

Employer Duty to Workforce During a Pandemic

Response to COVID-19 Coronavirus



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Introduction

This article was excerpted from a 2013 publication that sought to outline various concerns a health care facility might face in the event of an outbreak of pandemic influenza. Today, the CDC is closely monitoring an outbreak of respiratory illness (COVID-19) caused by a novel coronavirus SARS-CoV-2, first identified in Wuhan, Hubei Province, China. Cases of COVID-19 are now being reported in a growing number of countries around the world, including the United States. Some aspects of this article may be helpful to health care facilities as they prepare for the possibility of community-based transmission of COVID-19.

Duty to Workforce

Businesses must ensure that their own employees are protected from infection to the maximum extent possible. The Occupational Safety and Health Administration (OSHA) was created by Congress with the passage of the Occupational Safety and Health Act in 1970 (OSH Act) to assure safe and healthful working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance.¹⁸ The OSH Act requires employers to provide a safe workplace free of hazards likely to cause death or serious physical harm to its employees.¹⁹ The OSH Act permits the Secretary of Labor to impose temporary emergency standards if he or she determines employees may be exposed to grave danger from physically harmful agents or new hazards.²⁰

Businesses may wish to consult OSHA's guide on pandemic preparedness.²¹ OSHA anticipates employers will develop and implement pandemic plans that minimize the risk of infection to employees, limit employee contact with infected persons, and make sick leave available to infected employees. OSHA also recommends reduced

contact among employees by permitting people to work from home, when possible, and using virtual means rather than face-to-face meetings.

In the event of a pandemic, employers may experience high absenteeism due to disease, fear, and other care-giving obligations. Management must determine how they compensate various staff members for different types of absence during a pandemic. For example:

- If a full-time staff member stays home from work because he/she fears becoming infected, will his/her salary be continued?
- If an employee is compelled to work (in order to guarantee salary continuance) and becomes infected, what are the legal ramifications?
- What is the policy towards salary continuance for hourly staff?
- If salary continuance policy towards exempt and hourly employees differs, will this be considered discrimination?
- If employees need to work overtime, how will they be paid? Does the business have adequate reserves to meet estimated overtime requirements?²³

If employees do become ill, the employer must consider how sick leave, vacation, disability (and in some cases, workers' compensation) will respond. Considerations might include prioritizing sick leave, disability, and vacation leave and determining how disability will be triggered. In determining those circumstances in which sick leave will be paid, hospitals should create a policy that encourages infected and potentially infected employees to stay home so as to reduce the possibility they may infect other employees. Management should also

consult with their disability insurers to discuss whether the insurer would require proof of illness as a trigger for disability payments and if such proof is likely to be available during a pandemic.

An analysis of vacation and sick leave should include examination of the Family Medical Leave Act (FMLA)²⁶ and any applicable state leave acts.²⁷ FMLA permits employers to require the use of paid leave (i.e., vacation and sick leave) in lieu of FMLA leave.²⁸ State leave statutes should be examined to determine if they provide employees greater protections than FMLA.

In some industries (such as healthcare or aviation) some employees are likely to contract flu in the workplace. For this reason, employers must consider how workers' compensation coverage will respond. Questions to ponder include:

- Does your institution's workers' compensation cover pandemic flu?
- If the institution is self-insured for any portion of its professional, general, or workers' compensation programs, are its reserves adequate?
- When will coverage be triggered?
- Will exposure be considered a workplace injury covered by workers' compensation?
- Are there reasonable accommodation requirements for return to the workplace after a pandemic exposure?
- Is there adequate coverage for psychiatric claims that may arise due to stress of working in the pandemic environment?²⁹
- Will exhaustion from overwork be considered a compensable workplace injury?

A business' workers' compensation exposure will be largely determined by the manner in which state interprets its workers' compensation laws.

If the laws provide for a liberal application of the remedy as most do, pandemic-related exposures will be covered by workers' compensation. Furthermore, if a business is self-insured for any portion of workers' compensation or general liability, it must consider whether its own reserves are adequate. One of key issues in this analysis will be the applicable statutes defining covered illness and injuries, those defining illness and injuries that arise out of or in the course of employment.³⁰

Institutions must also consider when termination is appropriate and legally acceptable. Are employees subject to employment contracts or collective bargaining agreements that limit the employer's ability to terminate? Are the employees subject to at will employment arrangements? How long must an employer continue salary for an employee who repeatedly refuses to report to but is not ill? What are the legal ramifications of compelling an employee to report to work in an environment where he/she is at high risk for contracting the flu? Do the applicable statutes requirement of employees? Is an employee entitled to reinstatement to his or her former position? FMLA requires that an employee returning from leave be returned to the "same position the employee occupied when the leave commenced or to an equivalent position with equivalent benefits, pay and other and conditions of employment."³³ State law may also contain reinstatement requirements.³⁴

Relationships with labor unions should be re-examined in preparation for pandemic. Businesses should consider how such an event might affect various provision in collective bargaining agreements, such as overtime stipulations, benefit specifications, seniority (e.g., how will seniority be affected if a worker is absent from work for several weeks?), grievance procedures and termination. Businesses should also determine whether they will be obligated to continue paying into union funds (vacation, retirement, disability, etc.) during a pandemic.

Some businesses may be faced with temporary closure. Businesses should understand federal and state notice provisions for employees³⁵ and consider what scenarios are sufficient to trigger such a shutdown and a construct a shutdown game plan. Items to be considered include: continuation of salary and benefits during a shutdown and if so, for how long; and availability of holidays, sick days, and vacation time for payment during such an event. Here again, knowledge of the terms of any applicable collective bargaining and employment agreements and state law is crucial. In addition, one should ensure the hospital has maintained adequate reserves to meet this eventuality.

While causation is likely to be a question with respect to any psychiatric claims, these claims should be anticipated in most state's liberal construction of worker's compensation laws

The most relevant provisions for California may be found at section 3600 of the California Labor Code. California requires injury be proximately, although not exclusively, caused by employment. The employment need only contribute to satisfy the proximate cause requirement. California Comp. & Fire Co. v. Workmen's Compensation Appeals Board. 68 Cal. 2d 157 (1968). New York also applies a liberal construction in favor of the employee.

New York Workers' Compensation Law §§ 2(7) and 10. Absent substantial contrary evidence, the injury will be presumed to have occurred in the course and scope of employment. *Johannesen v. New York City Department of Housing Preservation and Development*, 84 NY 1994).

C.F.R. § 825.214.

California Gov. Code § 12940 and *Neisendorfv. Levi Strauss & Co.*, 143 Cal. App. 4th 509 (2006).

C.F.R. § 825.214.

Cal. Code of Regs. § 7297.2, requiring employer guarantee to reinstate employee to same or comparable upon return from Family Rights Act leave. That regulation also sets forth certain defenses to the guarantee.

A shutdown may trigger the federal notice provisions set forth in the Worker Adjustment and Retraining Notification (WARN) Act at 29 U.S.C. § 2101 *et seq.*

18. <http://www.osha.gov/about.html>.

19. U.S.C. § 654.

20. U.S.C. § 655(c).

21. *Pandemic Influenza Preparedness and Response Guidance for Healthcare Workers and Healthcare Employers*, OSHA

22. Publication No. 3328-05 2007, <http://www.osha.gov/Publications/3328-05-2007.English.html>

23. *Hospitals in California, for example, should consult the California Division of Occupational Safety and Health, which promulgates additional regulations in addition to OSHA. See 8 Cal. Code of Regs., Ch. 3.2. Employees will not be exempt from the overtime requirements of the Fair Labor Standards Act. See Pandemic Flu and the Fair Labor Standards Act: Questions and Answers, http://www.dol.gov/whd/healthcare/flu_FLSA.pdf. State overtime laws, however, vary widely. Some states provide exemptions to overtime regulations for healthcare emergencies. See. e.g., 8 Cal. Code of Regs. § 11040.*

24. U.S.C. §§ 206 and 207.

25. *Hospitals should pay particular attention to their state's labor code provisions regarding meal and rest periods. Failure to provide adequate meal and rest periods may lead to extensive penalties. See. e.g. California Labor Code §§ 226.7 and 512 and 8 Cal. Code of Regs. §§ 11040 and 11050.*

26. U.S.C. § 2601 *et seq.*

27. U.S.C. § 2612(d)(2)(A); 29 C.F.R. § 825.207.

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