

# Preparing the workplace for a pandemic: part 1

*Editor's Note: A similar article by Donald W. Benson and Gina M. Cook appeared in the Tennessee Bar Journal, February 2008, Vol. 44, No. 2, [http://www.tba.org/Journal\\_TBArchives/tbj-2008\\_02.html](http://www.tba.org/Journal_TBArchives/tbj-2008_02.html).*

**H**ow should Indiana employers prepare their workplaces for possible pandemics of avian influenza, Severe Acute Respiratory Syndrome (SARS) or illness spread by bioterrorism? Is the risk of a pandemic illness significant enough to merit the devotion of time and resources necessary to secure the continuity of business operations?<sup>2</sup> What is the employer's role in promoting quarantine effectiveness, social distancing or preventative hygiene?

Is the near hysteria over the possibility of a pandemic caused by avian influenza or another similarly contagious illness merely the latest version of doomsday forecasts, 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. Almost every company of significant size devoted considerable amounts of management and IT time and capital to achieving 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 will encourage similarly creative business and legal planning that will not only help to minimize the effects of any such pandemic, but will also foster the type of productivity gains that resulted from

the attention devoted to the threat of Y2K.

This two-part article examines the nature and threat of the pandemic occurrence of a disease such as avian influenza and its possible effects on Indiana business operations. It then discusses pertinent federal and Indiana state regulations and guidelines, including the "State of Indiana Department of Health Pandemic Influenza Response Plan." Finally, the second part of the article highlights some of the major legal and logistical issues on which counsel should advise business clients in an effort to ensure that they are properly prepared for a possible pandemic.

## **Pandemic: a global outbreak of disease**

The United States Centers for Disease Control and Prevention (CDC) has set forth three conditions that must exist in order 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.<sup>3</sup> A pandemic results when these three factors converge with regard to a specific disease.

There were three influenza pandemics in the previous century: "Spanish influenza" in 1918, "Asian influenza" in 1957 and "Hong Kong influenza" in 1968.<sup>4</sup> The 1918 pandemic killed an estimated 40 to 50 million people worldwide.<sup>5</sup> Although the 1918 "Spanish influenza" was exceptionally deadly, the two subsequent pandemics also caused significant human death, including an estimated two million deaths in 1957 and one million deaths in 1968.<sup>6</sup>

Currently, public health officials are alarmed over the pandemic potential of the current strain of avian influenza, H5N1. Although avian influenza viruses primarily affect birds, on rare occasions these viruses can infect other species, including pigs and humans.<sup>7</sup> H5N1 has been spread by bird migration and commerce into the domestic and wild bird populations of 50 countries in Asia, parts of Europe, the Middle East and Africa.<sup>8</sup> Transmission from birds to humans has been relatively rare, but 372 confirmed cases resulted in 235 deaths in a wide geographic area, including Azerbaijan, Cambodia, China, Djibouti, Egypt, Indonesia, Iraq, Thailand, Turkey and Vietnam.<sup>9</sup>

An influenza pandemic occurs when a new virus subtype emerges that has not previously circulated in humans and "starts spreading as easily as normal influenza – by coughing and sneezing."<sup>10</sup> Public health experts are particularly concerned that H5N1 might ultimately 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.<sup>11</sup> 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.<sup>12</sup> This lack of immune defense makes it likely that people who contract this type of influenza will experience more serious symptoms than that caused by

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normal influenza, to which humans have already been exposed.<sup>13</sup>

**What is the threat of the occurrence of a pandemic and potential level of 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 50 years ago. Many more American companies now have their own sales, logistics, operations and financial employees who regularly travel to visit overseas plants or the offices and facilities of their vendors or buyers. Similarly, personnel from these vendors and buyers are making onsite calls to companies in the United States. The prevalence of these international trips has led the World Health Organization (WHO) to estimate that a global pandemic

for a highly contagious airborne disease like avian influenza could reach pandemic distribution in as little as three months.<sup>14</sup>

The WHO is currently working under three assumptions with regard to planning for a possible pandemic. The first assumption is that a pandemic would spread to all continents in less than three months.<sup>15</sup> The second assumption is that significant portions of the world's population would require medical care. The third assumption is that medical supplies will be inadequate in all countries due to limited supplies of vaccines and antiviral drugs.<sup>16</sup> Based on the comparatively mild 1957 influenza pandemic, the WHO projects approximately 2 million to 7.4 million deaths worldwide.<sup>17</sup> 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 have generally occurred in two or three waves, so that not all countries experienced the same level of disruption at the same time.<sup>18</sup> 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 at home, but with the ability to maintain near-normal operations; and (3) near total absenteeism at home, 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 company's operations in the United States and companies in other areas of the world in which the pandemic is most likely to originate. Many American companies are now directly a part of, or directly affected by, the global economy. These companies sell to or buy from locations in other countries. If those 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 American plants and operations to stay open in the United States will be affected.

Overall, not only could the lead time for influenza pandemic planning be extremely short, but uncertainty regarding the level of disruption that a particular virus may pose makes the problem even more vexing for planners. SARS was ultimately contained far short of causing massive deaths and disruptions to worldwide commerce. To date, the spread of smallpox or anthrax through bioterrorism has been largely avoided. Nevertheless, company 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

Federal regulations and guidelines issued by the Occupational Safety and Health Administration (OSHA), the United States Department of Agriculture (USDA) and the CDC may play a key role in shaping how companies in the United States respond to a pandemic. Government agencies may be expected to build upon this existing framework<sup>19</sup> in developing new regulations in response to an emerging disease threat.

In a pandemic scenario, OSHA's blood borne pathogens standard and respiratory protection standard<sup>20</sup> would come into play. In addition, the "general duty" clause of the Occupational Safety and Health Act<sup>21</sup> 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 various types of persons who may be affected by an avian influenza pandemic, such as those who clean areas affected by the virus, airline personnel and citizens living abroad.<sup>22</sup>

Given the fact that the source of a virus is often birds or animals, the USDA also 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 Asian countries that experienced an outbreak of the virus.

In February 2007, the CDC issued new community standards for mitigating an avian flu pandemic.<sup>23</sup> 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 also include closing schools and daycare facilities for up to 12 weeks, canceling public gatherings, advocating 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 one through five, much like the Saffir-Simpson scale used by the National

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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 state government regulations and guidelines**

In addition to, and in conjunction with, federal regulations and guidelines, the state of Indiana is working with the U.S. Department of Health & Human Services (HHS) to maintain its own regulations and guidelines to manage pandemic conditions within Indiana. On March 23, 2006, Indiana hosted a statewide pandemic flu summit to discuss the state's preparedness to respond

to a possible influenza pandemic. Then-Department of Health & Human Services ("HHS") Secretary Mike Leavitt and Gov. Mitch Daniels signed a Planning Resolution that outlined HHS and Indiana's shared and independent responsibilities for pandemic planning.<sup>24</sup>

Indiana introduced its Pandemic Influenza Plan ("Indiana Plan") in August 2005 and updated it in October 2006.<sup>25</sup> The Indiana Plan was implemented through the cooperation of several state agencies, including the Indiana Department of Health, the Governor's Office, the Indiana Department of Homeland Security, the Indiana Department of Agriculture and the Indiana Department of Natural

Resources.<sup>26</sup> The purpose of the Indiana Plan is to "provide an overview of the many medical and public health issues related to a pandemic."<sup>27</sup>

Indiana developed its plan using two CDC modeling programs that provide estimations on different segments of a pandemic impact.<sup>28</sup> In the event of a pandemic, relying on population, age distribution and medical resources, it is estimated that Indiana would experience a 25 percent attack rate. Translated into real numbers, the 25 percent impact implies that Indiana citizens would be faced with 20,823 hospitalizations and 4,110 deaths.<sup>29</sup>

The Indiana Plan contemplates that a pandemic will likely lead to shortages in medical personnel and medical resources, such as medication and hospital bed space.<sup>30</sup> The Plan also anticipates that social containment measures, including social distancing, restrictions on mass gatherings and public events, isolation of symptomatic individuals and individual or group quarantine, will be needed to curtail spread of the outbreak. Indiana Code section 16-41-9-15 details Indiana's requirements for legally isolating or placing an individual who is believed to have been exposed to or infected with a dangerous communicable disease in quarantine. The Indiana Plan contemplates the needs of special populations, including individuals in prisons or jails, juvenile detention centers, hospices, residential homes and long-term care facilities. The Department of Health will provide information and guidance on protective measures for these special populations.<sup>31</sup>

The Indiana Department of Health has established a command structure for pandemic influenza consisting of four branches: operations, logistics, planning and

finance administration.<sup>32</sup> Each of these branches plays a key and distinct role in implementing Indiana's preparedness plan. Indiana's Plan has also instituted strategies to monitor influenza activity in the state, has divided the state into 10 Public Health Preparedness Districts and has launched alternate care sites equipped to provide mass care during a pandemic. Protection of Indiana's healthcare workforce, including the use of infection control devices, is a key component of the plan.<sup>33</sup> Indiana's overall goal is to educate the medical community and general public, since education is "the primary means by which the effects of a pandemic will be mitigated in Indiana."<sup>34</sup>

In August 2007, the Center for Bioethics introduced its findings on the possible ethical issues that may arise in a pandemic flu preparedness plan and issued several recommendations to help protect the state from any liability caused by its preparedness plan.<sup>35</sup> Possible ethical concerns may arise with allocation of scarce resources and whether to consider social role or age as a basis for allocation, adoption of common procedures in implementing different phases of the Indiana Plan, addressing issues of sanctions for absenteeism and ethical concerns with the use of control measures. Several recommendations include the adoption of a "high expectations, no punishment" approach to absenteeism, implementing a care treatment approach that rejects the consideration of age or social role as relevant criteria and developing a protocol for all healthcare institutions, which will take effect upon declaration of a statewide pandemic influenza emergency by the governor.<sup>36</sup> 📌

*Author's Note: Next month, Part 2 will highlight the major legal and*

*logistical issues on which to advise company clients to ensure that they are properly prepared for a pandemic.*

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## Preparing the workplace for a pandemic: part 2

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Part 1 of this article (at pp. 25-29, *Res Gestae*, March 2009) focused on the nature and threat of a pandemic occurrence on Indiana companies. This second part highlights the major legal and logistical issues on which to advise company clients to ensure that they are properly prepared for a pandemic.

Employers who prepare for a possible pandemic will need to think of a broad range of issues associated with disaster planning. Preparation should take into account both federal and Indiana directives. When drafting a pandemic preparation plan, employers should include procedures for

handling employees who become ill 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. Employers also should consider implementing health and medical initiatives, such as disease screening and vaccination programs. Given that large numbers of employees may be absent from the workplace in the event of 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 of the work site. 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 a communicable disease policy and related procedures as one of the first planning measures to implement in advance of any potential pandemic. Attorneys should advise their clients to consider adopting some version of the following employee policy, tailored, as appropriate, to meet individual company needs and the dangers confronted by the client's specific employees:

#### Communicable Illness

In order to help keep [company] safe, we need your help. If you are (a) diagnosed with an illness that is communicable in our workplace such as active TB (tuberculosis) or SARS (severe acute respiratory syndrome), or avian flu, (b) if you believe you may have been exposed to a person so diagnosed, or (c) 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, obviously, full confidentiality cannot be guaranteed under these circumstances.

### Travel and quarantine policies

Companies also should consider their policies regarding foreign travel. Policies should state that travel should be curtailed, in accordance with advisories issued by the CDC and the United States

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 to follow recommended health precautions.

The potential for the imposition of quarantine for travelers to certain areas also must be considered. If an employee travels to a region for which quarantine upon return home is required or advisable, the employer should request that the employee inform his or her supervisor or human resources department immediately so that home work assignments or paid administrative leave can be arranged. If an employee travels on personal business to a region requiring quarantine upon his or her return home, the company should consider allowing the employee to either 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 work site.

The Indiana Plan recommends that companies consider setting a protocol for the conditions triggering a business closure and establishing plans for how to cope with a period of closure.<sup>1</sup> Mandatory closure of gatherings of more than 100 persons may be ordered during a severe pandemic (defined as one that kills roughly one in 50 ill persons).<sup>2</sup>

### Compliance with HIPAA

The Privacy Rule regulations issued by the Department of Health & Human Services under



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the Health Insurance Portability & Accountability Act of 1996 (HIPAA)<sup>3</sup> require that an employer protect the privacy of its employees' personal health information. Companies should consult with legal counsel to determine which diseases an employee or potential employee must disclose to the employer and who will have access to the information provided. When there is a need to inform other employees of a possible workplace exposure, every effort must be made to maintain the privacy of the infected employee.<sup>4</sup>

### Worker's compensation

Employers should ensure that their worker's compensation insurance premiums are paid in full. Without the worker's compensation exclusive remedy for workplace injuries, employers may be vulnerable to creative tort claims, such as negligence or wrongful death. The Indiana Worker's Compensation & Occupational Diseases Act provides compensation to employees who are disabled or die from occupational disease arising out of and during the course of employment.<sup>5</sup> Employers should consult with counsel about whether the Worker's Compensation Board is available in the states in which they employ workers and pay particular attention to states where the company's external sales representatives are based.

### Clarify leave policies

Employers have a tendency to think of leave policies as a benefit that is ripe for employee abuse and may initially 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. First, there may be employees who have traveled for business who find them-

selves subject to quarantine but who can work from home. Second, there may be ill employees or employees caring for ill family members that should remain at home in order to reduce the risk of infection to others.<sup>6</sup> Third, there may be ill employees who will come to work and who will then need to be sent home to keep them from spreading the infection. Fourth, under the new policies issued by the CDC, schools and daycare facilities may be shut down for an extended period of time, and employees may be without any means of available child care. Finally, there may be some employees who are too afraid to venture out in public for fear of contracting illness.

In some or all of these situations, both the CDC's and Indiana's response plans stress that employers should consider how to use leave policies to (1) promote 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 worker – go to work and risk becoming ill or stay home from work and risk losing a job and ability to support a family. According to a 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 childcare so that at least one employed adult in their household could go to work if schools and daycare facilities were closed for an extended period of time.<sup>7</sup> 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 10 days.<sup>8</sup>

An employer's pandemic response plan should ensure that leave policies address the needs of the employer as well as the employee. Leave should be employed in such a way as to limit unnecessary social interaction, but also minimize the more troubling effects of employee absenteeism on company operations and an employee's financial situation. Paid leave, or unpaid leave with health benefits, can mean the difference in maintaining a workforce in the area or experiencing significant employee turnover. Avoiding turnover can be particularly significant as a company attempts 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 there is a leave plan in place and that the plan has been communicated to employees will help to minimize the impact of workplace absenteeism on both the company and its employees, whether the emergency is a pandemic or a natural disaster such as Hurricane Katrina.

In considering leave issues, business clients should be counseled on the requirements of applicable federal, state and local leave laws that govern paid or unpaid leave for ill 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 articulate the following items: (1) how the employee requests a 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 401k contributions,

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vacation pay, etc.) are provided or continue to accrue during the leave period; and (5) when the leave is exhausted, whether and when the employee will be allowed to return to work.

### **Statutes and regulations that may affect leave policies**

#### *Family & Medical Leave Act*

The federal Family & Medical Leave Act of 1993 (FMLA) and implementing regulations<sup>9</sup> may have a significant impact on leave policies. If the employer has more than 50 employees at a location, and an employee who has requested leave has worked at least 1,250 hours within the last 12 months for that employer, the FMLA provides that the employee can elect to take up to 12 weeks of unpaid leave due to a “serious health condition.”<sup>10</sup> Influenza that requires continuing treatment by a physician over a three-day period will likely be considered a protected “serious health condition” that triggers the FMLA right to return to a substantially equivalent job when the leave ends.<sup>11</sup> If the employee is absent

from the workplace for several months, but was never told that this absence exhausted the FMLA leave period, the employer’s obligation to reinstate the employee may extend far into the future.<sup>12</sup>

#### *Americans with Disabilities Act*

Employees who suffer permanent health problems affecting a major life activity like breathing may be entitled to protection under the Americans with Disabilities Act of 1990 (ADA).<sup>13</sup> Once the ADA-protected employee returns to work, the employer will likely 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.<sup>14</sup>

#### *ERISA and accrued leave and benefit policies*

In 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 paid leave at a time when they can least afford it.

In examining leave and benefit policies, the Employee Retirement Income Security Act of 1974 (ERISA), the federal statute that governs certain types of employee benefit plans, must be considered.<sup>15</sup> Prudent employers will confirm that the proper, updated Summary Plan Descriptions (SPD) of its benefit plan (Plan) are distributed to Plan participants and their covered dependents. Otherwise, Plan provisions allowing the Plan to be changed may not be enforceable.<sup>16</sup> Worse still, 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 some previous, and more generous, version of the Plan.<sup>17</sup> Further, in the event of a pandemic, a self-administered Plan will have an immediate need to increase the size of its administrative staff to handle the anticipated increase in benefit requests and appeals. Unfortunately, under ERISA, the question of whether the participant is entitled to benefits will most often 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 enhance the record through discovery. Accordingly, it is crucial that the Plan allocate sufficient resources to fully develop the administrative record, or benefits may be later

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awarded by the courts to otherwise unqualified applicants.

***Examine pay and telecommuting rules***

A pandemic may result in many employees working from home. Telecommuting employees who are non-exempt employees under the Fair Labor Standards Act of 1938 (FLSA)<sup>18</sup> can create off-the-clock and overtime issues for employers. The employee who is performing the normal work activities of the job over 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 of regular work hours. These off-the-clock activities may push the total hours worked in a week beyond 40, entitling the

employee to overtime pay at one-and-a-half times the regular rate of pay.<sup>19</sup> In order to avoid problems under the FLSA, employers can require employees to check e-mails or to 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 40 hours a week.

**Communicating pandemic response plan to employees**

Before a company presents a pandemic response plan to its employees, it should ensure that the plan's contents are compliant with state and federal laws and as up to date with local, state and federal guidelines for pandemic response as possible. The fluctuation in conditions, especially in relation to

avian influenza, is ongoing and worldwide, and the government's measures for responding are subject to alteration at any time.

Employers should ensure that their pandemic response plan covers the basic aspects of emergency planning in a way that employees can understand. The following is a partial list of concerns that a company'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 under-

standable 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 facilities are suddenly closed and what an employee should do if these closures will continue for an extended period of time?

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 in case 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 either via the employee handbook or a special publication. Each company should also maintain a copy of the response plan on its premises for quick reference.

## Conclusion

In the very worst of pandemic scenarios, employers may be called upon to be creative and flexible beyond the requirements of employment law in order to assist employees and maintain a stable work force.<sup>20</sup> Expanded employee assistance, flexibility with leave and attendance policies and extra efforts to communicate about benefits and provide arrangements for the continued payment of wages during facility closures can be instrumental steps 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. 📌

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1. "State of Indiana Department of Health Pandemic Influenza Response Plan," July 2006, pp. 156-57.

2. *Id.*, p. 157.

3. 45 CFR §§ 160, 164 (2005).

4. *See id.* §164.512(b).

5. Ind. Code §22-3-7-2.

6. 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.

7. 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 currently voluntary National Fire Protection Association (NFPA 1600) *Standard on Disaster/Emergency Management & Business Continuity* (2004), which is available at <http://www.nfpa.org/assets/files/PDF/NFPA1600.pdf>. This standard has been endorsed by the U.S. Department of Homeland Security.

8. *Id.*

9. 29 U.S.C. §§ 2601-2654 (2005); 29 C.F.R. §§ 825.100-.800 (2005).

10. The term "serious health condition" is defined at 29 U.S.C. §2611(11) (2005).

11. *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).

12. *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 12 weeks leave if an employer fails to designate time as FMLA qualifying.

13. 42 U.S.C. §§ 12101-12213 (2005).

14. 29 C.F.R. §1630.9 (2005).

15. 29 U.S.C. §§ 1001-1461 (2005).

16. *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).

17. *Id.*

18. 29 U.S.C. §§ 201-219 (2005).

19. "Periods 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." 29 C.F.R. §785.16(a) (2005). 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, then the work is compensable. *Id.* §785.11.

20. *See supra* note 7.