

Pandemic Preparations for the Workplace

by Donald W. Benson and Katherine S. Dix

From the perspective of an employer or its counsel, this article examines the threat of and response to a possible pandemic and the relevant legal landscape.

Colorado employers face several issues when determining whether and how to prepare their workplaces for possible pandemics of avian influenza, severe acute respiratory syndrome (SARS), or illness spread by bioterrorism. These issues include determining whether the risk of a pandemic illness is significant enough to merit the devotion of time and resources necessary to secure the continuity of business operations¹ and the employer's role in promoting quarantine effectiveness, social distancing, or preventative hygiene.

Employers also may wish to consider whether the near-hysteria over the possibility of a pandemic caused by avian influenza or any other similarly contagious illness is merely the latest version of a doomsday forecast, similar to the prediction that Y2K would shut down global business operations. That prediction spawned an entire industry devoted to business preparations for the millennium, and almost every company of significant size devoted considerable amounts of time toward management and information technology (IT), as well as capital, to achieve readiness for Y2K.

Of course, many attorneys, accountants, consultants, and vendors profited handsomely from these efforts, but it should be noted that business productivity gains in the early years of this century may be due in no small part to the updating and planning that occurred in advance of Y2K. Accordingly, it is possible that the current alarmist news coverage focused on the possibility of a pandemic may encourage similarly creative business and legal planning that not only will help minimize the effects of any such pandemic, but also will foster the type of productivity gains that resulted from the attention devoted to the threat of Y2K.

This article examines the nature and threat of the pandemic occurrence of a disease such as avian influenza and its possible effects on Colorado business operations. It discusses pertinent federal and Colorado state regulations and guidelines, including the Colorado State Emergency Operations Plan, Incident Annex 1 Pandemic Incident. Finally, the article highlights some of the major legal and logistical issues on which counsel should advise business clients to ensure that they are properly prepared for a possible pandemic.

Pandemic: A Global Outbreak of Disease

The U.S. Centers for Disease Control and Prevention (CDC) has set forth three conditions that must exist for a global outbreak of a disease to occur: (1) the emergence of a new type of virus for which humans have little or no immunity; (2) the capability of this new virus to infect and cause illness in humans; and (3) the capability of the virus to spread easily and without interruption among humans.² A pandemic results when these three factors converge with regard to a disease.

There have been three influenza pandemics in the previous century: "Spanish influenza" in 1918; "Asian influenza" in 1957; and "Hong Kong influenza" in 1968.³ The 1918 pandemic killed an estimated 40 to 50 million people worldwide.⁴ Although the 1918 Spanish influenza was exceptionally deadly, the two subsequent pandemics also caused significant human deaths, including an estimated 2 million deaths in 1957 and one million deaths in 1968.⁵

Currently, public health officials are alarmed over the pandemic potential of the current strain of avian influenza, H5N1. Although the vast majority of avian influenza viruses do not infect humans,

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on rare occasions, these bird viruses can infect other species, including pigs and humans.⁶ H5N1 has spread by bird migration and commerce into the domestic and wild bird populations of more than fifty countries in Asia, parts of Europe, the Middle East, and Africa.⁷ Transmission from birds to humans has been relatively rare, but 413 confirmed cases have resulted in 256 deaths in a wide geographic area, including Azerbaijan, Bangladesh, Cambodia, China, Djibouti, Egypt, Indonesia, Iraq, Lao People's Democratic Republic, Myanmar, Nigeria, Pakistan, Thailand, Turkey, and Vietnam.⁸

An influenza pandemic occurs when a new virus subtype emerges that has not previously circulated among humans and "starts spreading as easily as normal influenza—by coughing and sneezing."⁹ Public health experts are particularly concerned that H5N1 ultimately might mutate into a strain that is contagious among humans, because it is an influenza A subtype and has genetic similarities to influenza strains that have spread among humans.¹⁰ With such a genetic adaptation, H5N1 would no longer be a bird virus, but a new human influenza virus to which the human immune system would have no preexisting immunity.¹¹ This lack of immune defense makes it likely that people who contract such a type of influenza will experience a more serious disease than that caused by normal influenza to which humans have already been exposed.¹²

The Threat of a Pandemic and Potential Disruption

The emergence of a virus that meets the biological characteristics set forth by the CDC seems quite plausible, given the rapidity with which viruses develop and change. Moreover, viruses that have these characteristics are assisted in their spread through populations and from one population to the next by the reality of a truly global economy in which people travel far more than they did fifty years ago.

Many more American companies now have their own sales, logistics, operations, and financial employees who regularly travel to

their companies' overseas plants or to those of their vendors or buyers. Similarly, personnel from these vendors and buyers may visit businesses in the United States. The prevalence of these international trips has led the World Health Organization (WHO) to estimate that a highly contagious airborne disease like avian influenza could reach pandemic distribution in as little as three months.¹³

The WHO currently is working under three assumptions with regard to planning for a possible pandemic. The first is that a pandemic would spread to all continents in less than three months.¹⁴ The second is that significant portions of the world's population would require medical care. The third is that medical supplies will be inadequate in all countries due to limited supplies of vaccines and anti-viral drugs.¹⁵

Based on the comparatively mild 1957 influenza pandemic, the WHO projects approximately 2 to 7.4 million deaths worldwide.¹⁶ The level of disruption to business that may be posed by a pandemic will depend in part on the stage of the pandemic. Previous pandemics generally have occurred in two or three waves, so that not all countries experienced the same level of disruption at the same time.¹⁷ Thus, employers may face various stages of disruption caused by a pandemic, including: (1) overseas occurrence affecting travel and foreign suppliers and customers; (2) high absenteeism, but with the ability to maintain near-normal operations; and (3) near total absenteeism, making it difficult to keep operations open, along with possible disruption of utilities and quarantines of the facility area.

Business disruption levels also will be significantly affected by the level of interdependence between a business's operations in the United States and businesses in other areas of the world, where the pandemic is most likely to start. Many American businesses are now directly a part of, or directly affected by, the global economy. American companies sell to or buy from locations in other countries. If other countries experience a pandemic that significantly limits their ability to buy American products or to deliver the goods and services that U.S. companies have purchased, the ability of plants and operations to stay open in the United States will be affected.

Overall, the lead time for influenza pandemic planning may be extremely short and uncertainty regarding the level of disruption that a particular virus may pose makes the problem even more vexing for planners. SARS ultimately was contained before causing massive deaths and disruptions to worldwide commerce and, to date, the spread of smallpox or anthrax through bioterrorism has been largely avoided. Nevertheless, business planners may do well to heed the current alarms about the potential disruption that a virus such as avian influenza could cause, given the history of past influenza pandemics and the ever-increasing level of global connectivity.

Pertinent Federal Government Regulations and Guidelines

Existing federal regulations and guidelines issued by the Occupational Safety and Health Administration (OSHA), the U.S. Department of Agriculture (USDA), and the CDC may play a key role in shaping how businesses in the United States respond to a pandemic. Governmental agencies may be expected to build on this existing framework in developing new regulations in response to an emerging disease threat.

In a pandemic scenario, OSHA's blood-borne pathogens standard and respiratory protection standard¹⁸ would come into play. In addition, the "general duty" clause of the Occupational Safety and Health Act¹⁹ requires an employer to provide a safe and healthy work environment for employees, thus giving OSHA broad statutory authority for issuing new regulations. In November 2006, OSHA acted on this authority and issued new guidelines for persons who may be affected by an avian influenza pandemic, such as those who clean areas affected by the virus and airline personnel, as well as citizens living abroad.²⁰

The source of a virus often is birds or animals, so the USDA can be expected to play a major role in preventing the spread of any pandemic virus. For example, to stem the spread of avian influenza virus to the United States, the USDA helped to enforce a federal ban on the importation of all birds from the Asian countries that experienced an outbreak of the virus.

In February 2007, the CDC issued new community standards for mitigating an avian flu pandemic.²¹ These mitigation guidelines include social distancing strategies to reduce contact between people during the outset of a pandemic when vaccines and medicines will not be readily available. These guidelines include closing schools and daycare centers for up to twelve weeks, canceling public gatherings, planning for liberal work-leave policies and telecommuting strategies, and the voluntary isolation of cases and quarantine of household contacts.

These guidelines also include the new Pandemic Severity Index, which rates the severity of an influenza outbreak from levels 1 through 5, much like the Saffir-Simpson scale used by the National Hurricane Center to rate a hurricane's intensity. The use of social distancing measures will be based on the Pandemic Severity Index, matching the level of distancing methods to the magnitude of the pandemic.

Pertinent Colorado State Government Regulations and Guidelines

In addition to and in conjunction with federal regulations and guidelines, the state of Colorado is working with the U.S. Department of Health and Human Services (HHS) to maintain its own regulations and guidelines to manage pandemic conditions within the state. On March 24, 2006, the HHS and other federal agencies held a summit with Colorado public health and emergency management and response leaders to discuss and create policies for dealing with an influenza pandemic. Governor Bill Owens and HHS Secretary Michael Leavitt signed a Planning Resolution detailing the HHS's and Colorado's shared and independent responsibilities for pandemic planning.²²

Under the Planning Resolution, the HHS has accepted responsibility for providing guidance, technical assistance, (subject to available funding) financial assistance for pandemic planning, and (subject to a review of Colorado's plans for use) a portion of the federal stockpile of pandemic influenza antiviral drugs. Colorado has agreed to devote numerous resources to state and local planning and the development of an operational plan for responding to a pandemic influenza.

In May 2007, Colorado issued the most recent operational plan intended to provide a systematic and coordinated response to a pandemic influenza event at both the state and local level.²³ The plan covers such areas as incident reporting and investigation; appropriate mobilization and response based on the threat level; and

coordinated communication for alerts, notifications, and education.²⁴ The operational plan also includes recommended responses based on the levels of threat.²⁵

Colorado bases its response plan on the features that set apart pandemic influenza.²⁶ The plan adopts for planning purposes the following assumptions:

1. Such an influenza will have an incubation period of an average of two days.²⁷
2. Sick patients may shed the virus up to one day before symptom onset and the peak infectious period is the first two days of illness.²⁸
3. Each ill person could cause an average of two secondary cases if no interventions are implemented.
4. Planners anticipate at least two "waves" of local epidemics for most communities, each wave lasting six to eight weeks.²⁹

Using these assumptions, the Colorado response plan estimates that the clinical disease attack rate will be approximately 30 percent of the overall population. School-age children and healthcare workers, public workers, and other public responders will be at higher risk for infection. The plan further anticipates an average of 20 percent of the working age adults will become infected, with a potential for a 40 percent infection rate at the peak of the pandemic.³⁰ Approximately 50 percent of the infected will seek outpatient care. The number of hospitalizations and deaths will depend on the virulence of the virus, with the fatality rate between 0.2 and 2 percent of the infected. Approximately 29,956 deaths (2 percent of the infected) are expected for a severe pandemic.³¹

Based on guidance thus far issued by governmental agencies, employers may be faced with very detailed governmental workplace regulations in the face of a pandemic. Accordingly, preparation for a pandemic should include identifying the management team responsible for monitoring new governmental regulations and adopting procedures for communicating changes to affected supervisors and employees to ensure compliance with any new requirements.

Colorado Emergency Preparedness Partnership

In preparation for the Democratic National Convention, the Denver InfraGard Members Alliance (IMA), the Denver Police Foundation, Business Executives for National Security, and the Philanthropy Roundtable joined forces to create the Colorado Emergency Preparedness Partnership (Partnership).³² The Partnership's goal is to use the capabilities of the private sector to strengthen Colorado's ability to respond to a disaster. A primary program of the Partnership will be the creation of a voluntary registry of private sector resources and capabilities that could be used during a crisis, including warehouses, office space, trucks, equipment, and skilled personnel.³³ The registry will be implemented under the leadership of the IMA and the Federal Emergency Management Agency.³⁴

Preparation in the Workplace

Employers who prepare for a possible pandemic should consider a broad range of issues associated with disaster planning. Preparation should take into account both federal and Colorado direc-

tives. When drafting a pandemic preparation plan, employers should include procedures for handling employees who are sick in the workplace and the implementation of health and hygiene measures, such as remote work strategies and crisis management procedures, to promote social distancing and cut down on transmission risks.³⁵ Employers also should consider implementing health and medical initiatives, such as disease screening and vaccination programs.

Because large numbers of employees may be absent from the workplace during a major avian influenza or other disease outbreak, employers should implement plans for new employee training, cross-training of existing employees, and developing a pre-planned communications strategy for contacting large numbers of employees located outside the worksite. Each of these areas for planning and preparation raises its own set of legal issues and potentially far-reaching legal requirements.

Communicable Disease Policy

Employers should consider adopting and implementing communicable disease policies and procedures as one of the first planning measures in advance of any potential pandemic. Attorneys should advise business clients to consider adopting some version of the following employee policy, tailored, as appropriate, to meet individual business needs and the dangers confronted by the client's specific employees:³⁶

➤ Communicable Illness

To help keep [company] safe, we need your help. If you are: (1) diagnosed with an illness that is communicable in our workplace, such as active TB (tuberculosis), SARS (severe acute respiratory syndrome), or avian flu; (2) if you believe you may have been exposed to a person so diagnosed; or (3) if you have recently visited a location in which there has been an outbreak of such an illness and you do not feel well or are exhibiting any symptoms of the illness in question, you must report this to [insert title of appropriate company representative]. This information will be kept confidential to the extent reasonably possible, but full confidentiality cannot be guaranteed under these circumstances.

Travel and Quarantine Policies

Companies also should consider addressing their employee policies regarding foreign travel. Policies should state that travel should be curtailed in accordance with advisories issued by the CDC and the U.S. Department of State. Employees traveling to areas with current outbreaks of a communicable disease should be required to obtain and maintain all recommended vaccinations and follow recommended health precautions.

The potential for the imposition of quarantine for travelers to certain areas also must be considered. If an employee travels for work reasons to a region for which quarantine is required or advisable when returning home, the employer should request that the employee inform his or her supervisor or human resources department immediately, so that work from home or paid administrative leave can be arranged.

If an employee travels for personal reasons to a region requiring quarantine on his or her return home, the company should consider allowing the employee to use sick leave, accrued paid time off, or vacation time, or be placed on unpaid administrative leave. If the employee is diagnosed with a communicable illness or quarantined in association with such an illness, the company should consider

requiring a note from a medical provider, stating that the employee may safely return to work, before permitting the employee to return to the worksite.

The Colorado Division of Medical Health Disaster Preparedness and Response recently issued a PowerPoint presentation on “Planning for Pandemic Influenza.”³⁷ The presentation recommends that businesses consider encouraging employees to stay home when they are ill, conduct teleconferences instead of group meetings, and plan for a reduced workforce.

Compliance With HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA)³⁸ requires employers to protect employee privacy with respect to a great deal of medical information. The statute and regulations promulgated by the HHS provide strict guidelines as to how certain “protected health information” of employees must be safeguarded; who may have access to this information; and how such information can be used (for example, generally for health plan administration purposes and for the payment of claims but not for any employment-related purpose).

HIPAA requires the maintenance of a privacy regimen in connection with protected health information, and this aspect of HIPAA protections could extend to workplace exposures. HIPAA compliance must be considered when handling certain information related to the health of an infected employee, or when there is a need to inform other employees of a possible exposure.

If HIPAA is applicable, specific steps must be taken to maintain the privacy of an infected employee.³⁹ Accordingly, businesses should consult with legal counsel to determine what HIPAA’s affect will be prior to requesting health information from an employee, or before using such information after it has been procured.

Workers’ Compensation

Employers should ensure that their workers’ compensation insurance premiums are paid in full. Without the workers’ compensation exclusive remedy for workplace injuries, employers may be liable under many potential tort claims, including negligence and wrongful death. Under certain conditions, Colorado includes communicable diseases that arise out of the job due to the nature of the work.⁴⁰ Employers should consult with counsel about whether the workers’ compensation bar is available in the states in which they employ workers, paying particular attention to states where external sales representatives are based.

Leave Policies

Employers have a tendency to think of leave policies as a benefit subject to employee abuse, and initially may be concerned with ensuring that employees remain at work as absenteeism grows in response to an outbreak of disease. In the various stages of a pandemic, however, the problem may be quite different. There may be employees who have traveled for business who are subject to quarantine but can work from home. There may be sick employees or employees caring for sick family members whom the employer wants to remain at home to reduce the risk of infection to others.⁴¹ Sick employees may come to work and need to be sent home to keep them from spreading the infection. Under the new policies issued by the CDC, schools and daycare centers may be closed for an extended period of time and employees may be without any

means of child care. Finally, some employees may be afraid to venture out in public, for fear of contracting illness.

In some or all of these situations, the CDC’s response plans emphasize that employers should consider how to use leave policies to: (1) maintain compliance with pandemic social distancing directives; (2) maintain operations; and (3) sustain a functional and available workforce. Employers must recognize that a pandemic presents a double-edged sword to the average American workers—either go to work and risk becoming ill, or stay home from work and risk losing their jobs and ability to support their families.

According to a recent poll conducted by the Harvard School of Public Health, a large proportion of working adults with children thought that, if faced with pandemic conditions, they could arrange child care so that at least one employed adult in their household could go to work if schools and daycare centers were closed for an extended period of time.⁴² However, when asked about possible financial difficulties due to missed work, a greater number of adults reported they would face financial problems, especially if they were forced to miss work for seven to ten days.⁴³

Therefore, an employer’s pandemic response plan should ensure that leave policies address the needs of the employer as well as the employee. Leave policies should be implemented in such a way as to limit unnecessary social interaction but minimize the more troubling effects of employee absenteeism on business operations and an employee’s financial situation.

Paid leave or unpaid leave with health benefits can mean the difference in maintaining the workforce in the area or experiencing

significant employee turnover. Avoiding such turnover can be particularly significant as a business seeks to resume normal operating levels. Similarly, fighting every claim for unemployment benefits may not be in the employer's interest if the denial of benefits encourages the pool of available workers to shift to areas unaffected by the disease. Ensuring that a leave plan is in place and has been communicated to employees will help to minimize the impact of workplace absenteeism on both employers and employees, whether the emergency is a pandemic or a natural disaster.

Business clients should be counseled on the requirements of applicable federal, state, and local leave laws that govern paid or unpaid leave for sick employees, employees caring for immediate family members, first-responder health-care providers, and employees called to active military service to enforce a quarantine. Leave policies should clearly spell out the following items: (1) how the employee requests leave; (2) any requirements for regularly reporting his or her medical condition; (3) whether the leave is paid leave; (4) whether any benefits (such as health insurance, matching 401(k) contributions, and vacation pay) are provided or continue to accrue during the leave period; and (5) when the leave is exhausted, whether the employee will return to work.

Statutes and Regulations That May Affect Leave Policies

The Family and Medical Leave Act of 1993 (FMLA), the Americans with Disabilities Act of 1990 (ADA), and the Employee

Retirement Income Security Act of 1974 (ERISA) each play a key role in shaping how business should draft or revise their leave policies to prepare for a pandemic. Employers and the counsel advising them should be aware of the following in crafting leave policies.

The Family and Medical Leave Act

The FMLA and implementing regulations⁴⁴ may significantly affect leave policies. If the employer has more than fifty employees at a location, an employee who has requested leave and has worked at least 1,250 hours and at least twelve months for that employer, may elect to take up to twelve weeks of unpaid leave due to a "serious health condition."⁴⁵ Influenza that requires continuing treatment by a physician over a three-day period likely will be considered a protected serious health condition that triggers the FMLA right to return to a substantially equivalent job when the leave ends.⁴⁶ If the employee is absent from the workplace for several months but was never told that the absence exhausted the FMLA leave period, the employer's obligation to reinstate the employee may extend far into the future.⁴⁷

The Americans with Disabilities Act

Similarly, those employees who suffer permanent health problems affecting a major life activity, such as breathing, may be entitled to protection under the ADA.⁴⁸ Once the ADA-protected employee returns to work, the employer likely will need to engage in the mandated process to determine whether any reasonable accommodation must be provided to help the employee perform the essential functions of his or her prior position.⁴⁹

ERISA and Accrued Leave and Benefit Policies

When preparing for a possible pandemic, employers should examine any contractual promises contained in handbooks and leave policies. These policies may allow employees to accrue, from year to year, large amounts of paid leave. Employers may need to consider the inclusion of exception clauses for disasters, emergencies, and epidemics that limit the lump-sum use of such paid leave. Employers who fail to plan for such contingencies could experience tremendous financial liability for such leave at the time they can least afford it.

When examining leave and benefit policies, ERISA,⁵⁰ the federal statute that governs certain types of employee benefit plans, must be considered. Prudent employers should confirm that the proper, updated Summary Plan Descriptions (SPD) of its benefit plan (Plan) are distributed to Plan participants and their covered dependents. Otherwise, provisions allowing the Plan to be changed may not be enforceable.⁵¹ Worse still, if the employer cannot prove that the participant or beneficiary received a revised SPD, the employer may be required to provide higher benefits according to some previous and a more generous version of the Plan.⁵² Further, in the event of a pandemic, a self-administered Plan may need to increase the size of its administrative staff to handle the anticipated increase in benefit requests and appeals.

Under ERISA, the question of whether the participant is entitled to benefits usually will be determined based solely on the record before the Plan administrator (whether an in-house benefits administrator or a third-party entity hired to provide and record benefits), not at some future time when lawyers can flesh out the file through discovery. Accordingly, it is crucial that the Plan allocate sufficient resources to fully develop the administrative file, or

benefits may be awarded by the courts to otherwise unqualified applicants.

Examine Pay and Telecommuting Rules

A pandemic may lead to many employees working from home. Those telecommuting employees who are non-exempt employees under the Fair Labor Standards Act of 1938 (FLSA)⁵³ can create off-the-clock and overtime issues for employers. The employee who is performing the normal work activities of the job on a computer from home may be working substantial additional time without management's knowledge or supervision. Additionally, these employees may be checking e-mail and voicemail outside regular work hours. These off-the-clock activities may push the total hours worked in a day beyond twelve or in a week beyond forty, entitling the employee to overtime pay at one and a half times the regular rate of pay.⁵⁴ To avoid problems under the FLSA, employers can require employees to check e-mail or perform work only during specified hours of each day, to carefully record and submit documentation of their time worked, and to ask and receive permission before working in excess of forty hours in a week.

Communicating a Pandemic Response Plan to Employees

Before employers present a pandemic response plan to their employees, they should ensure that its contents are compliant with state and federal laws and are up-to-date with local, state, and federal guidelines for pandemic response. Avian influenza conditions are in flux and, accordingly, the government's measures for responding are subject to alteration at any time.

Employers also should ensure that their pandemic response plan covers the basic aspects of emergency planning in a way that employees can understand. The following are some questions that a business's pandemic response plan should address:

1. Does the response plan designate a person within the company who is responsible for pandemic contingency planning?
2. Does the response plan designate a contact person for employees in case emergency conditions disrupt communications?
3. Does the response plan identify the company's leave policies and outline in a clear and understandable fashion the steps an employee must take to qualify for leave?
4. Does the response plan identify a back-up arrangement if the company's IT person becomes ill and is unable to provide assistance and ensure the proper storage of electronic data?
5. In a similar vein, will the pandemic response plan include a pre-pandemic cross-training program for employees?
6. Does the response plan provide any guidelines for employees who are stranded due to business travel?
7. If the response plan provides for work absenteeism options, such as telecommuting or shift-swapping, does it outline the procedure for employees to follow if they wish to engage in these optional forms of working?
8. Does the response plan provide for actions an employee should take if schools and daycare centers are suddenly closed? What should an employee do if these closures will continue for an extended period?
9. Does the response plan outline the company's conditions for business closure and re-opening?

10. Does the response plan summarize a contingency plan for paying employees their wages if banks or financial institutions are closed as a result of emergency conditions?

These concerns, and many others, should be addressed clearly and concisely. Once approved, the pandemic response plan should be distributed to all employees in either the employee handbook or a special publication. Employers also should maintain a copy of the response plan on their premises for easy access.

Conclusion

In the very worst of pandemic scenarios, employers may be called on to be creative and flexible beyond the requirements of employment law to assist employees and maintain a stable workforce.⁵⁵ Expanded employee assistance, leave and attendance policies, extra efforts to communicate about benefits, and arrangements for the continued payment of wages during facility shutdowns can be instrumental in maintaining a loyal workforce. As employers become more attuned to the significant risks of pandemics, prudent planning for such contingencies will become a normal part of their emergency preparedness.

Notes

1. The Trust for America's Health and the Robert Wood Johnson Foundation's sixth annual "Ready or Not? Protecting the Public's Health from Diseases, Disasters, and Bioterrorism Report," released in December 2008, rated Colorado seven out of ten on health emergency preparedness capabilities. "Protecting the Public's Health from Diseases, Disasters, and Bioterrorism" (Dec. 2008), available at healthyamericans.org/reports/bioterror08. However, recent news reports place avian influenza on the front page of pandemic concerns. *USA Today* reported on January 26, 2009, that a Chinese teenager died of bird flu, bringing the country's death toll to five this year. "China Reports Fifth Bird Flu Death This Year," *USA Today* (Jan. 26, 2009), available at www.usatoday.com/news/world/2009-01-26-china-bird-flu_N.htm. *The New York Times* reported on January 3, 2008: "Egyptian authorities and The World Health Organization announce that four women died in Egypt of avian flu in the last week in unrelated cases." McNeil, Jr., "Egypt: 4 Women Die of Bird Flu," *The New York Times* (Jan. 3, 2008), available at query.nytimes.com/gst/fullpage.html?res=9D04EEDD1131F930A35752C0A96E9C8B63&sc=2&sq=Egyptian%20%20avian%20flu&st=cse.

2. U.S. Department of Health and Human Services (HHS), Centers For Disease Control & Prevention (CDC), "Questions and Answers About Avian Influenza (Bird Flu) and Avian Influenza A (H5N1) Virus" (2006), available at www.cdc.gov/flu/avian/gen-info/qa.htm.

3. World Health Organization (WHO), "Ten Things You Need to Know About Pandemic Influenza" (2005), available at www.who.int/csr/disease/flu/pandemic10things/en/index.html.

4. *Id.*

5. *Id.*

6. *Id.*

7. HHS CDC, "Avian Influenza: Current Situation" (2007), available at www.cdc.gov/flu/avian/outbreaks/current.htm; WHO, "Epidemiology of WHO-Confirmed Human Cases of Avian Influenza A(H5N1) Infection," 81 *Weekly Epidemiological Record* 249, 249 (2006), available at www.who.int/wer/2006/wer8126/en/index.html.

8. WHO, Cumulative Number of Confirmed Cases of Avian Influenza A (H5N1) Reported to WHO, Week of March 30, 2009, available at www.who.int/csr/disease/avian_influenza/country/cases_table_2009_03_30/en/index.html/.

9. WHO, *supra* note 3.

10. HHS CDC, *supra* note 7.

11. WHO, *supra* note 3.

12. *Id.*
 13. *Id.*
 14. *Id.*
 15. *Id.*
 16. *Id.*
 17. *Id.*
 18. *Id.* at § 1910.134 (a) to (o).
 19. *Id.* at § 654(a). Colorado employers also have a common law duty “to exercise ordinary care in seeing that the employee is provided with a reasonably safe place in which to work.” *Gordon v. Clotworthy*, 257 P.2d 410, 411 (Colo. 1953).
 20. U.S. Department of Labor, Occupational Safety & Health Administration (OSHA), “OSHA Guidance Update on Protecting Employees from Avian Flu (Avian Influenza) Viruses” (2006), available at www.osha.gov/dsg/guidance/avian-flu.html.
 21. HHS CDC, “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.
 22. HHS CDC, “Planning Resolution Between Secretary of Health and Human Services Michael O. Leavitt and Governor Bill Owens of Colorado” (2006), available at www.pandemicflu.gov/plan/states/colorado.html.
 23. Colorado State Emergency Operations Plan, Annex 1 Pandemic Incident (2007), available at https://dola.colorado.gov/dem/operations/seop2007/seop_2007.htm.
 24. *Id.* at 2.
 25. *Id.* at 5-7.
 26. *Id.* at 3.
 27. *Id.*
 28. *Id.*
 29. *Id.*
 30. *Id.* at 4.
 31. *Id.*
 32. Denver Police Foundation, Public Safety Program, “Colorado Emergency Preparedness Partnership” available at www.denverpolicefoundation.org/pages/emergency-preparedness-partnership.html.
 33. *Id.*
 34. *Id.*
 35. The Department of Homeland Security recommends that businesses adopt practices that encourage sick employees to stay home and anticipate how to function with a significant portion of the workforce population absent due to illness or caring for ill family members. See Department of Homeland Security, “Plan to Stay in Business,” available at www.ready.gov/business/plan/influenza.html.
 36. Employers should be aware that procedures set forth in an employee manual or handbook may constitute an implied contract, unless the manual or handbook contains a clear disclaimer of any contractual rights. *Jaynes v. Centura Health Corp.*, 148 P.3d 241, 248 (Colo.App. 2006).
 37. Havice-Cover, “Planning For Pandemic Influenza,” Colorado Division of Mental Health, Disaster Preparedness and Response, available at www.cdhs.state.co.us/dmh/Documents/HR_Planning_for_Pandemic_Influenza.ppt#256,1,Planning for Pandemic Influenza.
 38. Health Insurance Portability and Accountability Act of 1996, Pub.L. 104-191, 110 Stat. 1936.
 39. 45 C.F.R. §§ 160 and 164.
 40. Generally speaking, an occupational disease is compensable under the Colorado workers’ compensation statute if: (1) the employer is a cov-

ered employer and employee is a covered employee; (2) at the time of the injury, the employee is performing service arising out of and in the course of his or her employment; and (3) the injury or death is proximately caused by an injury or occupational disease arising out of the course and scope of employment. CRS § 8-52-102(1). For example, avian influenza likely would be compensable if a doctor or nurse contracted the disease while providing care as a regular part of his or her job duties.

41. In this regard, employers must be aware of the risk of possible racial and national origin discrimination if groups of workers in affected industries (e.g., poultry processing) who must be sent home are predominantly from a particular ethnic or racial group.

42. See HHS CDC, *supra* note 21 at 47.

43. *Id.*

44. 29 U.S.C. §§ 2601 to 2654; 29 C.F.R. §§ 825.100 to .800.

45. The term “serious health condition” is defined at 29 U.S.C. § 2611(11) and has been expanded by recent revisions to the Family and Medical Leave Act of 1993 (FMLA) Regulations that became effective January 16, 2009. See “Relief in Sight? DOL Issues Final FMLA Regulations,” *Little ASAP* (Nov. 2008), available at www.littler.com/PressPublications.

46. See, e.g., *Miller v. AT&T Corp.*, 250 F.3d 820, 832-33 (4th Cir. 2001) (holding that flu symptoms and treatment constituted serious health condition requiring FMLA leave).

47. But 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 twelve weeks of leave if an employer fails to designate time as FMLA qualifying.

48. 42 U.S.C. §§ 12101 to 12213; CRS § 24-34-402. In September 2008, President George W. Bush signed the ADA Amendments Act, which makes it easier for many employees to be covered by the Americans with Disabilities Act (ADA), particularly under the “perceived as disabled” provisions. See “Congress Tells the Courts How to Interpret The ADA,” *Little ASAP* (Sept. 2008), available at www.littler.com/PressPublications.

49. 29 C.F.R. § 1630.9.

50. 29 U.S.C. §§ 1001 to 1461.

51. See, 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).

52. *Id.*

53. 29 U.S.C. §§ 201 to 219.

54. 29 C.F.R. § 785.16(a) (2005) (“[p]eriods during which an employee is completely relieved from duty, and which are long enough to enable him to use the time effectively for his own purposes, are not hours worked”). Generally speaking, if an employer “suffers or permits” the employee to work, knowing or acquiescing in the performance of work, and such work benefits the employer, the work is compensable. *Id.* at § 785.11. Subject to limited exceptions, nonexempt employees are entitled to overtime for hours worked in excess of forty hours per week, twelve hours per day, and twelve consecutive hours. 7 CCR 1103-1.

55. Prudent planning for such pandemic contingencies will become a normal part of an employer’s emergency preparedness. Creative approaches to preparedness can be developed using the current voluntary National Fire Protection Association (NFPA 1600) Standard on Disaster/Emergency Management & Business Continuity (2004), which is available at www.nfpa.org/assets/files/PDF/NFPA1600.pdf. This standard has been endorsed by the U.S. Department of Homeland Security. ■

