

# Labor Law Bulletin

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Labor and employment law trends  
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## LEAVE ISSUES AT THE FOREFRONT OF EMERGENCY PREPAREDNESS PLANNING

Each employer faces unique issues in the event of an avian flu outbreak or other pandemic. Are your employees more susceptible to infection because they handle raw poultry, may be traveling to locations where there have been outbreaks, or are health care workers who may treat contaminated patients? Does your organization provide critical infrastructure services, such as power, telecommunications, or healthcare and, therefore, has a special responsibility to plan for continued operation during a crisis? These are a few of the questions each organization must consider in preparing for a potential avian flu epidemic. This bulletin discusses the most common issue all employers would face: how to treat employees who must or want to take time off during a pandemic or other crisis.

Employers should review their leave policies to determine how those policies will apply in the event of substantial absenteeism due to the illness of the employee or family members, or employees' fear of getting sick by coming to work.

Employers will not have much control over leaves to which employees are entitled by federal or state law. Of course, the Family and Medical Leave Act (FMLA) is the dominant law in this area. It allows an eligible employee to take up to 12 workweeks of unpaid leave during any 12-month period to care for himself or an immediate family member with a serious health condition. An employee is guaranteed continued health insurance at active employee rates during an FMLA leave and, with narrow exceptions, reinstatement to his former position. Although FMLA leave is unpaid, employers must allow employees to apply accrued vacation and/or paid sick days to FMLA absences due to the employee's illness if the employer's normal policy permits such usage. If the employer would allow an employee to use vacation or sick days to care for a family member, that benefit must be extended to employees on FMLA leave for that reason.

The employer's policy also will control those absences not covered by FMLA leave because the FMLA period has been exhausted or the employee is not eligible for FMLA. For example, the employee may not have been employed at least 12 months, does not have a serious health condition or wants to care for a family member who falls outside the scope of the FMLA, all of which are foreseeable contingencies. The policy should address the reasons such a leave may be taken, who is eligible, the maximum length, whether paid time off can or must be used, reinstatement rights, insurance continuation rights and medical certification requirements to commence and return from a leave. It is virtually certain that a pandemic will result in absences not covered by the FMLA so a policy dealing with non-FMLA leaves (often called a personal leave or non-FMLA medical leave) is essential.

Some employer policy decisions may have obvious but significant implications. If the employer does not allow employees to use certain paid time off benefits during a leave, employees may have an incentive to return to work sooner than they otherwise would. That may be good or bad depending on whether the employee's return

to work increases the risk of exposure to others. An employer's short-term and long-term disability programs should be reviewed to consider how they will operate during extended absences.

Employers may not have much control over employee absences even if the employee is not sick. Under OSHA, an employee is not required to come to work if he reasonably and in good faith believes that he would be in imminent danger of death or serious injury in the workplace. 29 CFR § 1977.12(b). Employers must be prepared to deal with absenteeism resulting from fear that coming to work will increase the risk of exposure. Employee communication programs designed to provide accurate and credible information about those risks should be part of the employer's emergency preparedness program.

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 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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