Surviving the Pandemic—Employment Law Issues

by Robert E. Gregg and Jennifer S. Mirus



According to the U.S. Department of Health & Human Services, by mid-November 2009, nearly one in six Americans had been infected with the H1N1 flu virus.[1] Pandemics and pandemic threats arise periodically, and H1N1 is the latest in a series which includes the 1980's swine flu, the Asian bird flu, and, more recently, Severe Acute Respiratory Syndrome (SARS). These have given employers an opportunity to establish a foundation in policy, practice, and law which can be used now to address H1N1 without panicking. This does not mean a serious flu outbreak will be *easy* to deal with, but it means there are guidelines and precedents to help employers prepare and cope with more confidence and effect.

A Plan

The Occupational Safety and Health Act of 1970 includes a "general duty" clause which requires employers to keep the workplace free of recognized hazards.[2] A pandemic is a recognized hazard.

All organizations should have a Pandemic Preparedness Plan, just as there should be other "critical incident" plans for violence and natural disasters. The Plan should be developed well in advance, before any particular pandemic is identified. The Plan can then quickly be upgraded and implemented to meet the issues of a particular pandemic. Basic Plan elements are (1) a team; (2) practicing; (3) cross-training; (4) alternative work sites and workers; (5) supplier services; (6) human resource practice and policies; and, above all (7) communication.[3]

Employees and their family members will get the flu. *Any employee who has flu-like symptoms should not be at work.* The Centers for Disease Control and Prevention (CDC) current guidance provides that such employees should not return until after 24 hours of being fever-free and symptom-free without medication.[4] Employers can conduct screening (i.e., take temperatures and check for symptoms) on a general, or reasonable suspicion, basis.

Generally, employers may unilaterally reduce work hours; employers with collective bargaining agreements must consult with the union in most situations *except* a direct threat. This must be done on a non-discriminatory basis, and non-exempt employees must generally be paid only for hours worked. Payment of exempt employees in pandemic situations can raise more complicated situations. Under the "salary basis test" in the Fair Labor Standards Act (FLSA), exempt employees must generally be paid their full salary if they work any hours in a given work-week.[5] (There are certain exceptions, some of which only apply in the public sector). It may be valid legally to adjust salaries of exempt employees for an illness-related, short-term absence.[6]

Employer-mandated involuntary leave in which there is no proof of sickness (e.g., due to a perception of symptoms, or caution) will require payment of an exempt employee's salary for any time off less than a full-week term. Unemployment compensation benefits may be available to those on involuntary leave.

Pandemic-Related Absences

Are employees who are off the job due to their own or their family's pandemic-related illness protected from discharge for "excessive absence"? As mentioned, federal (and possibly state) laws provide for a "safe workplace." Laws also cover quarantine of seriously ill, or perceived to be ill, employees. Expect more regulations or executive orders encouraging a mandatory absence from work for those who seem to have flu symptoms. In that case, firing an employee for a flu-related absence could violate public policy and give rise to an unfair discharge case.

Employees are generally entitled to federal Family and Medical Leave (FMLA) rights if their employer has 50 or more employees within a 75-mile radius. Pandemic-related illnesses will generally qualify as "serious health conditions," particularly if hospitalization, three days of absence, repeated treatment by a health-care provider, or a continuing regimen of treatment is involved. Employees are entitled to up to 12 weeks of unpaid leave for an employee's own serious health condition or to care for a family member with a serious health condition. Employers can require medical certification of the need for FMLA leave. Employees who take FMLA leave must be reinstated to their former position or a substantially equivalent position. Employers may dock pay from exempt employees who use FMLA time without jeopardizing the employee's exempt status. Employees may be able to substitute accrued paid time for unpaid FMLA leave.

Federal (and possibly, state) disability laws generally provide that temporary medical conditions are not "disabilities," so a temporary pandemic-related illness is not likely to be considered a "disability." *However*, the CDC has warned that people with existing disabilities—such as asthma, diabetes, heart conditions, or immune system disorders—are "at risk" for H1N1 complications.[7] Thus, the effects of such an illness on pre-existing long-term conditions may qualify as a disability-related absence. Employers cannot discriminate against employees

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with disabilities and must provide reasonable accommodations for them. If a disability exists, an employer may be required to provide unpaid leave (even beyond FMLA leave), job restructuring, telecommuting, or other accommodations. Disability laws cover an employer's ability to ask employees about medically-related issues —any medical inquiries must be job-related and consistent with business necessity. However, if the employer has a reasonable belief that an employee constitutes a direct threat to himself or others in the workplace, the employer can keep the person out of the workplace as long as there is a direct threat.[8]

Employers who take job actions on the basis of perceived conditions or on the basis of an employee's "association with" a disabled individual may be deemed to violate the Americans With Disabilities Act (ADA), so employers should avoid generic questioning or "fishing" into an employee's medical issues. Employers should, however, encourage employees with a higher risk of complications from the flu to contact a health-care provider as soon as possible. Taking antiviral medicines early might prevent severe complications from the flu, such as hospitalization or death. People at a higher risk for flu complications include pregnant women, and those with chronic medical conditions.

This should be part of the general Plan communication to all employees. Do not survey or interrogate employees about their medical conditions, and avoid focusing on employees with disabilities. Finally, immunization is a personal medical choice and cannot be required.

Non-Sick-Leave Absences

A pandemic may result in closure of day-cares, schools, or other institutions, and employees will request leave to deal with these situations. These are not absences due to illness of the family member as the family member may be healthy, but has nowhere to go for care or services during normal work hours. H1N1 is predicted to have a more serious effect on children than adults, so closures are more likely in schools, day-cares, and other child service facilities.

Non-serious illness leave is not protected by the FMLA. Outside of an employer's policy, there is no protection from "unexcused absence" discipline or discharge for *non-sick* absences, but public policy may come into play, depending on whether a government order shuts down schools, day-cares, and other facilities.[9] Moreover, employers need to beware of bad publicity and precedent. Even if there is no legal protection, firing people in this situation can create a backlash– the sort of publicity which results in later legislation to "fix the problem" and creates more protective laws and legal liability for employers in the future.

Pandemic circumstances warrant flexibility and exceptions to the general rules. Flexible leave policies and alternate work schedules will help prevent the spread of flu at the workplace, allow employees to continue to work or function while limiting contact with others, help maintain continuity of operations, and help people manage their health and their family's needs.

Is it Faking?

Employers are often concerned that some employees will take advantage of a situation and claim illness just to get a few days off. Is rigid "policing" worth the risk? Strict challenges of leave requests may result in genuinely sick people coming to work, infecting others, and creating multiples of pandemic absences. Workers' compensation claims may result if employees can track their own illness to work, due to the organization's less than effective practices to prevent infected employees from being at work (or even challenging absences and "pressuring" sick people to come in).

A pandemic may be an occasion to relax the scrutiny. There will be some employees who "game" the system but, on balance, the overall welfare of the workplace should be considered, and modification of employment policies may be the best practice. Absence policies and special pandemic memos to employees should include the employer's right to get medical verification for any absence. This can limit any abuse of pandemic leave, but employers should "go easy" on requiring such verification.[10]

The "Cautious Employee"

Some employees may be so anxious about a pandemic illness that they wish to stay home to avoid an infection. In this situation, there is no existing serious condition, no protection under the FMLA, and probably none under public policy. It can count as an unexcused absence and result in discipline or discharge. These employees can use vacation or other paid time off (PTO), but an employer can also deny the use of such PTO. Most employers' policies require approval of non-illness-related absences, and give the employer the discretion to deny any request. In fact, a pandemic may be valid reason to cancel vacations in order to have sufficient staff available to make up for those who are sick due to the flu. The denial of PTO and any discipline for unexcused absences must be non-discriminatory. However, the "at risk" employee may be protected by the ADA. If there is medical verification that an infection will create serious complications for an existing condition, then avoidance of exposure may be a reasonable accommodation for the disability.

Extra or Different Work

Employers generally have the discretion to require employees to put in longer work hours than those typically scheduled and to do any job necessary for the operation. A pandemic may be a situation in which other staff are needed to fill in wherever and whenever necessary to cover the work of those who are absent. As a result, cross-training can mean survivability in a pandemic.

Employers need to be aware of exempt (salaried) vs. non-exempt (hourly) status —non-exempt employees must generally be paid time-and-a-half their regular rate of pay for all hours worked in excess of 40 in a work-week. Exempt employees are not entitled to overtime pay or compensatory time, and can be shifted to hourly work if necessary. However, doing hourly work may destroy the salaried exemption for that week and require payment of time-and-a-half overtime for work beyond 40 hours. Employers may be restricted or prohibited from adding additional work hours for employees who are on FMLA leave, or who are disabled and on a limited work

schedule due to their disability.

A Pandemic Preparedness Plan should be careful about reliance on employment or temp agencies, as it is likely such agencies will themselves suffer large absentee rates and will be overwhelmed with demands for temporary workers.

Telecommuting

An employer may require telecommuting, assign employees to telecommute, or to work from any other location. This requires a review of the essential functions of the job. An employer may also deny telecommuting, except under the ADA's "reasonable accommodation" provisions.

The ADA may require telecommuting (or not), as illustrated by the following cases. In the first, a government employer could not justify a "no-work-from-home" policy. An employee sought permission to work from home two days a week due to her disability restrictions, but the request was refused on the ground that removing the documents she worked with created a security risk. However, at trial, the employee's supervisor testified that her daily presence in the office was not necessary as long as she had the documents to work on. Further, the papers at issue were low-level, with no security designation, and were not covered by any department security or safekeeping practices. As a result, the employer's refusal was without foundation.[11] In the second case,[12] a work-from-home accommodation was found to be validly withheld due to the employee's performance record. The government employer denied the disabled employee's accommodation request to continue telecommuting because the employee repeatedly missed deadlines and produced significantly less work than others,[13] and at less than her prior at-work level. This justified discontinuation of the accommodation.

Electronic security is another concern for employees working at home. Children of employees can use the same laptop or computer for games, and savvy teens can tap into the other information on the computer. (They may share it with others. It's fun!) Any work at home should be subject to security policies and security systems set up by the employer's IT specialist.

Wages and Hours

Lack of care in this area can cost a lot in wage and hour liability. Electronic devices, like BlackBerries, laptops, and pagers, may make it difficult to be "off the clock." Company-provided cell phones, laptops, and other devices make it easy to communicate during "non-work" hours and create an impression that the employee is "on call." A pending FLSA case, *Rulli v. CB Richard Ellis, Inc.*,[14] will address this issue. In *Rulli*, maintenance workers who were issued phones or pagers were expected to have them on at all times, and it was expected that any call (usually to answer questions or provide advice) would be returned within 15 minutes. At times, the workers were expected to go and do work. The suit raises the issue of how much of this constant "on-call" duty the workers should actually be paid for. The plaintiffs ask for hourly pay and overtime pay for all of the company's maintenance workers, nationwide, for this off-hours, on-call work. The case is a good warning that supervisors should be cautioned (and periodically reminded) that the convenience of contacting employees at any hour can have FLSA consequences.

Employers should also review their policies and procedures for on-call responsibilities to ensure they are clearly in compliance with the FLSA, and that worked time is properly recorded. The employer should have a system for tracking hours; clear, detailed policies or memos regarding off-site work; and tangible guidelines on how to keep time and any other important production records. There should be instructions on hours of work and regarding the need for prior approval of overtime.

Supervisors and other employees should also receive instruction about calling people who are at home and at what hours, to avoid overtime complications. With respect to calling employees on sick leave, employees at work often call absent workers to get information or advice. Such calls can interrupt healing and may violate the employee's FMLA rights; further, they can convert sick leave to paid time. For salaried employees, any "work" in a day may require payment for the full day (or week), unless the employee's absence qualifies under the FMLA. All employees (at work and those at home) should receive clear information regarding such calls, but keep such calls to a minimum.

Travel and Sickness

What is an employer's responsibility when an employee gets sick while on job-related travel? The employee may not be "working" for the days of illness. The duty of care for an employee's welfare continues to apply. Even though no work is being accomplished, the employer still has a duty to show concern, and to assist the employee in finding care and in returning home. Employers should establish an advance protocol for on-the-road illness. This should be part of the Pandemic Preparedness Plan. The details should be given to each person who is going to be on job-related travel. The things to consider include:

- the employee's duty to inform management of the illness.
- the employee's duty to follow illness/safety procedures and not infect clients or others.
- a communication process to allow the employer to check on or be informed of the employee's ongoing status and safety.
- an emergency contact process, with local contacts and family, or, at least, the hotel management, to assure the safety of the employee.
- the ability to assist the employee in finding local medical care, if needed.
- assisting the employee in handling any health insurance complications due to the employee being out of state or out-of-network.
- assisting the employee with the re-arrangement of air or other transportation.
- assisting the employee with any unexpected expenses due to that illness.

Illness while in travel status is a "mixed" personnel/employment issue.

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Ct. App. 2008).
14. Centro Familiar Cristiano Buenas Nuevas v. City of Yuma, 615 F. Supp. 2d 980 (D. Ariz. 2009).
15. Bethel World Outreach Church v. Montgomery County, 967 A.2d 232 (Md. Ct. Spec. App. 2009).
16. Westgate Tabernacle, Inc. v. Palm Beach County, 14 So.3d 1027 (Fla. Ct. App. 2009).
17. *See* Chaffee and Merriam, *Six Fact Patterns of Substantial Burden In RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437 (2009).
18. Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203 (C.D. Cal. 2002).
19. *Id.* at 1226.
20. *Id.* at 1229.
21. Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 456 F.3d 978 (9th Cir. 2006).
22. *Id.* at 983-84.
23. *Id.* at 984.
24. *Id.*
25. Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter, 326 F. Supp.2d 1140 (E.D. Cal. 2003).
26. "In denying the second CUP application, the Board of Supervisors disregarded, without explanation, the Planning Division's finding that Guru Nanak's acceptance of various mitigation conditions would make the proposed temple have a less-than-significant impact on surrounding land uses." 456 F.3d at 990.
27. Sts. Constantine and Helen Greek Orthodox Church, Inc. v City of New Berlin, 396 F.3d 895 (7th Cir. 2005).
28. Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003).
29. 396 F.3d at 899-900.
30. *Id.* at 901.
31. *Id.*
32. Westchester Day School v. Village of Mamaroneck, 236 F. Supp.2d 349 (S.D.N.Y. 2002).
33. Westchester Day School v. Village of Mamaroneck, 504 F.3d 338, 346 (2d Cir. 2007).
34. *Id.* at 351-52.
35. *Id.* at 352.
36. *Id.*
37. TEX. CIV. PRAC. & REM. CODE § 110.003(a)-(b) (West 2009).
38. Barr v. City of Sinton, 295 S.W.3d 287 (Tex. 2009).
39. Merced v. Kasson, 577 F.3d 578 (5th Cir. 2009).
40. Chaffee and Merriam, *Six Fact Patterns of Substantial Burden in RLUIPA: Lessons for Potential Litigants*, 2 ALB. GOV'T L. REV. 437, 473-479 (2009). ML

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Unless the illness is caused by work-related factors, there is no worker's compensation coverage. As for wages, an illness on the road is no different than one at home. The employee is not working, and the same rules on wages and hours, and paid or non-paid sick leave, apply as they would if the person called in absent due to illness while at home.

The employer is generally not responsible for payment of medical care expenses, and might not be liable for extra hotel stay charges or travel re-booking charges. The employer does, however, have a duty to help the person and facilitate his or her return, and this may mean fronting or guaranteeing some of those costs. The employee may be charged back for these costs, but the primary current concern should be the welfare of the ill person.

Communicating with Employees

Employers should share materials that educate employees on the fundamentals of pandemic illness, the symptoms, modes of transmission, and personal and family response strategies. Other tips are:

- train supervisors to spot symptoms, and how to report and handle the situation of apparent symptoms in employees.
- educate employees, and continually emphasize sanitation and prevention practices relevant to the pandemic illness.
- anticipate employee fear and preempt the "rumor mill." Proactive communication will result in significant goodwill, and prevent having to later clarify false information or panicky reactions to rumors.
- ensure that your communications are culturally and linguistically appropriate for the workplace.
- share appropriate parts of your Pandemic Preparedness Plan with employees.
- develop methods for ongoing communication with employees, including daily or weekly updates, and enhanced call-in lines for absence reporting.
- remind employees about resources available to them (EAP plan, benefit counseling).
- urge employees to be proactive, take care of their own health, and take personal responsibility to stay abreast of developments by following reliable sources such as the CDC (www.cdc.gov) and www.flu.gov.

Conclusion

Establishing a plan will assist employers in maintaining essential functions and meeting commitments during a period of high absence. The planning process should involve communication with and input by employees and contractors regarding their operational and personal concerns about a pandemic and its effect upon them, their families, and income. Make employees aware of information sources regarding preparedness, as well as heightening awareness of health insurance and disability policies practices. Careful preparation and proactive planning is the key to minimizing disruption and surviving the pandemic.

Notes

1. U.S. Department of Health & Human Services, *H1N1 by the Numbers* (Dec. 14. 2009) at http://www.flu.gov/news/blogs/bythenumbers.html. This source states total U.S. cases are approximately 50 million, with the CDC estimating that there have been 200,000 hospitalizations and 10,000 deaths since the outbreak of the H1N1 flu in the spring of 2009.
2. 29 U.S.C. § 654 (West 2009).

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3. For more information, see The Centers for Disease Control and Prevention (CDC), *CDC Guidance for Businesses and Employers To Plan and Respond to the 2009–2010 Influenza Season* (Oct. 21, 2009); OSHA, *Worker Guidance: Precautions For All Workers during the 2009-2010 Flu Season* (Nov. 05, 2009), and OSHA, *Guidance on Preparing Workplaces for an Influenza Pandemic*, OSHA 3327-02N 2007 (Feb. 01, 2007) at http://www.osha.gov/Publications/influenza_pandemic.html.
4. *CDC Guidance for Businesses and Employers To Plan and Respond to the 2009–2010 Influenza Season* (Oct. 21, 2009).
5. 29 C.F.R. § 541.602 (2004).
6. For additional information, see *Pay and Absence Concerns for Exempt Employees*, by the Boardman Law Firm.
7. CDC, *People at High Risk of Developing Flu-Related Complications* (Nov. 10, 2009).
8. *See, e.g.*, the Americans With Disabilities Act, 42 U.S.C.§ 12111(3) (West 2009).
9. For example, a major exception to many states' at-will employment doctrines is "discharge against public policy."
10. The CDC suggests, for example, that employers develop flexible leave policies to allow workers to stay home, and not require a doctor's note for workers who are ill with influenza-like illness to validate their illness or to return to work, since doctors' offices and medical facilities may be extremely busy and not be able to provide such documentation in a timely way. CDC Guidance, *supra* note 4.
11. Freeman v. Chertoff, 604 F. Supp.2d 726 (D. N.J. 2009).
12. Robinson v. Bodman, 333 Fed. Appx. 205 (9th Cir. 2009).
13. "[O]ver the course of the 477 hours that Robinson worked from home, the only work she produced was one half-page report." *Id.* at 208.
14. No. 2:2009cv00289 (E.D. Wis., filed Mar. 15, 2009). *See also*, Abdelkhaleq v. Precision Door of Akron, No. 5:07 CV 3585, 2009 WL 2762356 (N.D. Ohio Aug. 28, 2009) (employee on "pager duty" sued under FLSA claiming time spent on-call constituted time spent working). ML

Merger of Adjoining Parcels

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29 Cal.4th 990 (Cal. 2003) (holding that lots shown on an 1865 map but never individually deeded were not entitled to grandfather status, absent any law then authorizing divisions of land by map).
4. *See, e.g.*, San Diego, Calif. Code § 125.0760 (2000).
5. Cal. Gov't Code § 66451.10, *et seq.* (West 2009). For a thorough account of California's merger law, see *Merger and Local Governments* (1986), available from the California Governor's Office of Planning and Research.
6. *See* Stell v. Jay Hales Dev. Co., 11 Cal. App. 4th 1214 (Cal. Ct. App. 1992); *see also*, Citizens for Covenant Compliance v. Anderson, 12 Cal. 4th 345 (Cal. 1995) (disapproving a ruling in *Stell* regarding enforceability of restrictive covenants).
7. 11 Cal. App. 4th at 1223-24.
8. Cal. Gov't Code § 66451.10, *et seq.* (West 2009).
9. Cal. Gov't Code §§ 66451.12 to 66451.17 (West 2009).
10. 11 Cal. App. 4th at 1224-25.
11. Cottone v. Zoning Hearing Bd. of Polk Twp., 954 A.2d 1271 (Pa. Commw. Ct. 2008).
12. *Id.* at 1276.
13. *Id.* at 1279.
14. *Id.*
15. 151 Cal. App.4th 827 (Cal. Ct. App. 2007).
16. *Id.* at 834. ML

Economic Incentives

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23. Rachel Weber, *Do Better Contracts Make Better Economic Development Incentives*, 68 J. Am. Plan. Ass'n 43 (2002).
24. Greg LeRoy, *Nine Concrete Ways to Curtail the Economic War Among the States, in Reining in the Competition for Capital*, Ann Markusen, ed. (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2007).
25. Scott J. Ziance, *Making Economic Development Incentives More Efficient*, 30 Urb. Law. 33 (1998).
26. Timothy J. Bartik, *Solving the Problems of Economic Development Incentives*, 36 Growth & Change 139, 143 (2005). ML

Supreme Court

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process right of the plaintiffs." By the time the case reached the oral argument stage before the Supreme Court, all of the underlying property disputes had been resolved, either because the property had been returned or because the plaintiff had relinquished a claim to the property. The Supreme Court, in an opinion authored by Justice Breyer, vacated and remanded on the basis that, in such circumstances, the case no longer presented an Article III "case or controversy." An actual controversy had to exist at all stages of review, not just when the complaint was filed, and the complaint before the Court sought only declaratory and injunctive relief, not damages (a damages claim was launched only after the Seventh Circuit issued its ruling). Because the "case more closely resemble[d] mootness through 'happenstance' [rather] than through 'settlement,'" the exception to vacating the judgment set out in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U. S. 18, 21 (1994), did not apply (namely, that, by virtue of a settlement, a party had "voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari"). The Court concluded that "we should follow our ordinary practice, thereby 'clear[ing] the path for future re-litigation of the issues.'" The upshot? Local governments will need to wait for this future re-litigation to clarify how long law enforcement officers may retain seized property without providing for administrative review and without offending due process. ML

Ordinances

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District of Columbia voters adopted an initiated ordinance in 1998, which has not been adopted by Congress.
2. Joel Warner, *Medical marijuana has become a growth industry in Colorado*, Westword, Feb. 5, 2009.
3. Colorado Constitution, Article XVIII, §14(1)(a).
4. Littleton calls their sales tax license a business license, although a lawyer who

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