Morrison & Foerster Monthly News

Volume 22, No. 11 November 2010

Employment Law Commentary

Influenza and Pandemic Preparation: A Legal Perspective

By Miriam Wugmeister and Shai Kalansky

As we approach influenza season, it is a good time for organizations to review the state of their preparation relating to pandemics and other significant outbreaks of disease. Last flu season saw the rapid spread of the pandemic influenza H1N1 2009 (together with all related sub-strains, "H1N1") across the globe following its initial discovery in Mexico. The Brookings Institute noted that influenza could disrupt markets as a result of "a loss of confidence and a change in spending patterns driven by fear." Given influenza's potential to halt commerce as in, for example, Mexico City's mandated shut down in April 2009, and given prior outbreaks of SARs and other pandemics, companies should plan ahead for the effects of possible pandemic. Early preparation can prevent hasty and ill-advised last-minute action which could result in liability.

As a result of the potential harm that H1N1, SARS, or other similar pandemics can cause, companies should consider their potential exposure and begin contingency planning. The World Health Organization indicates that as of August 10, 2010, there have been 18,500 H1N1-related reported deaths worldwide. As of April 16, 2010, the Centers for Disease Control and Prevention ("CDC") reported that H1N1 activity had spread to all 50 states. Given the prevalence of pandemics, this alert suggests some, albeit not all, topics companies should consider in order to prepare prudently for potential outbreaks that directly or indirectly impact their businesses. Three important topics for companies to consider are: Employment Issues, Business Continuity, and Insurance.

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Employment Issues

Employers covered by the Americans with Disabilities Act ("ADA") must take special care in preparation for an outbreak impacting their employees because the ADA restricts medical inquiries and examinations of current employees. The following information is based on the advice of the United States Equal Employment Opportunity Commission ("EEOC") and provides an overview on some of the issues companies must consider in order to avoid violating the ADA. Note that each state may have additional requirements which may necessitate an additional and individualized analysis.

Prior to an outbreak, for contingency planning purposes, employers should determine the likely scope of impact on employee absenteeism. To do so, employers may take a survey of employees designed to identify both medical and non-medical reasons for absence in the case of an outbreak. Note that employers should not ask exclusively about medical information, as this will violate the ADA. The EEOC has published a survey which employers may use which the EEOC has determined is consistent with the ADA obligations. Collecting data is the first step in determining the effects of an outbreak and can be used to prepare contingencies and accommodations for employees. With real data in hand, employers may begin planning to address issues such as lack of public transportation, lack of child care, and remote work solutions. Each of these contingencies creates particular logistical, technological, and legal issues that employers should discuss with their advisors.

During a pandemic outbreak, employers should have a plan to minimize the interruption of business and minimize health-related concerns. As part of such a plan, employers may require employees who become symptomatic to leave the workplace. Employers may, in most instances, also ask symptomatic employees if they are experiencing influenza-like symptoms or other symptoms relating to an outbreak so long as those questions do not illicit information about a disability. Again, note that under federal and state law, medical information is considered to be particularly private and, as such, must be kept confidential. Employers that administer their health insurance plans as "plan sponsor" cannot use data acquired in such capacity to make employment decisions. If an outbreak is not severe, the CDC recommends simply informing employees about the illness, including information regarding symptoms, risk factors for complications, and appropriate precautions, advising employees to consult with their health care provider should they become ill, and encouraging employees to consult with their health care provider about vaccination if one is available. Finally, an employer may instruct its employees to adopt infection-control practices at work, including hand washing, coughing and sneezing etiquette, and appropriate disposal of tissues.

During a severe outbreak, the CDC recommends that employers ask all employees about symptoms (rather than just a select group) and that the employers direct symptomatic employees to stay home. Employers probably may inquire into employees' medical conditions where an employer has a reasonable belief, based on objective evidence, that an employee will pose a direct threat to other employees due to a medical condition. It is important to recognize that this is not an exception to the ADA, but rather, is a defense that an employer may assert to charges of discrimination. In order to prevent the spread of pandemics, employers may want to review their sick leave policies and make appropriate adjustments so that there is no incentive to come to work while sick. Some issues to consider include the amount of sick days allotted per employee and whether or not to require a doctor's note for use of sick days in relation to pandemic-related absence. Note that following a severe outbreak-related absence, an employer probably may require an employee to provide a doctor's note certifying fitness to return to work prior to returning to work because it is probably within the scope of the defense discussed above.

Contract Clauses Related to Business Continuity

During an outbreak, businesses may be prevented from fulfilling their contractual obligations because of increased absenteeism in their supply chain, in their own work force, and in their customers' work forces. In preparation for such a possibility, businesses should examine the "force majeure" clauses in their contracts. Force majeure clauses allocate the risks of certain events, which are sometimes referred to as acts of god, between contracting parties.

Where the parties have not contractually allocated risk for force majeure events, courts will turn to statutory contractual backstops like the "Excuse by Failure of Presupposed Conditions" under Uniform Commercial Code §2-615 or to common law definitions of impracticability to determine which party bears the risk. When courts are determining whether an event should excuse one party's performance, they often apply a two-part test where the event must 1) be unforeseeable and 2) beyond human control. However, not all jurisdictions will apply this test. By way of example, some courts have found epidemics to be force majeure events while in other cases the court was unwilling to excuse performance "as an act of god" when an employer's premises were shut down by local health authorities due to a diphtheria outbreak. As a result, businesses should not presume that a pandemic will be a defense to non-performance of their contractual obligations. Given the uncertainty in the absence of contractual language on point, the best means to control the allocation of risk is through contractual drafting. In other words, businesses should negotiate the force majeure language in their contracts to ensure that it provides coverage that is appropriate and beneficial for their particular circumstances.

In order to retain more control over the impact of a force majeure event, companies should give serious consideration to the scope of the force majeure clauses in their contracts as well as the clauses' triggering events.

First, as a general matter, companies should think about which sorts of events should trigger the protections of a force majeure clause, such that performance is excused. When negotiating the terms of the force majeure clause, keep in mind that courts will narrowly construe enumerated events unless there is catch-all language that indicates a broader intent, but even then, catch-all language is not a panacea.

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If companies think they are likely to be limited by an outbreak, they should consider including pandemics, epidemics, or even "communicable and virulent disease" to the definition of force majeure. Alternatively, if a company relies on suppliers that could be affected by an outbreak, then the company may want to explicitly exclude such language from the definition of force majeure to transfer the risk of loss onto their suppliers. Remember, in the event of a severe outbreak, it is possible that some party to a contract will be unable to meet its obligations so businesses should consider how to allocate that risk.

Second, when drafting a force majeure clause, an important part of the operative language is the threshold of the triggering event. That is to say, some clauses only come into play when the triggering event makes performance "impossible" while others are only triggered when performance is unreasonably difficult. This, again, is ultimately a question of allocation of risk.

With appropriate contractual language, companies can mitigate their risk in the event that they are directly or indirectly impacted by an outbreak

Insurance

Contingency planning and transferring risk to others can assist in mitigating a company's risk. However, in the event that a company must ultimately bear the risk of an outbreak, insurance can minimize the deleterious consequences of the outbreak. Below is a discussion of several types of insurance worth considering, but note that there are other types of coverage you should consider as well.

- Business Interruption Insurance provides money in the event that a business is unable to operate because of an interruption; in effect, it replaces lost income. In the context of a pandemic, Business Interruption Insurance is particularly important for companies that lack redundancy for critical operations, companies that have sole site operations and companies whose employees travel frequently to locations with outbreaks.
- Another important policy is an Extra Expense Insurance which covers additional expenses associated with an emergency. This sort of insurance could be particularly useful for companies worried about the extra expense associated with, for example, implementing remote work solutions to keep a business running which may require increasing bandwidth and computing power.
- Another policy that could prove useful is Contingent Business Interruption Insurance which protects against the extra expenses and lost profits associated with an interruption of business at a supplier or customer's premises. This sort of insurance is particularly important for companies whose contracts generally have them bearing the risk of loss in the event of a force majeure event.

There are many steps to take in preparation for any disaster. The above discussion simply highlights steps that are of particular note with respect to a pandemic or specific outbreak, but this should not be considered a replacement for an individualized analysis, as the facts and circumstances of every company are unique.

If you have further questions, please contact Miriam Wugmeister (212) 506-7213 or Shai Kalansky (212) 336-4472.

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1. Warwick J. McKibbin, *The Swine Flu Outbreak and its Global Economic Impact*, The Brookings Institution (May 4, 2009), http://www.brookings.edu/interviews/2009/0504_swine_flu_mckibbin.aspx?rssid=mckibbinw.
2. Joshua Partlow, *Mexican Schools Shut as Epidemic Hits 'Critical' Point*, Washington Post, April 28, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/04/27/AR2009042702017.html.
3. Dr. Keiji Fukuda, Special Advisor to the Director-General on Pandemic Influenza, World Health Organization, virtual press conference transcript, pg. 8 (Aug. 10, 2010), available at http://www.who.int/mediacentre/vpc_transcript_joint_2010_08_10.pdf.
4. Ctrs. for Disease Control & Prevention, Morbidity and Mortality Weekly Report, April 16, 2010, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5914a3.htm?s_cid=mm5914a3_e.
5. Generally employers with fifteen or more employees engaged in interstate commerce. 42 U.S.C. § 12111 (2, 5).
6. 42 U.S.C. § 12101 et seq.
7. For purposes of this section, an outbreak is one where local, state, or federal officials have declared an influenza pandemic.
8. U.S. Equal Employment Opportunity Commission, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act, October 9, 2009, http://www.eeoc.gov/facts/pandemic_flu.html.
9. EEOC's ADA-COMPLIANT PRE-PANDEMIC EMPLOYEE SURVEY

   Directions: Answer "yes" to the whole question without specifying the factor that applies to you. Simply check "yes" or "no" at the bottom of the page.

   In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:

   - If schools or day-care centers were closed, you would need to care for a child;
   - If other services were unavailable, you would need to care for other dependents;
   - If public transport were sporadic or unavailable, you would be unable to travel to work; and/or;
   - If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

   Answer: YES_____ , NO_____
10. Note that medical data should be kept separate and apart from regular employee files and access to such information should be limited to those administrators and managers that need to know.
11. See *Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990*, 8 FEP Manual (BNA) 405:7192-7197 (1995).
12. Note that in addition to the confidentiality obligations of the ADA, the Health Insurance Portability and Accountability Act of 1996, as amended ("HIPAA") now requires that companies keep employee medical information confidential or face sanctions. Pub. L. No. 104-191, 110 Stat. 1936 (1996) as incorporated to companies through Title XIII of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("ARRA"), also known as the Health Information Technology for Economic and Clinical Health Act or the "HITECH Act," ARRA § 13408-13410; see also, 45 C.F.R. 164.504(f)(2)(iii)(B) (2009).
13. See Ctrs. for Disease Control & Prevention, Guidance for Businesses and Employers to Plan and Respond to the 2009-2010 Influenza Season, at 9 (2009), http://www.pandemicflu.gov/professional/business/guidance.pdf.
14. Id. at 10.
15. The EEOC considers an inquiry "'job-related and consistent with business necessity' when an employer 'has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.'" EEOC Compliance Manual, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), No. 915.002 (July 27, 2000) ¶ 6910, at 5485 (CCH 2008). A direct threat is one where "a significant risk of substantial harm, to health or safety of the individual or others cannot be eliminated by reasonable accommodation." In evaluating whether an employee is a "direct threat," the EEOC's regulations identify four factors to consider: 1) duration of the risk; 2) the nature and severity of potential harm; 3) the likelihood that potential harm will occur; and, 4) the imminence of potential harm.
16. 42 U.S.C. § 12113.
17. Article II of the Uniform Commercial Code ("UCC") governs the sale of goods. It acts as a gap-filler for contracts when a contract is silent on certain issues. Thus, when resolving contractual disputes related to the sale of goods, courts will turn to Article II of the UCC in the absence of contractual language on point.
18. *Coombs v. Nolan*, 6 F. Cas. 468, (S.D.N.Y. 1874).
19. *Phelps v. School District No. 109*, 302 Ill. 193, (Ill., 1922); *see also*, *School Town of Carthage v. Gray*, 37 N.E. 1059 (Ind., 1894).

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Protected Employee Speech and Social Media: Old Wine in a New Bottle

By Timothy Ryan[1]

A recent complaint issued by the National Labor Relations Board ("NLRB" or "Board") is a reminder to employers that federal labor law policy, created in the first half of the 20th century, still has relevance in the first half of the 21st century.

The NLRB is the agency which administers federal law dealing with the rights of employees, employers, and unions. In a complaint filed in Connecticut, the Board charged that an employer illegally terminated an employee for making derogatory remarks about her supervisor on her Facebook page. The Board also alleged that the company's Social Media Policy is "overly broad" and violates federal labor law.

The National Labor Relations Act protects the rights of workers—whether their employer is union or non-union. Those rights include the right to communicate with each other about wages, hours, and other terms and conditions of employment. When two or more employees communicate with each other about their hours, their pay, or, as in this case, about their boss, they are likely engaged in protected concerted activity. The scope of this protection is quite broad. The courts and the Board have found an unlawful interference with concerted protected activity when an employee was fired for discussing wages and rates of pay with another employee,[2] when an employee was terminated because he objected to a pay cut,[3] and when an employer maintained a rule that could "reasonably tend to chill employees in the exercise of their… rights."[4] Generally, criticism of a supervisor that is false and defamatory or unrelated to work is not protected.

The employer's Social Media Policy is alleged to be unlawful because it contains provisions which prohibit employees from depicting the company in any way, without first getting approval from the company. The policy also prohibits employees from making "disparaging, discriminatory or defamatory comments when discussing the company or the employee's superiors, co-workers and/or competitors." The Board's complaint alleges that when the employee posted negative remarks about her supervisor on her Facebook page which could be read by other employees, she was engaged in protected concerted activity. The complaint also alleges that the company's Social Media Policy is "overly broad" because its prohibition against employees posting disparaging remarks about the company and its supervisors interferes with the employees' exercise of their rights to engage in protected concerted activity.

The NLRB's legal theory in this case is not new. The right of employees to engage in this type of concerted activity is long settled. What's new is that, rather than bashing a boss over lunch in the cafeteria, the employee here used a Facebook page to do it. The employer involved in this case vehemently denies the allegations of the complaint and the accuracy of the facts described in it.

The significance of the complaint in this case is evident from the fact that the NLRB issued a news release about the complaint, something it rarely does. Employers should pay attention to this case because of the message it sends—employers should carefully examine their social media policies and determine whether they might be construed to interfere with employees' protected rights.[5] This warning applies as equally to non-union companies as it does to union companies.

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1. Mr. Ryan is a partner in the firm's Los Angeles office, where he specializes in labor and employment law. Mr. Ryan has extensive experience in the representation of employers in matters involving union organizing, collective bargaining, labor arbitration, and labor relations. The firm's management-representation experience covers a wide variety of industries, including manufacturing, retail, hotel, and entertainment.

2. *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531 (6th Cir. 2000)

3. *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502 (8th Cir. 1993)

4. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998)

5. For additional information about developing a legally-compliant social media policy, please refer to "Employees and Social Media: What is Your Company's Policy?" from our August 2010 Employment Law Commentary. Additional discussion is available in "Social Media in the Workplace" from our January 2010 Employment Law Commentary.

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