

IN THIS ISSUE

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The Outbreak of a New Illness, SARS (Severe Acute Respiratory Syndrome), Has Significant Implications for the Workplace

AN EMPLOYER'S RESPONSE TO SARS AND OTHER COMMUNICABLE ILLNESSES

By Garry Mathiason and Marjorie Fochtman

If not for the war in Iraq, the outbreak of SARS would undoubtedly be the lead news story in April 2003. Thousands of people have been infected, and there have been a number of fatalities from this new illness. It is apparently highly contagious (under at least some circumstances) and potentially deadly. The CDC (Centers for Disease Control) has issued a travel health alert for visitors to and from mainland China, Hong Kong, Vietnam, and Singapore (www.cdc.gov/ncidod/sars/travel_alert.html), and President Bush has signed an executive order adding SARS to a list of seven other communicable diseases for which a person can be quarantined by public health authorities. The great seriousness of the other diseases on the list [plague, diphtheria, cholera, infectious tuberculosis, smallpox, yellow fever, and hemorrhagic fever (e.g., Ebola virus)] gives a sense of the level of concern with which SARS is being viewed by at least some in the medical community and government. SARS has reached the United States, although as of the date of this ASAP, it is uncertain as to how fast, serious, and widespread the SARS outbreak will be in this country.

SARS poses particular concerns for employers for several reasons beyond the obvious need to protect employees who may be at risk and the need to address employee concerns: it is possible that SARS, or at least some strains of it may be both easily transmittable in the workplace and very serious; medical experts are still searching for a test to detect its presence, as well as a vaccine; the incubation period after exposure but before

symptoms appear is believed to be at least 10 days; and early symptoms can mimic less severe respiratory problems.

OCCUPATIONAL SAFETY AND HEALTH OBLIGATIONS

Unfortunately, employers have been provided with limited, and sometimes conflicting, guidance. Medical experts and government agencies are treating SARS as a very serious illness, and one which is potentially easily transmitted in a workplace environment, yet it is unclear when and if public health authorities will impose a quarantine in any particular case. There are also at least some media reports that the SARS strain found in the U.S. to date may be less serious. Employers have a duty to provide a safe workplace for all employees under OSHA regulations, but there is no regulation directly on point. There are specific OSHA regulations and guidelines governing other communicable illnesses such as TB and bloodborne pathogens such as HIV or HBV with which certain employers must comply, but to date there is no SARS regulation under OSHA. In the absence of such a specific regulation, the OSHA general duty clause will apply. This, in essence, requires an employer to provide a safe workplace in whatever manner is reasonably necessary.

However, despite this duty of employers to provide a safe workplace, there are also some limitations on an employer's ability to respond. Employers must be careful to avoid discrimination—including discriminating against an individual who is disabled or perceived as disabled.

Employers must continue to meet a number of other legal obligations as well, which include issues that arise not just with SARS but also with other communicable diseases.

Taking all of this into account, we believe that employers are best advised to establish a written communicable illness policy and response plan that covers SARS, as well as other communicable diseases that are readily transmitted in the workplace. For many workplaces, this would include active TB or SARS but *not* something like HIV, which is not easily transmittable through typical workplace activities in most workplaces. Our experience in writing such policies is that they need to address at least the following:

1. What illnesses, or exposure to illness must an employee disclose to the employer, and when and how should such disclosure be made.
2. When should an ill employee stay home, when will an ill employee be sent home and when can the employee return.
3. When will an employer require a quarantine of ill employees or those who have been exposed to others who have been ill.
4. Whether employees will be paid for the time spent in quarantine.
5. What benefits are available to employees.
6. What, if any, travel or other limitations will be imposed.
7. Procedures to address all of these matters on a case-by-case basis under often fluid and uncertain conditions.

WAGE & HOUR AND EMPLOYEE BENEFITS IMPLICATIONS

1. Work-related Illnesses (Travel exposures or otherwise)

The Employee Becomes Ill. If an employee becomes ill while traveling for a work assignment, that employee is likely to be eligible for benefits under the employer's workers' compensation program, although the exact nature of the work being performed by the employee at the time of transmission, and the nature of the illness may well effect the coverage determination.

The Employee is Quarantined. If an employee is not ill, but as a result of travel for a work assignment quarantine is (1) required by a governmental agency or (2) suggested by a governmental agency, or (3) deemed an advisable precaution by the employer, many employers will want to consider providing that employee with work assignments that can be performed at home. If this is not feasible, or appropriate, the employer may want to place the employee on administrative leave. Whether such leave is paid or unpaid leave will vary depending upon the employee's exempt status, the employer policies, and restrictions imposed by state law.

If the employee is non-exempt, and no sick leave, PTO or vacation benefits are available, it is *possible* that the non-exempt employee may be required to take the time off without pay. This is discussed in more detail below.

An exempt employee must be paid his or her salary if the employee performs any work in the workweeks in which the administrative leave occurs. If an exempt employee is quarantined for a complete workweek, and performs no work in that week, it is possible that the employee may not need not to be compensated. Again, this is discussed in more detail below. An exempt employee may choose

to use sick leave, PTO or vacation during this time, provided the employer's policies and applicable state law permit the use of such benefits.

For example, in some states, an employer may not require an employee to use vacation when the employee's absence is initiated by the employer. Thus, if an employer requires an employee to stay away from work, the employer may not require the use of vacation. However, an employee may choose to use accrued sick leave, PTO or vacation benefits if permitted by the employer's policies and applicable state law.

The Risks of Requiring Administrative Leave without Pay. Although it may be lawful, we generally do *not* recommend unpaid leave for any employee who is quarantined as a result of a work related exposure. This is particularly true if the decision to quarantine is made at the employer's discretion rather than government agency requirement or suggestion. As an example, in California, Labor Code section 2802 requires that an employer indemnify an employee for all losses incurred by the employee in the discharge of his or her duties. It is our opinion that the California Labor Commissioner may well find that wages *must* be paid under such circumstances based on the principles of Labor Code section 2802, or perhaps Labor Code section 132(a), which prohibits discrimination against an employee who is "injured" in the course of performing his or her duties.

2. Non-work Related Exposures

The Employee Becomes Ill. If an employee becomes ill as a result of personal travel, or other non-work related exposure, the employee is likely to be eligible to use sick leave, PTO, vacation, and perhaps FMLA leave and disability leave, depending on the employer's own policies and the degree of illness. If no sick leave is available, it is possible that a non-exempt employee could be required to

take the time off without pay. This is discussed in more detail below. Provided the employer has a bona-fide sick leave policy, an exempt employee who has either not yet accrued sick leave benefits or has exhausted sick leave, may have his or her salary docked only for complete days of absence for illness (unless partial day absences are required by the FMLA).

The Employee is Quarantined. If an employee is not ill, but as a result of personal travel quarantine is (1) required by a governmental agency (2) recommended by a governmental agency or (3) deemed an advisable precaution by the employer, many employers will want to consider providing work assignments that can be performed at home. If this is not feasible or appropriate, the employee may be placed on administrative leave. An employee may be eligible to use accrued sick leave, PTO or vacation benefits if permitted by the employer's policies and applicable state law. If no paid leave benefits are available, it is *possible* that a non-exempt employee may be required to take the time off without pay. This is discussed in more detail below. An exempt employee must be paid his or her salary if the employee performs any work in the workweeks in which the administrative leave occurs. If an exempt employee is quarantined for a complete workweek, and performs no work in that week, it is *possible* that the employee may not need not to be compensated. Again, this is discussed in more detail below. An exempt employee may be entitled to use paid time off benefits during this time, provided the employer's policies and applicable state law permit the use of such benefits.

The Risks of Requiring Administrative Leave without Pay. If the employee is put on administrative leave for quarantine purposes, the law is unclear as to whether the leave can be without pay. We believe that if quarantine is required by a governmental agency, it is likely, but not certain, that the leave can be without pay

subject to the salary basis rules for exempt employees noted above. If quarantine is recommended, but not required by a governmental agency, the risk that government agencies or the courts would find that the leave must be paid is greater, but we believe the better answer in most states is that the law does not require that such a leave be paid. Lastly, the risk of an adverse decision would seem to be greatest if an employee is quarantined solely at the employer's discretion and is given unpaid leave.

IMPLICATIONS FOR EMPLOYMENT CONTRACTS

Employers with collective bargaining agreements or other contracts of employment must review those contracts before adopting and enforcing a communicable illness policy, particularly before requiring the use of PTO or imposing administrative leave without pay. Such contracts may limit an employer in how such a policy or its terms may be implemented. And an employer with a collective bargaining agreement may have a bargaining obligation with regard to the adoption of the policy or its terms.

DISABILITY DISCRIMINATION LAW IMPLICATIONS

Under the Americans with Disabilities Act and similar state laws, disability-related inquiries and medical examinations of employees are limited to situations where the inquiry or examination is shown to be "job related and consistent with business necessity." The restrictions on medical inquiries and examinations apply to all employees, and not just those with disabilities. These restrictions raise concerns when someone is required to stay off work unless, or until, they can prove they do not pose a risk of contagion in the workplace.

Such a policy could be viewed as evidence that the employee is "regarded as"

disabled by the employer. Secondly, an inquiry and request for a medical release could be viewed as violating the statutory restrictions on medical inquiries to employees.

Generally, a disability-related inquiry or medical examination of employee will be viewed as "job related" and consistent with business necessity, when the employer has "a reasonable belief," based on objective evidence, that:

1. An employee's ability to perform the essential functions *will* be impaired by the medical conditions; or
2. The employee *will* pose a direct threat due to a medical condition.

There appears to be three situations where the employer would want the employee to undergo a medical examination, and obtain a medical release before returning to work when they have been exposed to a communicable illness

The first situation, when a public agency quarantines an employee, would seem to present minimal risk of violating ADA or state laws if the employer requires the employee to provide a medical release before returning to work. In that situation the employer would have reasonable objective evidence upon which to rely that the employee poses a direct threat to the health of others. Likewise, if a relevant public agency recommends, but does not require that the employee be quarantined, the employer conditioning a return to work on a medical release should be viewed as job related and consistent with business necessity. This case again would be based on relevant objective factors, such as the recommendation of a public agency. Information from a public agency should be viewed as reliable and sufficiently objective to trigger a reasonable belief that returning the employee to work prematurely could pose a threat to others,

but the risk of liability would seem somewhat higher.

The third situation is less clear. If a public agency does not quarantine an individual or recommend that the person be self-quarantined, there would seem to be a greater risk that the employer conditioned an employee's return to work on a medical release. A request that the employee obtain a medical examination and medical release before returning to work could be viewed as based not upon objective evidence, but upon a generalized assumption that someone traveling to a specific area would be infected with SARS. Unless there is other objective evidence, e.g. the person is showing some symptoms of the illness in question, such a request carries with it a risk that it would be deemed unlawful.

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THE IMPLICATIONS OF DISCRIMINATION ON THE BASIS OF OTHER PROTECTED CLASSIFICATIONS

It is possible that a particular outbreak of a communicable illness might disproportionately affect members of a protected classification (i.e. race, national origin, or etc.). Employers need to be cognizant of this fact and make sure that they are not unilaterally discriminating against such groups. Evidence of a communicable illness policy that covers all communicable illnesses and not just one that disproportionately affects a particular protected group is helpful here. Specific examples of non-discriminatory enforcement will also be very important.

For more information about SARS, please see the CDC web page at www.cdc.gov. If you would like further information concerning an appropriate response to communicable illnesses in the workplace, please contact your Littler attorney or the authors of this ASAP.

