



Preparing the workplace for a pandemic

by Donald W. Benson and Anne M. Mellen

How should Ohio employers prepare their workplaces for possible pandemics of avian influenza, Severe Acute Respiratory Syndrome (SARS) or illness spread by bioterrorism?

Federal and state government rules and regulations

Federal regulations issued by the Occupational Safety and Health Administration (OSHA) and the Centers for Disease Control and Prevention (CDC) will play a key role in shaping how businesses respond to a pandemic. In the event of a pandemic, OSHA's blood borne pathogens and respiratory protection standards may apply.¹ Additionally, the OSHA "general duty" clause requires employers to provide a safe workplace free of recognized hazards likely to cause harm, thus giving OSHA broad authority for issuing new regulations that may affect a business' pandemic response.² The CDC recently issued new standards for mitigating an avian flu pandemic including social distancing, closing schools and daycares, planning for liberal work-leave policies and telecommuting, and voluntary isolation and quarantine.³ Additionally, Ohio maintains its own guidelines to manage a pandemic.⁴

Accordingly, in the event of a pandemic, employers will need to take into account both federal and Ohio directives.

Workplace preparation

Communicable disease policy

Attorneys should advise clients to consider adopting the following policy tailored to each individual business:

Communicable illness

If you are diagnosed with a communicable illness such as active tuberculosis or severe acute respiratory syndrome, or avian flu, if you believe you may have been exposed to a person so diagnosed, or if you have recently visited a location where there has been an outbreak of such an illness and you do not feel well or are exhibiting symptoms of that illness, you must report this to [company representative]. This information will be kept confidential to the extent reasonably possible but full confidentiality cannot be guaranteed.

Travel and quarantine policies

Companies should update their travel policies in accordance with general government advisories. Employees traveling to areas with outbreaks of communicable diseases should be required to obtain and maintain all recommended vaccinations.

If an employee travels for work to a region for which quarantine on return is required or advisable, the employer should request that the employee inform management immediately to arrange work assignments or paid administrative leave. If an employee travels on personal business to a region requiring quarantine on return, the company should consider allowing the employee to use sick leave, accrued paid time off or unpaid administrative leave.

HIPAA

The Health Insurance Portability and Accountability Act (HIPAA) requires that employers safeguard "protected health information" of employees. Counsel should advise clients as to which diseases an employee or applicant must disclose and who will have access to that information.⁵ When there is a need to inform others of a possible workplace exposure, the privacy of the infected employee must be maintained.⁶

Workers' compensation

Counsel should advise employers to ensure that their workers' compensation (WC) insurance premiums are fully paid. Without the WC exclusive remedy for workplace injuries, employers may be liable under different tort claims. Counsel should advise clients about whether the WC bar is available in the states where their clients employ workers.⁷

Clarify leave policies

Counsel should advise employers on using leave policies to maintain compliance with federal and Ohio directives; maintain operations; and sustain a functional and available workforce. The following may affect business clients' leave policies:

FMLA

Under the Family and Medical Leave Act (FMLA) and implementing regulations, qualifying employees may take up to 12 weeks of unpaid leave due to a "serious health condition."⁸ Influenza requiring treatment by a physician over a three-day period could be a protected "serious health condition" that triggers the right to return to a substantially equivalent job when the leave ends.⁹ Moreover, if the absent employee was never told that this absence exhausted FMLA leave, the employer's obligation to reinstate the employee may extend.¹⁰

The ADA

Employees who suffer permanent health problems affecting a major life activity like breathing may be entitled to protection under the Americans with Disabilities Act (ADA) and Ohio

law.¹¹ Once the protected employee returns to work, the employer may need to determine whether any reasonable accommodation must be provided to help the employee perform the essential functions of his or her prior position.¹²

Accrued leave and benefit policies

Employers should examine contractual promises contained in handbooks.¹³ These policies may allow employees to accrue large amounts of paid leave. Employers should consider the inclusion of exception clauses for epidemics that limit the lump-sum use of paid leave.

Attorneys should counsel clients to confirm that the updated summary plan descriptions (SPD) of their benefit plan (plan) are distributed to plan participants and covered dependents. Otherwise, provisions allowing the plan to be changed may not be enforceable.¹⁴ Moreover, if the employer cannot prove that the participant or beneficiary received a revised SPD, then the employer may be required to provide higher benefits according to a previous version of the plan.¹⁵

Provisions of a pandemic response

A business's pandemic response plan should address at least the following:

- Designation of a company representative responsible for pandemic planning;
- Designation of a contact person if conditions disrupt communications;
- Identification of comprehensive leave policies;
- Identification of back-up persons for key jobs;
- Implementation of a prepandemic employee cross-training program;
- Implementation of guidelines for employees stranded due to business travel;
- Implementation of procedures for work absenteeism options such as telecommuting or shift-swapping;
- Implementation of procedures for schools and daycare closures;
- Implementation of conditions for business closure and re-opening; and
- Implementation of a contingency plan for paying employees if financial institutions are closed as a result of emergency conditions.

Once approved, the pandemic response plan should be distributed to all employees. ■

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Endnotes

¹²⁹ C.F.R. §1910.134 (a)-(o) (2006).

²²⁹ U.S.C. §654(a). Ohio does not have its own version of federal OSHA. By statute, however, Ohio employers have a duty to furnish a safe place of employment, adopt and use methods and processes and follow and obey orders to render places of employment safe. See R.C. Ann. §4101.11. Further, no employer shall require, permit, or suffer any employee to go or be in any place of employment that is not safe. R.C. Ann. §4101.12. Also, no employer shall fail to do every other thing reasonably necessary to protect the life, health, safety and welfare of these employees or frequenters. Id.

³U.S. Dept. of Health and Human Servs., Centers for Disease Control and Prevention, "Interim Pre-pandemic Planning Guidance: Community Strategy for Pandemic Influenza Mitigation in the United States—Early Targeted Layered use of Non-Pharmaceutical Interventions" (2007), available at www.pandemicflu.gov/plan/community/mitigation.html.

⁴⁴"State of Ohio Emergency Operations Plan-Human Infectious Disease Incident Plan," (October 2005); "ODH Pandemic Influenza Preparedness and Response Plan (PIPRP)," March 15, 2006, available at www.ohioandemicflu.gov.

⁵⁴⁵ CFR §§160, 164 (2005).

⁶See id. §164.512(b).

⁷Under certain limited conditions, communicable diseases that are contracted at the workplace are covered by Ohio's workers' compensation statute. Under Ohio's workers' compensation statute, R.C. 4123.68 (2008), if an employee's disease meets certain tests imposed by law, it can be compensated. The disease must be contracted in the course of employment. *Hutchinson v. Ohio Ferro Alloys Corp.*, 70 Ohio St.3d 50, 52 (Ohio 1994). The disease must be peculiar to the claimant's employment by its causes and the characteristics of its manifestation or the conditions of the employment result in a hazard that distinguishes the employment in character from employment generally. Id. Finally, for the disease to be compensable, the employment must create a risk of contracting the disease in a greater degree and in a different manner than in the public generally. Id.

⁸²⁹ U.S.C. §§2601-2654 (2005); 29 C.F.R. §§825.100-800 (2005). The term "serious health condition" is defined at 29 U.S.C. §2611(11) (2005).

⁹See *Brenneman v. Medcentral Health System*, 366 F.3d 412 (6th Cir. 2004).

¹⁰But see *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 95-96 (2002) (striking down regulations that prohibited employers from retroactively designating leave as FMLA leave). The effect of this decision is that employees will not be entitled in every case to more than 12 weeks leave if an employer fails to designate time as FMLA qualifying.

¹¹⁴² U.S.C. §§12101-12213 (2005); O.R.C. Ann. §§4112.01(A)(13), 4112.02(A) (2008).

¹²²⁹ C.F.R. § 1630.9 (2005); Ohio Adm. Code §4112-5-08(E)(1) (2008).

¹³In Ohio, employee manuals, company handbooks and similar documents may be important in establishing the terms and conditions of employment, and they may create implied contracts. *Cohen & Co. v. Messina*, 492 N.E.2d 867, 870 (Ohio Ct. App. 1985). However, for documents to be considered valid contracts, there must be a "meeting of the minds." *Parklaun Manor, Inc. v. Jennings-Lawrence Co.*, 197 N.E.2d 390, 394 (Ohio Ct. App. 1962). Absent the necessary "meeting of the minds," a handbook or manual merely constitutes a "unilateral statement of company rules and regulations." *Kiel v. Circuit Design Technology, Inc.*, 562 N.E.2d 517, 520 (Ohio Ct. App. 1988) (internal citations omitted).

¹⁴See, e.g., *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 75 (1995) (holding that an employer could eliminate retiree medical benefits based on reservation of right to amend plan provision set forth in summary plan description).

¹⁵Id.