

## PANDEMIC- PLAN OR PANIC

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Along with baseballs flying and black flies buzzing in the air this spring a new variation of swine flu emerged. At first this new strain, H1N1, looked like it would cause a global outbreak that would be prolonged, widespread and deadly to many because humans have no immunity to it. The first reported cases of possible infection in the United States caused whole school districts to close and other drastic measures by government officials to be taken to try to control the spread of this flu. Luckily, it now looks like this strain of flu is not spreading as quickly or as much as feared and more importantly it doesn't seem to be as deadly. But, this outbreak and scare should be a wake-up call for all employers to develop or review the company's plan in the event of a mass disaster/outbreak of a deadly communicable disease.

### Duty to Provide a Safe Work Environment

To prepare for a mass outbreak of a deadly communicable disease employers should develop and have in place a plan that addresses both the needs of the company's employees, the need of the company to function and any duty the company has for the safety of non-employees such as customers and clients. Naturally, such a plan must take into account all applicable local, state and federal laws. Occupational Health and Safety Administration ("OSHA") regulations require that employers take "all reasonable steps" to provide and maintain a safe work environment. How detailed a plan an employer needs to have for how it would handle a pandemic, or other mass disaster, in order to meet the standard of providing a safe work environment will depend on many factors about the company including the type of business, size, number of employees, location, and travel requirements of employees. The federal government has prepared and placed on its websites a huge amount of information and advice for employers on how to plan and handle issues that might arise from a pandemic of a communicable disease. It has set up a "One-Stop" site for this

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information at [www.pandemicflu.gov](http://www.pandemicflu.gov). In addition, information from OSHA can be directly accessed on its website [www.osha.gov](http://www.osha.gov).

## **A Pandemic Plan**

A Company's pandemic plan should include:

- Who will be responsible for implementation – should be a team because any single individual may be affected by the pandemic or otherwise unavailable when needed
- Steps and strategies to stop/minimize spread of the disease;
- How employee absences will be handled;
- Cross training of employees of job functions;
- Available employee leaves which have been reviewed and modified with whatever flexibility employer wants to allow;
- Any flexible work arrangement options available to reduce contact such as telecommuting, flexible work hours and reduced travel;
- Any alternative work locations;
- Who and how information will be conveyed to employees and anyone outside the company;
- Drafts of communications to employees and outsiders on concerns, preparations and strategies;
- Plans for disruptions in services (phone, electricity etc) and supply and distributions chains;
- If company has a union(s) consider including it in planning and get agreements on any changes to collective bargaining agreement(s) needed such as additional leave, telecommuting, and changes to shifts and schedules.

## **Absences**

It's estimated that in a pandemic about 40% of the workforce would be impacted by the disease. Mass absences in a pandemic would likely result from:

- Employees getting the disease;
- Employees needing to care for family members with the disease;

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- Employees exposed to the disease;
- Schools closing and child care lacking;
- Employees fearful of contracting the disease in the workplace.

Employers first need to avail employees absent during a pandemic with any paid or unpaid leave they have available under company leave policies, which depending on the circumstances may or may not include Family Medical Leave Act (“FMLA”) leave and/or accommodations under the American with Disabilities Act (“ADA”). If an employee doesn’t have leave time available the employer should consider whether as a matter of public policy it will grant employees paid or unpaid leave beyond its usual policies in this unusual circumstance. Employer flexibility on absences in this situation is very important.

With respect to an employee who stays out of work because of fear of contracting the disease, generally OSHA and other federal and state laws do not allow an employee to refuse to work. However, an employee can refuse to work if they have a “good faith” belief that in working they would be exposed to “imminent” danger. “Good faith” does not mean there has to actually be an “imminent” danger. Rather, it means only that the employee has reasonable grounds to believe it exists. A company should consider what government officials are advising citizens about the dangers of the disease and what they should do to avoid the danger and prevent its spread. Also, in considering a employee’s “good faith” belief of “imminent” danger an employer must consider whether the individual has any disabilities which might make the disease more dangerous for that individual. In such cases the employer should consider whether the ADA might apply, and if so whether any reasonable accommodations should be considered. Employers in such situations need to think out of the box as to how/where the employee might be able to perform the job with less risk and should be flexible with regard to in-office/facility attendance.

A pandemic will rarely be a good time to terminate or impose other discipline for employee absences. It is very easy to imagine an employee terminated or otherwise disciplined for missing work during a pandemic bringing an action against the employer on the basis of public policy. Defending such an action in the face of tapes of the President and the Governor advising citizens to stay home if they suspect they may have or have been exposed to the disease is not a place most employers would want to be. That is not to say that an employer would never be justified in taking disciplinary action for absences during a pandemic. But, extreme caution should be taken if doing so. Yes, some problem employees will probably take advantage of the situation, but unless the employee’s absence



is very egregious it will almost always be better to wait until the employee repeats their behavior at another time, which they will do. and impose discipline then. At that point there will be great evidence of what a good and understanding employer and citizen the company was during the pandemic.

Bottom line, employers should plan and take steps now to minimize the effect a pandemic could have on their company, its employees, customers and clients. Flexibility with employees on absences and other matters in the event of a pandemic should be considered in developing a company plan. A company plan should take into account all federal and state laws and the company's own employee policies and contracts, including collective bargaining agreement provisions. Hopefully your company will never have to put its pandemic plan into effect, but if the worst happens far better to be prepared than panic.

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