

Labor Law Bulletin

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

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START THINKING ABOUT A COMMUNICABLE DISEASE POLICY

Although communicable diseases such as HIV, tuberculosis and hepatitis occasionally have raised concerns among companies and employees, the potential impact of avian flu on the nation's employers is a real concern to the United States government. The best time to plan and implement a communicable disease policy (CDP) is before it is needed.

Effective development of a CDP requires the collaboration of human resources, medical and legal staff. Here are a few of the legal issues to be considered.

Depending on the particular facts, employees with infectious diseases may be protected under the Americans with Disabilities Act (ADA), either because they have a statutory disability or are regarded as having one. The ADA contains significant restrictions on the ability of an employer to obtain, use and disclose an applicant's and employee's medical information. Employers may not make medical inquiries of applicants until a conditional job offer has been extended and then may disqualify an applicant from employment only if the medical condition prevents the employee from performing essential job functions with or without accommodations. Once employed, employers may not inquire about an employee's medical condition unless it has reason to believe that the employee's health is affecting his own performance or presents a real and direct risk to other employees. Medical information that is discovered may be disclosed only on a need-to-know basis.

While the ADA protects the rights of individual employees, the Occupational Safety and Health Act (OHS) requires employers to provide a safe workplace free from hazards, such as infectious disease, that are likely to cause serious harm to their employees. Thus an employer faced with the prospect of a communicable disease being transmitted at work will have conflicting and competing requirements under these two laws. Other laws may require employers to report known infectious diseases to state health departments. In Illinois, there are 72 diseases an employer may be required to report including, under certain circumstances, hepatitis, tuberculosis and HIV.

A common but thorny problem is dealing with employees and customers who refuse to work with an employee who is afflicted with or believed to be afflicted with a serious disease. The employer's requirement to protect the confidentiality of employee medical information usually prevents the employer from squelching rumors and communicating accurate health information to reduce panic and anxiety among others. While an employer may threaten to sanction employees who refuse to work with others, that generally is not a satisfactory long-term solution to the problem. Dealing with fearful customers is even more tricky. A CDP should contain provisions that outline a protocol dealing with these types of situations in a way that protects the interests of the individual employee and deals effectively with the anxiety of third persons who seek to protect themselves from a real or imagined risk.

To help employers plan for and deal with legal issues that may arise, Vedder Price has formed a Pandemic Preparedness Task Force. If you would like more information, feel free to contact Charles Wolf (312/609-7888), Peter Kelly (312/609-7875), Christopher Nybo (312/609-7729) or any other Vedder Price attorney with whom you have worked.

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