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Swine Flu: Preparing the Workplace for a Pandemic

By Steve McCown and Donald W. Benson

The United States has declared a “health emergency” regarding an outbreak of swine influenza A (H1N1). As of April 28, 2009, the Centers for Disease Control and Prevention (CDC) confirmed 64 cases of infected individuals in five states (New York, California, Texas, Kansas and Ohio).¹ California’s governor has activated the California Department of Public Health’s Emergency Operations Center. New York’s governor has activated its emergency preparedness plan. Cases have been reported in Mexico, Canada, Spain, Scotland and New Zealand. Many in Mexico have died of the flu virus. On Saturday, April 25, 2009, the World Health Organization, upon the advice of the Emergency Committee called under the rules of the International Health Regulations, also declared this event a “public health emergency of international concern.” The European Union’s health commissioner has urged Europeans to avoid nonessential travel to the United States or Mexico. The CDC, on April 27, also issued a travel warning recommending that people avoid nonessential travel to Mexico.

While it is too early to determine whether patients in the U.S. will experience the same high mortality rates as found in the initial Mexico patients, or even to project the virus’ possible spread through parts of the U.S. population, the CDC has confirmed that the viruses in the U.S. and Mexico are genetically similar and that the virus appears to be responsive to only two of the four commonly prescribed antiviral medications. There is currently no vaccine for this strain of the virus. Efforts have begun to isolate the virus and develop a vaccine. Last season’s influenza shots are not expected to be effective against this version of the virus.

Although the CDC encourages people not to panic, now is the time to activate plans and take necessary precautions. Prudent employers should begin to prepare for a wide range of decisions including: tough questions about restricting international travel, quarantines, educating management and employees on personal hygiene and cleaning protocols, leave from work, stockpiling antiviral medications and participating in public vaccination efforts.²

Swine Flu Symptoms & Transmission

The symptoms of swine flu in people are expected to be similar to the symptoms of regular human seasonal influenza and include fever, lethargy, lack of appetite and coughing. Some people with swine flu also have reported runny nose, sore throat, nausea, vomiting and diarrhea.³

You cannot get swine influenza from eating pork or pork products. Eating properly handled and cooked pork is safe. No food safety issues have been identified related to the flu.

Influenza viruses can be directly transmitted from pigs to people and from people to pigs. Human infection with flu viruses from pigs is most likely to occur when people are in close proximity to infected pigs, such as in pig barns and livestock exhibits housing pigs at fairs. Human-to-human transmission of swine flu can also occur. This is thought to occur in the same way as seasonal flu occurs in people, which is mainly person-to-person transmission through coughing or sneezing by people infected with the influenza virus. People may become infected by touching something with flu virus particles on it and then touching their mouth or nose.

Prevention & Protection

There are everyday actions people can take to stay healthy.⁴

- Try to avoid close contact with sick people. Influenza is thought to spread mainly person-to-person through coughing or sneezing by infected people.
- Cover your nose and mouth with a tissue when you cough or sneeze. Throw the tissue in the trash after you use it. Alternatively, cough into your elbow rather than covering your mouth with your hand.
- Wash your hands often with soap and water, especially after you cough or sneeze. Alcohol-based hands cleaners (containing at least 60% alcohol) are also effective.
- Avoid touching your eyes, nose or mouth. Germs spread that way.
- Get plenty of sleep, be physically active, manage your stress, drink plenty of fluids and eat nutritious food.

The CDC strongly recommends home isolation of infected individuals. Persons who develop influenza-like-illness (ILI) (fever with either cough or sore throat) should be strongly encouraged to self-isolate in their homes for 7 days after the onset of illness or at least 24 hours after symptoms have resolved, whichever is longer. Persons who experience ILI and wish to seek medical care should contact their health care providers to report illness (by telephone or other remote means) before seeking care at a clinic, physician's office, or hospital. Persons who have difficulty breathing or shortness of breath or are believed to be severely ill should seek immediate medical attention.

Employers Need to Prepare Now

Prudent employers will assemble a pandemic team and plan if they have not done so already. The pandemic team should develop a coordinated and efficient pandemic response plan so that the needed public health information is gathered and transmitted. The plan should ensure that communications to managers and employees about operations, cleaning protocols, leave and benefits are consistent and effective. A good plan will address how anticipated disruptions can be managed effectively while avoiding litigation risks and panic within the workplace.

The pandemic plan should provide pre-established means of communication and planning including:

- Operational alternatives to shift production to unaffected areas and mitigate disruptions from quarantines and high absenteeism;

- Education of employees on basic health precautions at work and at home, not reporting to work when sick or exposed, leaving work promptly when symptoms occur, and mechanisms for tracking who is ready to return to work or obtaining employee releases to return to work;
- Implementation of increased prevention and transmission precautions by increased cleaning protocols, disposal of employee tissues and cleaning up after sick employees;
- Selection of safety equipment for key personnel possibly including masks, gloves and cleaning supplies and equipment, and the educational requirements for its application, use, removal, and disposal;
- Redesign of procedures and operations to limit the face-to-face interactions of employees in group meetings, lines at time clock, cafeteria, elevators, etc.
- Education of management concerning employee communications, transmitting self-disclosed infection information from employees, sending employees home who want to stay at work, and communicating with employees too scared to report to work.
- Development and communication of information on travel restrictions to any known infected areas.

Specific assignments for an emergency response team should include the following in the event that further response is necessary:

- coordinating with federal, state and local authorities in control of public health and safety in case of quarantines and inoculation efforts;
- developing and implementing evacuation procedures if they become necessary;
- preparing facility shutdown checklists;
- identifying key personnel whose presence is important to continue vital company functions; and
- determining methods for communicating effectively with employees.

Employment Liability Risks

It is anticipated that the CDC and federal and state Occupational Safety and Health agencies will issue new guidance regarding swine flu. Once the new guidance is received, employers should review their pandemic plan to ensure it is consistent with the guidance. The new guidance may develop into rules or standards to be used in tort actions to argue that the employer's conduct was willful or so outrageous as to constitute an exception to the workers' compensation remedies in many states.

Company decisions about how to allocate scarce safety equipment and the possible use of antiviral medications and hoped-for vaccines, raise particularly thorny ethical and employment law issues when vaccines will initially be in short supply, or when employees refuse vaccines, if and when available.

Where a pandemic is associated with specific countries, national origins or racial groups, employers must be careful to avoid potential claims of disparate treatment and harassment as symptomatic employees are told to go home or remain away from work.

Swine flu may be compensable under state workers' compensation laws if the employee's job exposes him or her to a greater risk of contracting the condition than the risk to which the general public is exposed, and the employee's job duties caused him or her to contract the condition. If an employee with swine flu believes that it is work related, employers should have the employee fill out an Accident Report, the employer should fill out a First Report of Injury form and promptly submit the information to its workers' compensation carrier for further investigation.

Many employees will be eligible for FMLA leave, other contractually based leave rights, and protection under federal and state disability

and benefit protections. Whistleblower protections under benefit laws, safety regulations, and discrimination laws may be raised.

In any health emergency where people are scared and rumors common, employees will often come and self-report that someone in their family is sick or that a co-employee said that he/she was infected or exposed. There is a particular risk in such situations that confidential employee information may be disclosed and privacy violations created.

Managers on the front line especially will need the education and support of the executive team to handle a much wider range of employment law issues in order to avoid company liability in a pandemic event.

For individuals returning from infected areas, employees may be contagious for an estimate of one day before they show any signs and symptoms of the flu and an average of seven days or more with symptoms. Employers need to be cautious about sending employees home without symptoms and without pay. This raises important and substantial issues regarding potential discrimination claims, including race and national origin, as well as potential wage and hour issues for exempt employees. Employers with employees returning from one of the affected areas should consult with experienced counsel to handle individual circumstances.

Littler will be offering a webinar on Tuesday, May 5, 2009 and invites interested parties to attend a more detailed discussion of the issues faced by employers in developing effective pandemic plans. Information about the webinar can be found on Swine Flu: Preparing the Workplace for a Pandemic - Webinar.

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 Steve McCown is a Shareholder in Littler Mendelson's Dallas office. Donald W. Benson is a Shareholder in Littler Mendelson's Atlanta office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. McCown at smccown@littler.com, or Mr. Benson at dbenson@littler.com.

¹ For latest developments and information from the CDC on the swine flu, see <http://www.cdc.gov/swineflu/>.

² Many companies have already developed extensive Pandemic Plans, and previous Littler authored publications on these subjects are available:

- Donald Benson, *Pandemic Preparation in the Workplace*, Ga. Bar J., Oct. 2006.
- Donald Benson, *Antiviral Drug Stockpiling for Pandemic Planning*, Littler Insight, July 2008.
- Donald Benson and James Hart, *Preparing the Workplace for a Pandemic*, Cal. Bar J., Sept. 2008.
- Donald Benson and Anne Mellen, *Preparing for a Pandemic in the Workplace*, Ohio Lawyer, Sept. 2008.

³ CDC, *Key Facts About Swine Influenza (Swine Flu)*.

⁴ CDC, *Interim CDC Guidance for Nonpharmacological Community Mitigation in Response to Human Infections with Swine Influenza (H1N1) Virus*.