

Planning for Pandemic: Just Leave¹

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Over the past few weeks, what started as a couple of hundred cases of swine flu localized in Mexico has spread to other parts of the world, including the United States. The Centers for Disease Control and Prevention (“CDC”) is working closely with state and local officials to investigate the human cases of swine flu. Currently, forty confirmed cases have been reported in people in the United States. The CDC has determined that there is no human influenza pandemic at this time. In an effort to contain the further spread of the virus, the government of Mexico announced that as a precautionary measure all schools and school activities would be suspended until May 6, 2009. This concern has had a ripple effect throughout Mexico, essentially bringing all public activity nearly to a halt, as people wait to see how the situation unfolds. Across the globe, governments, public health organizations and employers have struggled to determine the best way to address the growing concern. This article addresses some of the issues facing U.S. employers when dealing with public health issues.

For most employers, consistent attendance is of particular concern in this challenging economic environment. Increased attendance and increased productivity are usually considered to go hand-in-hand. As a result, employers both directly and subtly encourage employees to come to work even if feeling unwell. Similarly, sick employees often need, or wish, to come to work. When contagious diseases are involved, however, the common reaction to absenteeism—encouraging employees to report to work—may prove counter-productive by encouraging behavior that could spread illness and increase absenteeism. In the event of a pandemic, the results could be devastating.

The first step in planning for pandemic is to consider two basic questions: (1) What must I do? and (2) What can I do?

There are a host of federal and state statutes that provide leave and benefit entitlements to ill

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employees with which employers should become familiar:

The Family and Medical Leave Act (“FMLA”): provides up to 12 weeks of job-protected leave to covered employees who meet eligibility requirements. The FMLA applies to any employer who employs 50 or more employees within a 75-mile radius. Time off may be continuous, intermittent or on a reduced leave schedule. Recent amendments to the act and its regulations have made substantial changes in employer and employee rights under the FMLA and have made this a good time for employers to review their policies and procedures to ensure but are up-to-date compliant.

The Americans with Disabilities Act (“ADA”): prohibits discrimination based on disability and requires reasonable accommodation of disability. Reasonable accommodation may include job-protected time off. Recent amendments to the ADA enlarge the definition of disability by expanding the meaning of “major life activities” by adding a list of examples of activities that fall within the definition. The ADA's definition of “disability” now expressly includes impairments that are episodic or in remission if they would substantially limit major life activity when active and places substantially more employees under the umbrella of ADA protection. The amendments mandate liberal interpretation of “substantially limits” to the “maximum extent” permitted by the act.

In addition to federal statutes, employers must also be cognizant of the variety of state statutes that impact their employees’ leave and benefit entitlements. For example, temporary disability and workers’ compensation laws provide employees with partial income-replacement benefits, though not job-protected leave. Many states have their own family leave laws, laws mandating reasonable accommodation of disability (which might include time off) and, increasingly, laws providing paid family leave. Keeping an eye on developing state law and regulation should be part of an employer's compliance programs and contingency planning.

Collective bargaining agreement provisions: could also be involved as employers seek to implement changes necessary to meet demands of business continuity with a substantially reduced workforce. For unionized workplaces, employers should consider including union representatives in contingency planning; at the least, the collective bargaining agreement should be reviewed for provisions that could impede the employer's planning for and response to a public health crisis.

As a general rule, employers are well advised not to differentiate between injuries and disabilities. Employers that require medical documentation for medical leaves of absence should require certification for both occupational and non-occupational injuries and illnesses. If a worker is hired to “fill in” for an employee on job-protected leave, be sure the documentation shows the person has been hired on a temporary basis, not as a permanent replacement.

Employer provided paid time off (PTO) is the first line of response available to employees suffering from illness. Components of PTO often include sick leave, vacation, personal days and, for some employers, floating holidays. Many employers no longer distinguish between various categories of leave and grant undifferentiated PTO to their employees. And, in the case of a public health crisis, eliminating the differentiations between vacation and sick leave will undoubtedly make good sense.

When PTO and job-protected leave have been exhausted, unpaid time off and longer unpaid leaves of absence remain options that employers may wish to provide. Typically, reinstatement

is not guaranteed and benefits are not continued for employees on unpaid leave of absence, but the leave of absence provides a tether between employee and employer which can improve stability, morale and, ultimately, enhance business continuity. In an emergency situation, where schools may be closed, public transportation halted, quarantines imposed, and other impediments to work arising that are outside the control of both employee and employer, excused time-off may offer the only option available to an employer, short of closing down entirely. Employees, who have not become ill or been affected by disaster, may ask to donate leave to co-workers who have exhausted their paid time off. Similarly, employees confronted with absence because of such issues may seek to have co-workers donate PTO to them. Donation of PTO from one employee to a co-worker, however, has tax potential implications to both individuals. In addition, it has the potential for misuse and abuse. Accordingly, PTO donation should be permitted only in accordance with company policy, which has been adopted only after the employer has considered and addressed the issues involved.

Usually, employees initiate time off by calling in sick or requesting leave. Employees who report to work “under the weather” are frequently permitted to stay. Employers concerned about contagious disease, however, are not obligated to permit a sick employee who has reported to work to remain. Before sending an employee home, the employer should consider whether the employee is able to perform his/her job duties and meet performance standards, or posing a health risk to others by his/her presence in the workplace.

Absent wage and hour or contractual provisions requiring payment, after PTO is exhausted, leave may be unpaid—even if an employee has been sent home by the employer. Further, employers may require a doctor's note to permit an employee to return to work.

It is worth remembering that the Occupational Health and Safety Act (OSHA) require employers to provide employees with a safe place to work. Thus, employees who reasonably believe they are being exposed to imminent danger, including contagious disease, may legally refuse to work. Employers need to be careful about taking adverse employment actions against employees who refuse to come to work because of safety concerns.

Additionally, employers will want to review their work related foreign travel policies and if appropriate may issue a travel ban for work purposes to those areas where a public health crises exists.

One of the initial steps in planning for pandemic should be to review and understand the organization's policies and legal obligations for ensuring that policies and procedures comport with legal requirements and meet current business needs. Simple communication with your workforce can go a long way to easing concern.

In the current climate, the CDC recommends that people take everyday preventative actions to help stop the spread of germs and prevent respiratory illnesses like the flu. These preventative actions include:

1. Avoid close contact with people who are sick. When you are sick, keep your distance from others to protect them from getting sick too.
2. Cover your mouth and nose with a tissue when coughing or sneezing. It may prevent those around you from getting sick.

3. Washing your hands often will help protect you from germs.
4. Avoid touching your eyes, nose or mouth. Germs are often spread when a person touches something that is contaminated with germs and then touches his or her eyes, nose, or mouth.
5. Practice other good health habits including getting plenty of sleep, being physically active, drinking plenty of fluids, and eating nutritious food.

A crisis is no time for playing catch-up. Training, well-drafted policies, notices and forms comprise the foundation for effective communication. Employers should be prepared to offer timely, accurate and consistent information about employee rights and obligations and employer requirements and benefits. Avoiding misunderstanding will be critical to avoiding chaos and liability, protecting public health and maintaining business continuity.

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