees. Although it will not be an H1N1 vaccine, it will help keep your employees healthy from other viruses which will keep them healthier and less vulnerable to catching H1N1.

Train your employees. Employee training is something concrete employers can point to if questioned about compliance with the OSH Act’s “general duty” clause. Training should include, at a minimum:

- Modes of transmission.
- Symptoms.
- Reporting process in event of possible/actual infection.
- Hygiene. This would include cough etiquette, proper hand washing, using hand sanitizers or disinfectant wipes, cleaning doorknobs, phone handsets, and elevator buttons, and wearing masks or respirators where the disease may have hit.

Resources:
www.pandemicflu.gov
www.cdc.gov
www.osha.gov
www.fda.gov
www.hhs.gov
www.who.org
www.shrm.org
www.ogletreedekins.com

This article is not intended as medical advice but is based on a compilation of government, medical, and other publications on the subject.

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