

Labor Law Bulletin

PREPARING FOR SWINE FLU PANDEMIC

With world governments and health organizations closely monitoring outbreaks of swine flu, media and public attention is again focused on the threat of a pandemic flu outbreak. These recent events present a good occasion for employers to conduct a self-audit of their own preparedness for human resources-related issues in connection with a pandemic outbreak or any other emergency situation. These issues include high rates of employee absenteeism, a need to conduct off-site operations and general business disruption.

How to prepare for and respond to absenteeism and business disruption caused by emergency situations must be decided primarily by business leaders, not lawyers. Nevertheless, employers may encounter employment-related legal issues in planning for or responding to these circumstances. Employee attendance is sure to be impacted as schools close and working parents struggle with childcare arrangements. Some employees may wish to stay home or decline to travel on business. So, the potential issues employers face are not limited to employees who become ill or have ill family members.

FMLA: Employees may be eligible for FMLA leave for their own illness or to care for sick family members. Effective January 16, 2009, new FMLA regulations have substantially altered FMLA procedures. Employers who have not yet reviewed or updated their policies and procedures are well advised to do so now, especially given a potential increase in leave-related issues resulting from recent events.

Other Leave Policies: Some state laws provide more generous leave benefits than the FMLA. Employers must decide whether to permit extended leaves under existing or special leave policies 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 (e.g., vacation and PTO) 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.

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. Vedder Price will continue to monitor OSHA developments in connection with swine flu.

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 swine flu or other diseases among employees should be mindful of applicable privacy laws. HIPAA prohibits health plans from disclosure of employee health information, but 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.

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 a pandemic or other business disruption. Refusal to work because of unsafe work conditions may be considered protected concerted activity should employers take action against such employees.

Telecommuting: Permitting or expanding the use of telecommuting in the event of a pandemic or other emergency raises various issues. For example, telecommuting may increase the risks of disclosure of trade secrets and other confidential business information. 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.

What Should Employers Do: Employers should actively monitor developing events and take measures as circumstances warrant. There are several good resources available on the Internet related to pandemic preparedness and swine flu in general:

- www.pandemicflu.gov (the Federal Government's website)

- <http://www.osha.gov/dsg/topics/pandemicflu/index.html> (OSHA)
- <http://www.cdc.gov/swineflu/> (Centers for Disease Control)
- <http://www.who.int/csr/disease/swineflu/en/index.html> (WHO)

Equally important as taking prudent measures when necessary, employers should avoid overreacting or acting rashly without fully considering the consequences. Doing so may expose employers to unnecessary litigation risk and cause undue alarm among workers. For example, where a pandemic is associated with specific countries, employees should be cautious to avoid potential claims of disparate treatment and harassment based on race or national origin as symptomatic employees are told to remain away from work or subjected to medical monitoring or inquiries.

If you have questions about pandemic preparation efforts or related issues, please call **Chuck Wolf** (312-609-7888), **Neal Korval** (212-407-7780), **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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Annual Employment Law Seminar

Vedder Price will address the significance of the labor and employment law changes under the Obama Administration and the 111th Congress, along with other topics, at the firm's Spring Employment Law Conferences on the following dates:

May 6, 2009

Standard Club, Chicago, Illinois

May 7, 2009

Hotel Sofitel, Rosemont, Illinois

June 24, 2009 — SAVE THE DATE!

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Vedder Price P.C. is a national business-oriented law firm with 250 attorneys in Chicago, New York and Washington, D.C. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, general litigation, corporate and business law, commercial finance, financial institutions, environmental law, securities, investment management, tax, real estate, intellectual property, estate planning and administration, health care, trade and professional association and not-for-profit law.

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