

Labor Law Bulletin

Labor and employment law trends
of interest to our clients and other friends.

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PREPARING FOR THE AVIAN FLU PANDEMIC

In recent months, there has been growing concern about the possibility of a pandemic flu outbreak. As of June 29, 2006, the deadly avian flu strain (H5NI reference) had been confirmed in 53 countries and linked to 228 reported human cases. Although human-to-human transmission (a precursor to any pandemic outbreak) has not been detected, the continuous mutation and reassortment of the virus makes this development likely, according to some experts.

Experts predict that the impact of an avian flu pandemic would be massive in terms of individuals affected and the illness' severity. Within the United States, the virus could strike over 90 million people (30% or more of the population), require hospitalization for 9.9 million and result in 1.9 million deaths. The World Health Organization (WHO) predicts anywhere from 2 million to 7.4 million deaths, an estimate it characterizes as conservative.

Given these foreboding figures, the potentially debilitating impact of a pandemic outbreak on business—in particular, the unprecedented rate of employee absenteeism—is not difficult to envision. If the number of people infected approaches even a fraction of the predicted numbers, business disruption would be significant. In addition to being sick themselves or caring for sick relatives, employees may decide not to go to work simply out of fear (reasonable or not) of being exposed themselves. Experts predict that up to one-third of all employees may stay at home and not work for up to three weeks and that businesses could face up to 40% absenteeism at any one time.

Due to the predictions and speculation in connection with avian flu, many businesses are undertaking pandemic preparedness plans. Such planning efforts bear some resemblance to other emergency preparedness plans businesses have developed to cope with potential disruptions such as natural disasters, Y2K, SARS or terrorism. If the predictions above materialize to some degree, businesses may be faced with a problem the magnitude of which has never before been experienced.

How to prepare for and respond to the business disruption a pandemic could cause must be decided primarily by business leaders, not lawyers. Nevertheless, employers developing plans have encountered employment-related legal issues, and it is conceivable that others may arise in the course of further preparations. For example:

Occupational Safety and Health Act (OSHA): OSHA requires employers to provide a workplace free from recognized hazards likely to cause death or serious physical harm. If an infected employee with a communicable condition comes to work and spreads the virus to others, employers could face potential OSHA violations, possibly under the “General Duty” clause. Moreover, OSHA provides that employees may refuse to come to work if they reasonably believe that there is an imminent threat of death or serious physical harm.

Health Insurance Portability and Accountability Act (HIPAA), Americans with Disabilities Act (ADA) and State Privacy Laws: Employers attempting to gather information about the spread of avian flu among employees should be mindful of applicable privacy laws. HIPAA prohibits health plans

from disclosure of employee health information, but it may permit uses or disclosures of protected health information that are necessary for public health reasons. The ADA's privacy provisions grant protection to all employees with respect to employer medical tests and inquiries and the dissemination of employee medical information. Many states also have medical privacy rules regarding the disclosure or use of employee health information.

Family and Medical Leave Act (FMLA) and Other Leave Policies: For eligible employees, the FMLA would cover employees who require time off for their own illness and to care for sick family members. Some state laws provide more generous leave benefits than the FMLA. Employers must decide, under existing or special leave policies, whether to permit extended leaves beyond FMLA or state law requirements and how to treat absent employees not eligible for FMLA or state leave. Moreover, employers may consider requiring employees to stay at home, mandating the use of paid leave (i.e., vacation) at company-determined times, not compensating employees at all while on leave, and other leave-related policies raising a host of legal and business issues. Pay issues for both exempt and non-exempt employees under the Fair Labor Standards Act are also triggered by employee absences initiated by the employee or the employer.

Telecommuting: Permitting or expanding the use of telecommuting in the event of a pandemic raises various issues. Telecommuting may increase the risks of disclosure for trade secrets and other confidential business information. The recent incident involving a stolen laptop containing personal data relating to millions of U.S. veterans and their families illustrates how the security of business information may be inadvertently jeopardized by telecommuting. Employers may also want to review policies and practices regarding work at home to ensure compliance with state and federal overtime laws for non-exempt workers to whom telecommuting is made available.

National Labor Relations Act (NLRA): Employers with unionized employees may be restricted by collective bargaining agreements in their ability to change policies in response to the pandemic. Refusal to work because of unsafe work conditions may be considered "protected concerted activity" should employers take action against such employees.

There are several good resources available on the Internet related to pandemic preparedness and avian flu in general:

- www.pandemicflu.gov (the federal government's website)
- <http://www.osha.gov/dsg/guidance/avian-flu.html> (OSHA)
- <http://www.cdc.gov/flu/avian/index.html> (Centers for Disease Control)
- http://www.who.int/csr/disease/avian_influenza/en/ (WHO)

To help employers plan for and deal with legal questions that may arise, Vedder Price has formed a Pandemic Preparedness Task Force. If you have questions about pandemic preparation efforts or related issues, please call Chuck Wolf (312/609-7888), Peter Kelly (312/609-7875), Chris Nybo (312/609-7729), or any other Vedder Price attorney with whom you have worked.

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