
HEALTH CRISIS MANAGEMENT IN THE WORKPLACE

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PANDEMIC PARANOIA: DON'T LET SWINE FLU PARALYZE YOUR WORKFORCE

Since swine flu was initially detected in April 2009, researchers have feverishly looked for ways to prevent a multi-border pandemic in the fall flu season. Swine flu is thought to be spreading faster in the United States than in other countries, possibly due to the substantial amount of interstate travel in the United States. Although many of the rumors regarding transmission and potential effects of the illness have subsided, it is still unclear what the impact will be at the height of flu season. According to CDC Director Richard Besser, MD, although the disease has now been found to be milder than anticipated, "We are still on the upswing of the epidemic curve." As swine flu spreads, it is likely to mutate to a form that does not respond to the vaccines researchers are currently developing. Therefore, employers need to prepare their workforce for the coming Fall and Winter 2009-2010 flu season.

POTENTIAL IMPACT ON EMPLOYERS

With over 10,000 confirmed and probable cases of swine flu and 17 deaths in the two months of detection, it is no wonder that swine flu has become a household term and initially invoked fear and paranoia throughout the world. Should Dr. Besser's prediction come to fruition, there will be thousands more cases of swine flu this flu season when the flu can thrive longer and spread more quickly, potentially with a vaccine that is rendered ineffective as a result of a mutated virus.

Studies show that sick employees result in millions of dollars of lost revenue per year. As such, with the rapid increase of reported cases, employers face millions of dollars of lost productivity and must be ever so mindful of maintaining a productive and healthy workforce. In addition to productivity losses, employers face increased costs related to litigation if appropriate measures are not taken with regard to leaves and requests to care for sick relatives. The swine flu could result in cases being brought under the Americans with Disabilities Act ("ADA"), Family and Medical Leave Act ("FMLA") and workers' compensation laws. As with any employment action, employers are cautioned to weigh all considerations in making decisions and to document their actions.

WAYS EMPLOYERS CAN MINIMIZE THE IMPACT OF SWINE FLU ON THEIR BUSINESSES

Revisit employee handbooks and personnel policies. Employers should review their employee handbooks and personnel policies to ensure that policies are compliant with the most recent changes in the ADA and FMLA. Employers should also consider whether current leave of absence policies are tailored to suit their needs in the event of a pandemic. In addition, employers may consider telecommuting arrangements for certain employees who need to work from home to care for relatives. However, telecommuting arrangements should be carefully considered. On the one hand, telecommuting is a possible fix to prevent the spread of a virus. On the other,

employees who are denied the right to telecommute may allege unfavorable treatment based upon a certain protected classification or may argue denial of an accommodation. Further, telecommuting has been found to frequently result in lower productivity and decreased team work.

Employers should develop communicable illness policies. The implementation of a communicable illness policy will further serve to protect an employer. To be effective, the policy should set forth clear procedures regarding the employer's obligations and expectations of employees. The policy should designate a person to whom employees may report incidents of communicable diseases and should advise employees that they may be required to stay home to prevent the spread of the illness. In addition, a travel policy should be added as it relates to travel for work. Additionally, employers must consider various wage issues. For example, are employees paid if the workplace is closed by the employer? Are employees paid if they call in sick pursuant to the procedure set forth in the policy? Is there a difference between how exempt and non-exempt employees are treated under the policy? Will the employee be required (or even allowed) to use PTO or vacation time? A carefully designed policy, if adhered to, should further reduce the employer's risk in ADA, FMLA and wage and hour litigation.

Cross train employees and get back to basics. To minimize lost productivity, employers should begin cross training employees now to perform more than one function. In the event numerous employees are out of the workplace with the impending flu season, cross training will help to continue smooth operations and decrease lost revenue. Employers can consider posting notices in restrooms and at kitchen sinks reminding employees to wash their hands. Signs could be posted at employee stations reminding employees to cover their mouths when they cough or sneeze. Employers may also provide anti-bacterial products for employees to use to minimize the spread of viruses.

Educate employees about the facts. At the outset of the swine flu, numerous rumors abounded such as swine flu can be caught by eating pork. However, research has determined that is not the case. Now, rumors abound regarding how the virus will mutate and its impact in flu season. To prevent paranoia, employers can provide employees with basic factual information related to swine flu, how it is spread and how employees can protect themselves.

Develop an emergency response plan. In the event the workplace needs to be closed, employers should have an emergency response plan in place with multiple levels of responsibility in the event that one or more of the responsible individuals is sick and unable to work. Who will serve as the company spokesperson to the media? Who will serve as the liaison between management and employees? Who will be responsible for processing payroll? An emergency response plan should be developed to answer these and other questions that often escape us in times of turmoil.

Create communication outlets and provide regular updates to employees. Employers can consider establishing a hotline or intranet site as a way for employees to receive timely information. In the event the facility is closed, employees need a way to receive

information. The hotline or intranet site can be used to provide information from a remote location. Of course, any communications need to be tailored to meet the needs of your workforce, both in terms of difficulty level and language. When new information becomes available that may affect employees, provide immediate and honest communication with the employees. Such openness tends to allay concerns.

Maintain privacy. Employers should take steps to protect the privacy of any individuals who have swine flu. Employers should not keep detailed health records in personnel files. Rather, employers should maintain a separate file for healthcare records. Employers should comply with the Health Insurance Portability and Accountability Act ("HIPAA"). In the event an employee's medical records need to be obtained, employers should have a HIPAA complaint authorization for release of medical records. The authorization should inform the employee that the records may be viewed by additional necessary personnel and that the employee has a right to revoke the authorization.

RECOMMENDATION

Employers are advised to institute the policies and procedures necessary to assist with continuing operations as seamless as possible. Of the practical suggestions identified above, some have minimal cost while some are more elaborate and will be more costly. Employers should consider the potential impact of lost employee productivity to determine which method is suitable for them. No matter what, employers must take steps to ensure that their workforce is not paralyzed by the swine flu pandemic this flu season.

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CONTINUITY OF OPERATIONS PLAN

I. Components of Continuity of Operations Plan

1. **Communication Plan.** The company should announce to employees that it is developing a continuity of operations plan in the event of a influenza pandemic, but temper the communication to avoid unnecessary panic and overreaction by employees. The announcement of the company's plan should state that the company is doing what the federal government has already started doing on a national scale: taking a prudent, rational approach to the threat, recognizing that the threat may not occur for months, for years or not at all. However, if a pandemic does strike, the company is determined not to be caught flat-footed and will have a plan in place to protect workers and to ensure that business operations will continue with as little interruption as possible.

The centerpiece of any plan adopted by the company is a mechanism of providing employees with the best available information about the pandemic. This includes educating employees about modes of influenza transmissions, symptoms employees should watch for, and the statistical risks of infection caused by exposure to the virus. In all likelihood, this will involve obtaining the most recent information and updates about a pandemic issued by the Centers for Disease Control, the U.S. Department of Health and Human Services, and the World Health Organization, and providing this information to employees in a meaningful and helpful manner.

2. **Absenteeism Plan.** The Health and Human Services Department recommends that private sector employers plan with the assumption that up to 40 percent of their workforce may be absent for periods of about two weeks at the height of a pandemic wave, with lower levels of staff absent for a few weeks on either side of the peak. Absences may be due to an employee's illness, the illness of a family member, voluntary quarantine due to an ill household member, or simply the fear of exposure to influenza at work.

Operating under this assumption, the company must determine the minimum number of employees needed to keep operations running. To ensure the company has the minimum number of employees needed to keep operations running, the plan should address two issues: (1) how to keep workers well (and working productively), and (2) how to operate with reduced staff or under alternate work arrangements.

a. Wellness Plan

Hygiene. The crisis plan should contain protocols emphasizing hygiene to avoid infection of co-workers. Employees should be instructed to wash their hands frequently, avoid close contact with other workers, avoid touching their eyes, nose or mouth and—most of all—remaining home when sick. The establishment and posting of hygiene and infection control guidelines is recommended.

The company may also wish to stockpile certain supplies that are likely to be in great demand in the event of a pandemic. Items like hand sanitizers, disposable gloves, masks, and the like are likely to be in short supply should a influenza pandemic occur.

Reimbursement for Preventative and Onset Treatment. Assuming anti-viral medications are developed and available in sufficient supply, companies may want to consider reimbursing the cost of employees obtaining such treatment. Such an investment may be small in comparison to the cost of having 40 percent of the workforce absent during the height of the flu pandemic.

Workplace Modifications. Heating and air-conditioning systems need to be evaluated to determine if their operation may accelerate the spread of influenza in the workplace.

Cleaning Procedures. Companies may need to modify their ordinary cleaning procedures to minimize the spread of influenza in the workplace. In addition to following heightened hygiene practices, the responsibility of cleaning staff may need to be increased to include regular replacement of air-conditioning filters, more frequent office cleaning, and regular cleaning of keyboards and telephones which are used by more than one individual.

Social Distancing Measures. To avoid contact with potentially infectious employees, companies should consider implementing “social distancing measures” for the workforce—that is, modifying the frequency and type of face-to-face interaction with coworkers. Social distancing measures may include substituting teleconferencing for face-to-face meetings, staggering breaks during shifts, allowing employees to work flexible work hours, and telecommuting. Social distancing measures may even go so far as imposing a moratorium on handshaking.

Identifying and Handling Ill Workers. In addition to educating employees about what symptoms to watch for, the company may want to implement protocols to detect and handle contagious employees. Some companies are considering using thermal scanning of employees to detect elevated temperatures. Others are considering more low-tech approaches, like regular monitoring of employees temperatures by distributing to employees digital thermometers to check their own temperatures.

In a pandemic, the company should not praise and reward the conscientious worker who comes to work despite being ill. The presence of a contagious employee in the workplace can result in the spread of the influenza virus among the workforce, resulting in more workers becoming infected and bringing operations to a stop. Instead, the company should insist that employees diagnosed with influenza remain home until they are determined by a physician or other health care professional as no longer posing a health threat to the rest of the workforce.

That may be a challenge with hourly workers, who often cannot afford to remain home ill and lose pay. Solutions to that problem include: (a) allowing employees to work remotely from home; (b) modifying leave policies to provide salary continuation; (c)

adopting emergency compensation and salary continuation policies effective during the period of the pandemic.

Mandatory Quarantine. Company should consider whether to impose a mandatory quarantine period if the employee is diagnosed with influenza. The length of the quarantine will depend on information relating to the periods of contagiousness provided by CDC, HHS or WHO. At the end of the quarantine period, employees should be required to obtain medical clearance before returning to work.

Working Remotely. To minimize contact with infected individuals, alternate work arrangement should be developed or refined. To avoid employee contact at the worksite or permit ill employees to work from home, employees should be assigned laptops or allowed to use their home computers to work remotely. If the employee does not have Internet access from his or her home, that issue needs to be resolved so that the employee can work remotely from home, if necessary. A determination needs to be made at what point, and under what circumstances, employee will be given remote access. Assuming that a large number of employees may be working remotely during the midst of a pandemic, employers will need to determine if the company's servers and networks are able to withstand a significant increase in capacity.

Shift Modification. Companies should consider whether ordinary shift schedules should be modified in order to reduce potential exposure to influenza. Scheduling more shifts with fewer numbers of employees can reduce the scope of exposure should any one employee be contagious.

Business Travel. The company should decide whether to ban nonessential business travel to high risk areas of infection. At a minimum, the company should require prior approval from a company officer or senior human resources representative for essential travel to those locales. If travel is essential, the company should ensure employees are given information about diseases and should help workers get medical care if they develop any symptoms.

b. Operations Plan

Replacement Workers. Assuming that up to 40 percent of staff may be absent during the height of the pandemic, the company will need to develop a plan to hire replacement workers in the event that existing staff cannot keep operations running efficiently. Sources for replacement workers include temporary staffing agencies, secondment or work-share agreements with similar companies, or hiring recent retirees. Other options include cross-training employees who work in non-essential positions to assume essential duties in the event of a pandemic.

Outsourced Services. The company's vendors and suppliers are likely to be impacted by an influenza outbreak no differently than the company itself. Companies may experience interruptions in services typically outsourced to vendors, like payroll or

benefits administration. The company's plan should provide for this contingency and determine how services once outsourced to vendors will be reassumed by the company in the event of a pandemic.

II. Legal Review of Continuity of Operations Plan

A pandemic will require employers to determine what their obligations are to ensure the health and safety of their employees. There are a myriad of state and federal laws that the employer must comply with to avoid liability to both infected and non-infected workers. What follows is a checklist to guide employers through the applicable laws and regulations that will apply in the event of an outbreak of influenza in the workplace.

Review State and Federal Reporting Obligations. Depending on the state where the employer is located and the industry in which it is engaged, the company may have an obligation to report cases of infectious diseases to state or local health authorities. Companies should investigate whether the laws and regulations of the state or municipality where they are located require them to report actual or suspected incidents of influenza.

Review OSHA Obligations. Under the general duty clause of the Occupational Safety and Health Act, employers are required to provide all employees with a non-hazardous workplace. While OSHA does not have regulations specifically pertaining to pandemic flu, OSHA can cite employers under the general duty clause if the hazard is generally recognized and is likely to cause death or serious physical harm. This potential liability alone is sufficient reason for a company to implement a continuation of operations plan which addresses a pandemic in the workplace.

In addition, companies may have an obligation under OSHA to record employee-related influenza cases in the appropriate OSHA injury logs, much like they are now required to do for employee-related tuberculosis cases. This reporting obligation is likely to be triggered in the event of a pandemic flu outbreak.

Review Workers' Compensation Issues. If an employee contracts influenza in the course and scope of his or her employment, the employee may be entitled to workers' compensation benefits. Most states' workers' compensation laws cover occupational diseases, a category which influenza arguably may fall within. If the ill employee qualifies for workers compensation benefits, the exclusive remedy provisions of a state's workers' compensation law would prevent the ill employee from bringing a civil suit against the employer for negligence or other workplace tort. This result carries both pluses and minuses for employers. On the one hand, the employer's liability is limited to the indemnity and benefits provided under the state's workers' compensation statute. On the other hand, with an increase in workers' compensation claims, the employer's experience modification rate—and thus, the amount it pays in workers' compensation premiums—is likely to increase as well. Companies should review their

workers' compensation policies and coverages to determine if a pandemic flu would be covered under the policies and the laws of the state where they operate.

Review Potential Tort Issues Involving Public Contact. While an employer's liability for a worker's occupational exposure to influenza may be limited to workers' compensation benefits, if an infected employee comes into contact with a member of the public and transmits the disease, the company may face civil liability for the infection under a theory of respondeat superior. While it may be difficult for a plaintiff to prove that it was his or her contact with the employee that led to the plaintiff's illness, a company should nevertheless consider imposing limits on infected employee's contact with the public, particularly for employees like salespersons whose job involve frequent face-to-face contact with customers.

Review of Policies Concerning Treatment of Infected Employees. In order to protect the workforce from widespread infection and maintain the minimum number of employees for the business to operate efficiently, the natural response to handling an infected employee is to remove the employee from the workplace, place the employee on leave, and thereby avoid the risk of further infection at the worksite. Legal review of the company's continuity of operations plan will therefore require a review of the circumstances under which the employer can remove an ill employee from the workplace, the company's leave policies (any modifications of those policies in the event of a pandemic) and advice on whether those practices and procedures may expose the company to legal liability.

State privacy laws and disability discrimination statutes generally prevent employers from questioning employees about health-related conditions without a business justification. However, where the employee's health condition presents a direct threat to the health or safety of others, employers are generally privileged to inquire about the employee's health condition and to take personnel action affecting the employee if such action is necessary to protect other workers.

The following laws are implicated by an employer's decision to remove an infected employee from the workplace:

a. Workers' Compensation

As stated above, workers' compensation benefits may be the exclusive remedy for an employee who is infected by influenza during the course and scope of his or her employment. However, some states provide additional damages or liability under the workers' compensation system if the workplace injury or occupational disease is the result of the employer's willful disregard for the employee's safety. Therefore, removal of an infected employee from the workplace in order to protect the health and safety of co-workers may be an affirmative obligation under some state workers' compensation laws.

b. OSHA

OSHA's general duty clause is another legal source that may require an employer to remove an infected employee from the workplace. As stated above, OSHA can cite employers under the general duty clause if a workplace hazard is generally recognized and is likely to cause death or serious physical harm. Depending on the transmittal risks of the influenza strain, the company may have not only the moral obligation to remove an ill employee from the worksite, but also the legal obligation to do so if removal is the only effective method to avoid transmittal among members of the workforce.

OSHA may also be implicated in a pandemic if an employee refuses to come to work because of fear of infection. OSHA permits an employee to refuse working conditions that constitute an "imminent danger." Whether the presence of pandemic flu in the workplace is an "imminent danger" depends on whether the flu can be transmitted by ordinary human-to-human contact and the statistical odds of contracting the influenza through simple workplace exposure.

c. Family and Medical Leave Act and State FMLA Laws

The Family and Medical Leave Act requires employers with fifty or more employees to provide eligible employees with up to 12 weeks of unpaid leave for leave required by the employee's own serious health condition or for leave to care for a family member with a serious health condition. In general, a "serious health condition" is one which renders the employee unable to perform his or her job and requires ongoing medical care. Whether pandemic flu is a serious health condition is unknown at this time. However, if the impact of pandemic flu meets the statutory definition, then the FMLA may be triggered. Many states have adopted their own analogs to the FMLA and provide greater benefits or coverage than the FMLA. Assuming pandemic flu meets the definition of a serious health condition under the FMLA, those state mini-FMLA laws are also likely to be triggered.

While an employer is authorized under the FMLA to designate any leave taken by the employee as counting toward the employee's annual 12-week FMLA leave allotment, the FMLA does not authorize the employer to force an employee to take a leave of absence. Furthermore, the FMLA contains privacy provisions that limit an employer from inquiring about an employee's health condition except as is reasonably necessary to determine if the employee's leave qualifies under the FMLA. The company's continuity of operations plan must therefore be sensitive to these legal restrictions under the FMLA.

Unless the employer provides otherwise, FMLA leave is unpaid. Employees—especially hourly workers—may be disinclined to take FMLA leave because they will be without a paycheck during the pendency of their leave. Employers developing a business continuity of operations plan should consider whether they wish to provide an incentive to encourage ill employees to stay home from work by providing employees with some form of salary continuation or wage advancement during the employees'

leave of absence. Many employers have addressed this issue by establishing leave donation programs whereby employees can donate their accrued paid leave to a leave bank that can be drawn on by employees who have no accrued paid leave.

Companies developing a business continuity of operations plan should also consider whether to suspend FMLA eligibility requirements in the event of a pandemic. To be eligible for FMLA leave, an employee must have worked for the employer for at least 12 months and have worked 1,250 hours during the 12 months prior to the date leave is taken. In order to encourage ill employees to stay home, employers may want to reconsider whether they will enforce these eligibility requirements for FMLA leave. Eligibility requirements for other leave programs offered by the employer should be similarly evaluated.

d. Americans with Disabilities Act

The ADA prohibits covered employers from discriminating against disabled individuals and requires employers to provide reasonable accommodation to disabled employees so long as the employees do not pose a direct threat to the health and safety of themselves and others. If pandemic flu qualifies as a “disability” under the ADA—which may be difficult given that it is a temporary condition that may or may not substantially limit a major life activity—companies will need to comply with the anti-discrimination and reasonable accommodation provisions of the ADA.

However, an employer may exclude a disabled employee from the job if that person would pose a “direct threat” to health or safety. Therefore, assuming an individual infected by pandemic flu is protected under the ADA, if there is a substantial likelihood based on solid medical evidence that a workers will transmit influenza to a co-worker or member of the general public, the employer would be permitted under the ADA to remove that employee from the workplace.

If pandemic influenza is a disability for purposes of the ADA, employers may have a duty to accommodate the employee, provided the accommodation is not one that unduly burdens the employer. This may include providing the employee with a leave of absence for recuperation and treatment for influenza.

e. Sick Leave, PTO Programs, Other Company-Sponsored Leave Programs

In order to encourage employees who are infected with influenza to stay home from work, companies may want to reevaluate their eligibility requirements for various company-sponsored leave programs to remove barriers that prevent employees from taking advantage of those programs. For example, a sick leave program which employees can only use if they are sick could be modified to allow employees to use their available sick leave for a wider range of circumstances. For example, if schools close due an influenza outbreak and the employee needs to stay home to care for his or her children, the company’s sick leave policy could be modified in order to allow the employee time-off to handle such an emergency.

There will inevitably be employees who at the time of a pandemic will not have accrued paid leave they can use if they become ill. Those employees are the ones most likely to come to work in order to continue drawing wages to meet their financial needs. In order to encourage them to remain home if they are sick, employers can set up leave donation programs whereby other employees can donate their accrued paid leave to a leave bank that can be drawn upon by employees who have no accrued paid leave. In addition to providing ill employees with salary replacement during their leave, leave donations programs are terrific devices to build morale and a sense of family within a corporation.

f. Benefit Plan Review

Companies developing a business continuity of operations plan should conduct a review of their benefit plans to determine how they will be impacted in the event of a pandemic. The review should include life insurance; accident, death and disability; short-term and long-term disability; health care (both for active employees and COBRA participants); flexible spending accounts; retirement plans; and workers' compensation. In addition to analyzing coverage issues, the company should make decisions relating to the continuation, modification, or suspension of the plans and coverages in the event of a pandemic crisis. This review will include communicating with vendors and providers to ensure that if a decision is made to continue the plans during the crisis, there is no interruption in coverage and benefits. For example, if employees are out on unpaid leave due to influenza and need to make 401(k) hardship withdrawals to cover their expenses, procedures should be in place so that withdrawals can be made easily and expeditiously.

g. Review of Telecommuting Agreements and Practices

Where employees will be permitted to work from home, telecommuting agreements should be prepared when practical. Such agreements should set forth the company's expectations for employees who are working from home, including their expected hours of work, recording and reporting hours worked, and how communications with managers and supervisors will be handled. Companies should also determine in advance if the employee has appropriate connections to the Internet, the procedures for accessing the company networks remotely, and how confidential information will be transmitted via the Internet. The agreements should also address who will be financially responsible for equipment and services needed by the employee while he is working from home.

h. Review of Pay Practices

In the event of a widespread pandemic, it is possible that payroll systems – whether in-house or outsourced—may be impacted. Additionally, it is possible that entire worksites may be closed, prompting possible layoffs. Payroll practices should be reviewed to ensure that employees are timely paid as required by state law. In the event

that payroll is outsourced, backup systems for ensuring timely payment of wages should be developed should vendors be unable to meet the company's ordinary payroll schedules.

To encourage employees to remain home if ill from influenza, the company should consider adopting a salary continuation program if the employee is not otherwise entitled to pay while on leave. Such salary continuation programs could include a program of pay advances to employees for the period of their leaves of absence.

j. Collective Bargaining Issues

If the company is subject to a collective bargaining agreement, changes in the workplace in response to a pandemic—for example, the hiring of retirees and replacement workers—would likely trigger negotiations with the union.

PANDEMIC
FLU
ACTION
PLAN

1. Overview and Context

In June 2009, the World Health Organization (WHO) signaled that a pandemic of 2009 H1N1 flu was underway. Influenza pandemics, characterized by a worldwide epidemic resulting from a new, dramatically different strain of influenza virus capable of spreading easily among humans, represent one of the greatest potential threats to the health of a general population. The Centers for Disease Control and Prevention (CDC) has compiled and analyzed pertinent information regarding 2009 H1N1 flu since its outbreak was first detected in April 2009, and has concluded that 2009 H1N1 flu has caused greater disease burdens—fever, cough, sore throat, runny or stuffy nose, body aches, headache, chills, fatigue, and, in some cases, diarrhea and vomiting—for people younger than 25 years of age than for older people. However, regardless of age, pregnant women and people with previously recognized high risk medical conditions from seasonal flu (e.g., asthma, diabetes, suppressed immune systems, heart disease, kidney disease, neurocognitive and neuromuscular disorders) appear to be at increased risk of complications from 2009 H1N1 flu.

Although both have similar symptoms, and are spread in a similar fashion, influenza pandemics and seasonal influenza epidemics differ in several respects. Two key differences concern immunity and degree of severity. People develop a degree of immunity to seasonal influenza epidemics over time. In contrast, there is little (if any) immunity for influenza pandemics. Consequently, the new virus strain can spread rapidly from person to person, potentially causing high levels of disease and death around the world. In fact, the CDC estimates that, in the United States alone, an influenza pandemic could infect up to 200 million people, and cause between 200,000 and 1.9 million deaths (compared with an annual average of 200,000 infections and 36,000 deaths in the United States caused by seasonal influenza epidemics). Predictability is a third difference between influenza pandemics and seasonal influenza epidemics. Whereas the latter occurs nearly every year—allowing vaccines protecting people from serious illness to be regularly developed for such viruses—the timing and impact of the former is more unpredictable. Consequently, developing and sustaining a particular population’s preparedness for an influenza pandemic is not only challenging, but also carries an inherent risk of complacency.

It is the policy of [Organization] to promote a safe and healthy environment for its employees. Having recognized the serious risks and potentially disastrous effects associated with an influenza pandemic, [Organization] has adopted the following pandemic preparedness plan in an effort to minimize disruption to business activities, protect the health and safety of our employees and their families, and limit the negative impact to the local community, economy, and society.

2. Planning Phase

2.1 Authority and Protocol

2.1.1 Pandemic Planning Team. [Organization]’s pandemic preparation and response shall be managed by a pandemic planning team (**Exhibit A**), consisting of [four] members, each with defined roles and responsibilities, as outlined in Section 2.1.1(b). The team will have a completed pandemic preparedness plan by [date], and will schedule [annual/semi-annual/quarterly] meetings/tests to assess the effectiveness of the plan.

(a) Alternate Team Members. Pursuant to Section 2.1.2, each position holder on the team must designate at least [two] successors (**Exhibit B**) in the event the primary position holder becomes unavailable, as defined in Section 2.1.2(a), and in such event, the successor will be delegated the respective authority of the position, pursuant to Section 2.1.3.

(b) Planning Objectives. Team members shall ensure that appropriate steps are taken in preparation of a pandemic. Specifically, pandemic planning will address the following areas:

- (i)** forecasting pandemic impact, and
- (ii)** communication protocol, and
- (iii)** infection control and prevention, and
- (iv)** [input additional objectives/tasks as needed].

The team’s lead coordinator will assign tasks to individual team members, and, when appropriate, set target dates for assessment by the whole team of each team member’s findings, plans, and procedures (**Exhibit C**).

2.1.2 Leadership Succession and Delegation of Authority. If the [position title] becomes unavailable in the course of a pandemic, general management of [Organization] is delegated in the order of succession listed in **Exhibit D**.

(a) Unavailable Defined. An individual will be deemed “unavailable” in the following circumstances:

- (i)** the individual is incapable of carrying out the assigned duties by reason of death, disability, or distance from/response time to the facility; or
- (ii)** the individual has already been assigned to a different pandemic planning team position; or
- (iii)** [input additional qualifying circumstances as needed]

2.1.3 Delegation of Authority. In the event of a succession of leadership, pursuant to Section 2.1.2, the successor will be delegated the appropriate authority to carry out all operational tasks normally performed by the previous position holder.

2.1.4 Plan Activation and Termination. The [position title/committee] of [Organization], is charged with determining when the plan is to be initially activated, and also

when the plan is to be subsequently terminated. Such determinations will be made based on the pandemic status updates provided by federal, state, and/or local public health and emergency management sources, but not before first consulting with [input position title(s)/committee(s)].

2.2 Operations Assessment

2.2.1 Non-Essential Operations. The table in **Exhibit E** lists all department operations that can be suspended temporarily without causing immediate or irreparable damage to [Organization].

2.2.2 Essential Operations. The table in **Exhibit F** lists (i) all essential business operations that are considered necessary to maintain [Organization]’s operational continuity and ultimate recovery, (ii) the respective departments performing such operations, (iii) the maximum absenteeism percentage of the department that will still allow the department to perform its essential function(s) without interruption, and (iv) whether a particular operation can be performed remotely.

(a) Cross Training. Cross training of employees for essential job functions will take place [on such dates designated by the pandemic planning team/semi-annually/annually]. Each employee being trained will be provided clear instructions by department heads regarding how the essential operations of the department are performed.

2.2.3 Essential Vendors. The table in **Exhibit G** lists (i) the contact information for all primary vendors of critical products and services considered necessary to maintain [Organization]’s operational continuity and ultimate recovery, (ii) the essential service or product provided, and (iii) [two] alternate vendors that can provide services or products identical to those of [Organization]’s primary vendor, thereby allowing [Organization] to perform its essential function(s) without interruption.

3. Response Phase

3.1 Communication. The communications system developed by the pandemic planning team, pursuant to Section 2.1.1(b)(ii) will be activated to provide [Organization] with up-to-date, reliable pandemic information, from federal, state, and local public health and emergency management sources. See **Exhibit C**. The team will disseminate the pandemic information material prepared pursuant to Section 2.1.1(b)(ii) to all employees, clients and vendors. See **Exhibit C**. In addition, the team will provide all employees, clients, and vendors with regular updates regarding the status of the pandemic as well as any product or service changes.

3.2 Operations Assessment

3.2.1 Non-Essential Operations. As [Organization] resources become limited, all non-essential operations outlined in **Exhibit E** shall be suspended on a cost-effective basis until the pandemic planning team decides that resumption of such non-essential operations will not impair [Organization]’s business continuity.

3.2.2 Essential Operations and Vendors. The pandemic planning team shall continually assess the status of all components to [Organization]’s essential operations outlined in **Exhibit F** and **Exhibit G** and, after consulting the [input position title(s)/committee(s)], determine how [Organization] resources should be reallocated, and whether alternative service/product providers should be utilized.

3.2.3 Absenteeism. The pandemic planning team shall track when employees are absent from work due to the pandemic, and when ill employees are expected to return to work. The team will reassign employees to essential or prioritized job functions as needed, providing clear instructions for performing such job functions, and provide refresher training seminars to employees being reassigned.

3.3 Policies. Pursuant to Section 2.1.4, the following policies will take immediate effect upon activation of the pandemic plan, remaining in effect until termination of the plan. Employees who are found to be in violation of any of the following policies may be subject to disciplinary action. No policy will be effective to the extent it conflicts with (1) federal or state law, or (2) pre-existing union, or other employment, contracts. (Refer to **Exhibit H** for additional information regarding the federal law relevant to businesses in developing their pandemic planning policies.)

3.3.1 Employee Leave.

(a) **Employees Who Become Ill.** An employee who becomes ill with pandemic influenza, or who displays symptoms of pandemic influenza, shall be required to stay home to minimize the spread of the pandemic. The employee will be required to provide a doctor’s note within [one/two/three] days of the absence. In addition, an employee who becomes ill will be required to remain symptom-free for [twenty-four hours/one week], without the use of medication, before returning to work.

(b) **Employees Who Are Not Ill.** An employee who is not ill with pandemic influenza may not take leave, or refuse to work, simply to avoid possible exposure to the pandemic in the workplace.

(c) **Employees Who Become Ill at Work.** An employee who arrives at work looking ill, or displaying flu-like symptoms, shall submit to a “thermometer test” and will be sent home if the employee’s temperature is 100° F or greater. The employee will be asked to see a doctor and to submit a doctor’s note to confirm the illness or clear the employee to return to work.

(d) **Family Member/Dependent(s).** An employee caring for a family member and/or dependent(s) who is ill with pandemic influenza will be granted leave to care for such dependent(s) to minimize the spread of the pandemic. An employee will also be granted leave to care for their children if schools or childcare programs close, or dismiss students, as a result of the pandemic.

(e) **Family and Medical Leave Act (FMLA)**

(i) Foreseeable Leave. Employees seeking to use FMLA leave shall provide [Organization] 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable.

(ii) Unforeseeable/Emergency Leave. Employees seeking to use FMLA leave shall provide [Organization] with notice as soon as practicable under the facts and circumstances of the particular case. In accordance with the FMLA, [Organization] may require employees to provide: (1) medical certification supporting the need for leave due to a serious health condition affecting the employee or a spouse, son, daughter or parent, including periodic recertification; (2) second or third medical opinions, at [Organization]’s expense; and/or (3) periodic reports during FMLA leave regarding the employee’s status and intent to return to work.

(iii) Paid Leave. Paid leave may be provided for leave due to pandemic influenza pursuant to [Organization]’s sick leave, paid time off, FMLA, or other leave policies. If the leave qualifies as FMLA protected leave, **[Option 1: [Organization] may require the employee to elect the substitution of paid sick leave, or paid personal leave; Option 2: [Organization] may require the employee to use all paid leave prior to taking unpaid leave].**

(iv) Insurance. Employees on FMLA leave shall continue to be covered by their group health insurance policy under the same conditions as coverage that would have been provided if the employee had been continuously employed during the leave period.

(f) Changes to Sick Leave Policy. In the event of a pandemic, [Organization] reserves the right to adjust its sick leave policies, provided such adjustment is not prohibited by a pre-existing union, or other employment, contract.

3.3.2 Alternative Working Conditions. In the event of a pandemic, employing alternative work arrangements to achieve social distancing—an infection control strategy that includes methods of reducing the frequency of closeness of contact between people to limit the spread of infectious diseases—may be the best interest of [Organization] and its employees. [Organization] has discretion, after consulting with pandemic planning team, to institute one or more of the following policies to minimize the spread of the pandemic in the workplace.

(a) Telecommuting. [Organization] may require employees possessing the necessary equipment and software to work from home, provided such employees can perform their primary functions from home adequately. [Organization] shall not require an employee to work from home if the employee is unable to do so. In addition, absent a showing of undue hardship, [Organization] shall offer telecommuting as a reasonable accommodation to those employees who are unable to attend work as a result of a disability, and who are capable of performing their job functions from home.

(i) [Organization] shall not require those employees who are telecommuting because of a disability to pay or reimburse [Organization] for additional reasonable costs such employees incur while working at home.

(ii) [Organization] shall not require employees covered by the Fair Labor Standards Act (FLSA) to pay or reimburse [Organization] for such items that are business expenses of the employer if doing so reduces the employee's earnings below the required minimum wage.

(iii) Employees shall be required to (1) carefully record and submit documentation of their time worked, and (2) receive permission from [Organization] before working in excess of forty hours in a week.

(b) **Staggered Work Shifts.** [Organization] may require employees who do not need to perform their work functions during the same time of the day as other employees to adjust their work shift accordingly to another time of the day. In addition, [Organization] may permit employees to work an extended number of hours in fewer work days, provided such employees are able to perform their primary functions adequately under such a schedule.

(c) **Teleconferences.** [Organization] may close conference rooms to those departments that are able to continue working effectively through teleconferences, in order to minimize face-to-face contact between employees and clients.

(d) **Social Areas.** Absent a collective bargaining agreement, or other employment contract, dealing with on-site break locations, in the case of severe pandemic conditions, [Organization] may close lunch rooms, and/or other gathering places in the workplace to minimize face-to-face contact between employees.

(e) **Pay Practice.** Pursuant to the Fair Labor Standards Act (FLSA), [Organization] will pay both exempt and non-exempt full-time employees who perform the essential operations necessary to preserve the business continuity of [Organization] at their regular pay rate for the hours actually worked, whether at home or at the workplace.

(i) Pursuant to the Fair Labor Standards Act (FLSA), if telecommuting is being provided as a reasonable accommodation for an employee with a disability, or if required by a pre-existing union, or other employment, contract, [Organization] shall pay the employee the same hourly rate or salary.

3.3.3 Health Care Practices/Protocol

(a) **Infection Control.** Employees shall exercise the following infection control practices at all times: regular hand washing, coughing and sneezing etiquette, and tissue usage and disposal.

(i) Coughing/Sneezing Etiquette

(1) All employees shall cover their mouth and nose with a tissue when they cough or sneeze, and dispose of the used tissue in the waste basket. If the employee does not have a tissue, they shall cough or sneeze into their upper sleeve, not their hand.

(2) All employees shall clean their hands after coughing or sneezing with soap and water, or with an alcohol-based hand cleaner.

(b) Personal Protective Equipment. [Organization] may require employees to wear personal protective equipment, such as face masks, gloves, or gowns. Absent a showing of undue hardship, [Organization] shall afford related reasonable accommodations, with respect to personal protective equipment, to employees with a disability.

(c) Exclusion From the Workplace

(i) Pandemic Illness as a Disability. [Organization] may exclude an employee with a disability from the workplace if [Organization]: (1) obtains evidence, based on the most recent and reputable medical information, that the employee poses a direct threat, or significant risk of substantial harm; and (2) determines that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat. This subsection shall apply only in the event the pandemic illness rises to the level of a disability.

(ii) Requirements for Employee Return. During a pandemic, [Organization] may require a doctor's note, a medical examination, or a reasonable time period during which the employee has been symptom-free, before it allows the employee to return to work, provided [Organization] has a reasonable belief, based on objective evidence, that the employee's present medical condition would (1) impair his/her ability to perform essential job functions with or without reasonable accommodation, or (2) pose a direct threat—a significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation—to safety in the workplace. [Organization] may also require a fitness-for-duty certification upon the employee's return to work, so long as [Organization] provides advance notice that such certification will be required.

(d) Medical Inquiries and Examinations

(i) Pre-Offer. With respect to an applicant for employment, [Organization] shall not make any disability-related inquiries or medical examinations, even if they are related to the job.

(ii) Post-Offer. After an applicant is given a conditional job offer, but before he/she starts work, [Organization] may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job as long as it does so for all entering employees in the same job category.

(iii) Employee. [Organization] may make disability-related inquiries and require medical examinations, provided such inquiries and examinations are job-related and consistent with business necessity.

(iv) Confidentiality. All medical information obtained by [Organization], including any medical information voluntarily disclosed by an employee, will be treated as a confidential medical record.

3.3.4 Travel. All current travel arrangements will be evaluated, and unessential business travel for [Organization], especially to areas with high pandemic influenza transmission rates, will be discontinued, and those employees who become ill while traveling shall notify [Organization]. All future travel plans for conducting business on behalf of [Organization] shall first be approved by [input position title(s)/committee(s)]. In addition, employees returning from areas with high pandemic influenza transmission rates may be required to submit to a medical examination [at Organization's expense], or remain symptom free for [three] days, before returning to work.

4. Recovery Phase

4.1 Communication. The pandemic planning team shall alert all employees, clients and vendors regarding the change in pandemic status, the procedure and/or timeline for resuming normal operations, and any applicable policy changes regarding products or services offered.

4.2 Operations Assessment. The pandemic planning team shall measure the impact of the pandemic on [Organization]'s operations and manage the efficient return to routine operations following the protocol established pursuant to Section 2.1.1(b)(i).

4.3 Preparedness Plan Assessment. The pandemic planning team shall conduct an evaluation of [Organization]'s pandemic response, and shall update and make changes to the current pandemic preparedness plan as appropriate.

EXHIBIT A

Pandemic Planning Team

Name	Position Title/Role	Email	Phone #	Emergency #
	Lead Coordinator			
	[Position Title/Role]			
	[Position Title/Role]			
	[Position Title/Role]			

[input additional entries as needed]

Additional Comments:

EXHIBIT B

Pandemic Planning Team Alternates

Position: _____

	Name	Email	Phone #	Emergency #
Alternate #1				
Alternate #2				

[input additional entries as needed]

Position: _____

	Name	Email	Phone #	Emergency #
Alternate #1				
Alternate #2				

[input additional entries as needed]

Position: _____

	Name	Email	Phone #	Emergency #
Alternate #1				
Alternate #2				

[input additional entries as needed]

Position: _____

	Name	Email	Phone #	Emergency #
Alternate #1				
Alternate #2				

[input additional entries as needed]

Additional Comments:

EXHIBIT C

Pandemic Planning Team Tasks/Objectives

A. Forecasting

1. Identify scenarios likely to result in an increase or decrease in demand for particular services/products during a pandemic, and establish corresponding procedures authorizing the reallocation of department resources in order to (1) meet such demand changes, and (2) maintain [Organization]'s essential operations, pursuant to Section 2.2.2.

Assigned to: [Position Title/Role/Name]; Target Date: [date]

2. Predict levels of employee absenteeism in the event of a pandemic based on factors such as worker or family member illness, community containment measures and quarantines, school and/or business closures, and public transportation closures, and develop several strategies to address the potential impact of such employee absenteeism on [Organization]'s essential business operations, outlined in Section 2.2.2.

Assigned to: [Position Title/Role/Name]; Target Date: [date]

3. Establish a transition procedure to allow for an efficient return to normal operations following the impact of the pandemic.

Assigned to: [Position Title/Role/Name]; Target Date: [date]

4. Confirm that [Organization]'s workers' compensation insurance premiums are paid.

Assigned to: [Position Title/Role/Name]; Target Date: [date]

[input additional objectives/tasks as needed]

B. Communication

1. Ensure that communication systems are operational, secure, inter-operable with other systems in case of the other system's failure, and able to handle increased and constant use.

Assigned to: [Position Title/Role/Name]; Target Date: [date]

2. Develop a system that will provide [Organization] with up-to-date, reliable pandemic information, from federal, state, and/or local public health and emergency management sources.

Assigned to: [Position Title/Role/Name]; Target Date: [date]

3. Prepare culturally and linguistically appropriate materials regarding pandemic fundamentals (e.g., symptoms, modes of transmission), personal and family protection (e.g., hand hygiene, coughing/sneezing etiquette), and [Organization]'s preparedness plan and response strategies/policies for dissemination to employees, clients and vendors.

Assigned to: [Position Title/Role/Name]

4. Prepare a list identifying key contacts of [Organization] and the pandemic planning team, including respective alternates/successors, for dissemination to employees, clients and vendors.

Assigned to: [Position Title/Role/Name]; Target Date: [date]

5. Create procedures to open channels of communication with other local organizations regarding the feasibility of collaborating in the event of a pandemic.

Assigned to: [Position Title/Role/Name]; Target Date: [date]

[input additional objectives/tasks as needed]

C. Infection Control and Prevention

1. Ensure that employees and clients have access to a sufficient supply of infection control products (e.g., hand-hygiene products, tissues, gloves, masks) at all of [Organization]'s business locations, and that work areas are sanitized on a [semi-daily/daily] basis.

Assigned to: [Position Title/Role/Name]

2. Encourage all employees, especially those at higher risk of medical complications (e.g., pregnant women, people 65 years of age and older, and people of any age with chronic medical conditions such as pulmonary disease, asthma, diabetes, neuromuscular disorders, and heart disease), to get vaccinated when vaccines are made available, and explore the feasibility of offering such vaccination opportunities at the workplace for the convenience of employees.

Assigned to: [Position Title/Role/Name]

[input additional objectives/tasks as needed]

Additional Comments:

EXHIBIT D

Leadership Succession

The table below lists the order of succession for general management of [Organization] if the [position title] becomes unavailable in the course of a pandemic.

	Name	Email	Phone #	Emergency #
[Position Title]				
First Successor				
Second Successor				

[input additional entries as needed]

Additional Comments:

EXHIBIT E

Non-Essential Operations

The table below lists all department operations that can be suspended temporarily without causing immediate or irreparable damage to [Organization].

Department	Operation	Suspension Period

[input additional entries as needed]

Additional Comments:

EXHIBIT F

Essential Operations

The table below lists (i) all essential business operations that are considered necessary to maintain [Organization]’s operational continuity and ultimate recovery, (ii) the respective departments performing such operations, (iii) the maximum absenteeism percentage of the department that will still allow the department to perform its essential function(s) without interruption, and (iv) whether a particular operation can be performed remotely.

Department	Operation	Absenteeism (%)	Capable of Remote Operation?

[input additional entries as needed]

Additional Comments:

EXHIBIT G

Essential Vendors

The table below lists (i) the contact information for all primary vendors of critical products and services considered necessary to maintain [Organization]’s operational continuity and ultimate recovery, (ii) the essential service or product provided, and (iii) [two] alternate vendors that can provide services or products identical to those of [Organization]’s primary vendor, thereby allowing [Organization] to perform its essential function(s) without interruption.

Primary Vendor Contact Information	Service/Product Provided	Alternate Vendor #1 Contact Information	Alternate Vendor #2 Contact Information

[input additional entries as needed]

Additional Comments:

EXHIBIT H

Federal Law Applicable To Businesses Developing Pandemic Plan Policies (FAQs)

Americans with Disabilities Act (ADA)

Q: What are the rights of employers to make disability-related inquiries or require medical examinations in the event of a pandemic?

A: An inquiry is not disability-related if it identifies nonmedical reasons for an absence during a pandemic (e.g., mandatory school closures or curtailed public transportation) on equal footing with medical reasons (e.g., chronic illnesses that weaken immunity). Under the ADA, an employer’s ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment. At the pre-offer stage, the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job. At the post-offer stage (i.e., after an applicant is given a conditional job offer, but before he/she starts work), an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job as long as it does so for all entering employees in the same job category. At the employment stage, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity. In addition, the ADA requires employers to treat any medical information, as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.

Q: May employers send employees home if they show symptoms of pandemic influenza? May employers prevent employees from coming to work? May employers mandate employees stay home if they or members of their family are known or suspected to have pandemic influenza or been exposed to someone with pandemic influenza?

A: Any plan of action preparing for an influenza pandemic outbreak may permit the employer to send employees home, provided the plan and the employment decisions comply with the laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, disability or veteran status. In addition, an employer may exclude an employee with a disability from the workplace if the employer (1) obtains evidence that the employee poses a direct threat (i.e., significant risk of substantial harm); and (2) determines that there is no available reasonable accommodation (that that would not pose an undue hardship) to eliminate the direct threat. The determination of a direct threat must be based on the most recent and reputable medical information. If a pandemic illness does not rise to the level of a disability, then a decision to require infected employees to stay home would not implicate the ADA. For a virus to be considered an ADA “disability,” the employee not only must suffer the short-term effects of the virus but also experience lingering effects that cause a disabling condition.

Q: May an employer require an employee who is out sick with pandemic influenza to provide a doctor's note, submit to a medical exam, or remain symptom-free for a specified amount of time before returning to work?

A: During a pandemic health crisis, under the ADA, an employer would be allowed to require a doctor's note, a medical examination, or a time period during which the employee has been symptom free, before it allows the employee to return to work where the employer has a reasonable belief (based on objective evidence) that the employee's present medical condition would (1) impair his/her ability to perform essential job functions with or without reasonable accommodation, or (2) pose a direct threat—a significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation—to safety in the workplace.

Q: During a pandemic, may an employer require its employees to adopt infection control practices? May an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of a pandemic virus?

A: Requiring infection control practices (e.g., regular hand washing, coughing and sneezing etiquette, tissue usage and disposal) does not implicate the ADA. In addition, an employer may require employees to wear personal protective equipment (e.g., face masks, gloves, gowns) designed to reduce the transmission of a pandemic virus. However, where an employee with a disability needs a related reasonable accommodation (e.g., non-latex gloves, gowns designed for individuals who use wheelchairs), absent a showing of undue hardship, the employer is required by the ADA to provide such reasonable accommodations.

Q: Are businesses and other employers required to cover any additional costs that employees may incur if they work from home?

A: Employers may not require employees to pay or reimburse the employer for such items if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the ADA.

Q: Should employers offer seasonal flu vaccines in the workplace?

A: Employers that wish to offer flu vaccinations in the workplace may do so as an employee health program under the ADA. Employee health programs must be offered on a voluntary basis to employees at a particular worksite. Where an employer singles out particular employees for the vaccine outside of an employee health program, the ADA would be implicated. Specifically, an employer would likely need to meet the ADA's standards to ask many of the pre-requisite medical questions which would accompany the vaccination. Accordingly, before asking any disability-related question, the employer would need to have a reasonable belief that, based on objective evidence, the particular employee has or has been exposed to a medical condition which would impair her ability to perform essential job functions or pose a direct threat (i.e., significant risk of substantial harm) in the workplace.

Family and Medical Leave Act (FMLA)

Q: Which employees are eligible to take FMLA leave?

A: Employees are eligible to take FMLA leave if they work for a covered employer and: (1) have worked for their employer for at least 12 months; (2) have worked for at least 1,250 hours over the previous 12 months; and (3) work at a location where at least 50 employees are employed by the employer within 75 miles. (Special eligibility rules apply to breaks in service to fulfill National Guard or Reserve military service obligations pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA).)

Q: Must an employer grant leave to an employee who is sick or who is caring for a family member that is sick? What legal responsibility do employers have to allow parents to care givers time off from work to care for children who have been dismissed from school?

A: An employee who is sick or whose family members are sick may be entitled to leave under the FMLA under certain circumstances (but an employer cannot force employees to take FMLA leave). The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave in a designated 12-month leave year for specified family and medical reasons which may include the flu where complications arise that create a “serious health condition” as defined by the FMLA. Employees on FMLA leave are entitled to the continuation of group health insurance coverage under the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period.

There is currently no federal law covering employees who take off from work to care for healthy children, and employers are not required by federal law to provide leave to employees caring for dependents that have been dismissed from school or child care. However, given the potential for significant illness under some pandemic influenza scenarios, employers should review their leave policies to consider providing increased flexibility to their employees and their families.

Q: Is an employer required by law to provide paid sick leave to employees who are out of work because they have pandemic influenza, have been exposed to a family member with influenza, or are caring for a family member with influenza?

A: Federal law does not require employers to provide paid leave to employees who are absent from work because they are sick with pandemic flu, have been exposed to someone with the flu or are caring for someone with the flu. Certain state or local laws may have different requirements, which should be independently considered by employers when determining their obligation to provide paid sick leave. If the leave qualifies as FMLA protected leave, the Act allows the employee to elect or the employer to require the substitution of paid sick and paid vacation/personal leave in some circumstances.

Q: Can an employee stay home under FMLA leave to avoid getting pandemic influenza?

A: The FMLA protects eligible employees who are incapacitated by a serious health condition, as may be the case with the flu where complications arise, or who are needed to care for covered family members who are incapacitated by a serious health condition. As such, leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA.

Q: May employers change their paid sick leave policy if a number of employees are out and the employers cannot afford to pay them all?

A: At a minimum, an employer's sick leave policy must follow the requirements of the FMLA if employees are covered by the Act. However, federal equal employment opportunity laws do not prohibit employers from changing their paid sick leave policy if it is done in a manner that does not discriminate between employees because of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status.

State and local laws should be consulted before making changes to sick leave policies. In addition, employers should consider that if their workforce is represented by a labor union and the collective bargaining agreement covers sick leave policies, employers may be limited in either the manner in which they change the policy or the manner of the changes themselves because the collective bargaining agreement would be controlling. In a workplace without a collective bargaining agreement, employees may have a contractual right to any accrued sick leave, but not future leave.

Q: What types of policy options do employers have for preventing abuse of leave?

A: Under the FMLA, employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. In addition, employers may require employees to provide: (1) medical certification supporting the need for leave due to a serious health condition affecting the employee or a spouse, son, daughter or parent, including periodic recertification; (2) second or third medical opinions (at the employer's expense); (3) periodic reports during FMLA leave regarding the employee's status and intent to return to work; and/or (4) consistent with a uniformly-applied policy or practice for similarly-situated employees, a fitness-for-duty certification (provided the employer gives advance notice that such certification will be required upon the employee's return to work).

Occupational Safety and Health Act (OSH Act)

Q: During an influenza pandemic, can a healthy employee refuse to come to work, travel, or perform other job duties because of a belief that by doing so, he or she would be at an increased risk of catching pandemic influenza?

A: The circumstances under which employees have a right to refuse to work are very limited. Refusing to do a job because of potentially unsafe workplace conditions is not

ordinarily an employee right under the OSH Act (although a union contract or state law may provide for such rights). Employees are not protected for simply walking off the job—employees may refuse an assignment only if (1) they reasonably believe that doing the work would put them in serious and immediate danger; (2) they have asked their employer to fix the hazard; (3) there is no time to call the Department of Labor’s Occupational Safety and Health Administration (OSHA); and there is no other way to do the job safely.

National Labor Relations Act (NLRA)

Q: May employers change work hours/schedules to minimize contact between employees?

A: Unless employees are (1) represented by a labor union and the collective bargaining agreement covers work hours or scheduling policies, or (2) covered by other employment contracts that specify work hours and schedules, employers may change work hours/schedules to minimize contact between employees. Organizations must abide by the union contract’s provision, to the extent they do not conflict with federal equal employment opportunity and family and medical leave laws. In addition, discharging, demoting, assigning to a less desirable shift or job, or withholding benefits on the basis of union-related activity is prohibited under Sections 8(a)(1) and 8(a)(3) of the NLRA—even if they are not unionized, employees are protected by the NLRA if they act together to improve health conditions in the workplace.

Fair Labor Standards Act (FLSA)

Q: How many hours is an employer obligated to pay an hour-paid employee who works a partial week because the employer’s business is closed? Can an employee be required to perform work outside of the employee’s job description? How many hours per day or per week can an employee work?

A: The FLSA generally applies to hours actually worked. It does not require employers who are unable to provide work to non-exempt employees to pay them for hours the employees would have otherwise worked. In addition, the FLSA does not limit the types of work employees (age 18 and older) may be required to perform. However, regardless of whether the work is listed in the employee’s job description, there are restrictions on what work employees under the age of 18 can perform. Moreover, the FLSA does not limit the number of hours per day or per week that employees aged 16 years and older can be required to work.

Q: Are businesses and other employers required to cover any additional costs that employees may incur if they work from home?

A: Employers may not require employees who are covered by the FLSA to pay or reimburse the employer for such items that are business expenses of the employer if doing so reduces the employee’s earnings below the required minimum wage or overtime compensation.

Q: Do employers have to pay employees their same hourly rate or salary if they work at home?

A: If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then the employer must pay the same hourly rate or salary. However, if this is not the case and there is no union, or other employment, contract, under the FLSA, employers generally only have to pay employees for the hours they actually work, whether at home or at the employer's office. However, employers must pay at least the minimum wage for all hours worked, and at least time and one half the regular rate of pay for hours worked in excess of 40 in a workweek. Salaried exempt employees must receive their full salary in any week in which they perform any work, subject to certain very limited exceptions.