An Employer’s Top 10 Considerations for Pandemic Preparedness

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On October 8, 2014, Thomas Eric Duncan ("Duncan"), the first person in the United States diagnosed with the Ebola virus, passed away in a Dallas, Texas hospital.² Less than a week later, two members of the Texas-based nursing team who cared for him tested positive for the Ebola virus, sparking nationwide concern about the potential for an Ebola epidemic within the United States.³ At that time, the risk of a United States worker contracting the Ebola virus seemed highest in the health care setting because this was the place where a symptomatic patient was likely to turn.⁴ But even those working outside of a health care setting could be at risk of contracting Ebola if a symptomatic co-worker returned to the workplace.⁵ Duncan’s death and the announcement about the sick nurses, who contracted Ebola from treating him, occurred during a time of heightened concern about influenza ("flu"). It was the beginning of “flu season” so many employees turned to their employers with questions about the safety of their working environment and the employer’s plan for dealing with a potential

⁵ See id. (identifying some risk for those in close contact in community settings with infected, symptomatic person).
Ebola pandemic in the United States.\textsuperscript{6} The following are considerations for employers when establishing a response plan for Ebola or other pandemic situations.

1. Have a Plan Before a Pandemic Hits

Identify a pandemic response team ("PRT"), with cross-functional membership from your business leaders, human resources, finance and legal teams, to create a company-wide communication plan that will address your employees' frequently asked questions. If you have a global workforce, your PRT should include leadership from outside of the United States to address exceptions and nuances in employment laws that are apt to arise. Separate communications may be created for supervisors to arm this segment of the workforce with compliant responses to foreseeable situations. The PRT should also discuss and create a business continuity plan by reviewing essential job functions and identifying key personnel and roles that are required to keep a business running in the event of a pandemic.

2. Communicate and Implement Preventative Measures

Employers should reinforce pandemic preventative measures such as hand-washing and respiratory etiquette, and encourage employees to stay home if they are ill. Employers may choose to sponsor an onsite flu clinic or encourage employees to consult with their healthcare provider about the availability of seasonal flu shots. Offices should keep tissues and cleaning products readily available and consult with cleaning staff to ensure that high-traffic office areas, like bathrooms, doors, and kitchen areas, are thoroughly cleaned every evening. While most offices will be focused on preventing transmission of the flu, the Centers for Disease Control and Prevention ("CDC") provides helpful guidance on prevention, cleaning and decontamination measures if an employer has concerns that an individual infected with the Ebola virus has had contact with the employer's office space.\textsuperscript{7}

3. Create a Centralized Forum for Employees to Raise Questions or Concerns

Human Resources departments ("Human Resources") should be readily

\textsuperscript{6} See Flu Activity During the 2013-2014 Season, CENTERS FOR DISEASE CONTROL (Aug. 26, 2014), http://www.cdc.gov/flu/pastseasons/1314season.htm (providing facts and figures from previous year's flu season).

\textsuperscript{7} See Information on Cleaning and Decontamination, CENTERS FOR DISEASE CONTROL (Dec. 18, 2014), http://www.cdc.gov/vhf/ebola/prevention/cleaning-and-decontamination.html (linking to various resources for Ebola cleaning and contamination guidance).
accessible to respond to employee questions that may be raised. Human Resources should track the questions and solutions implemented to ensure consistency in the employer’s response. Human Resources should also be involved to prevent managers from trying to navigate employment laws on their own, which will vary, given the employee’s respective geography. An employer should also involve Human Resources to help ensure that the employee’s potential medical condition is kept confidential. Additionally, when it comes to handling a suspected case of Ebola in the workforce, the “right response” will depend on the facts. There is no “one size fits all approach” in pandemic situations. It is always a wise decision for Human Resources to involve legal counsel to review a proposed course of action to make certain that it is legally compliant, especially if the proposed solutions could impact the terms and conditions of an individual’s employment.

4. Providing Leave under the Family and Medical Leave Act

If an employer has a United States employee who contracts the Ebola virus and the employee meets the eligibility requirement for leave under the Family and Medical Leave Act (“FMLA”) or state law equivalent, the employee will have a serious health condition that will permit them to take up to twelve weeks of unpaid, job-protected leave. Employers may also have a short-term disability plan that will provide the sick employee with some compensation while he or she is out of work. If the employee contracted the Ebola virus in the scope of his or her employment, the employee may be eligible for workers’ compensation benefits.

5. Providing Leave under the Americans with Disabilities Act

Employees who contract Ebola and who have exhausted job-protected leave under the FMLA, or those who may not have been FMLA eligible at the time of their illness, could also be eligible for extended leave or leave as a reasonable accommodation under the Americans with Disabilities Act, as amended (“ADA”). An employee diagnosed with Ebola may likely be considered a qualified individual with a disability

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8 See Family and Medical Leave Act, 29 U.S.C. § 2912 (1993) (entitling workers to twelve week time frame and legislating applicable circumstances). See, e.g., CONN. GEN. STAT. § 31-57(s) (permitting paid sick time for service workers).
9 See generally MASS. GEN. LAWS. ch. 152, § 6 (2015) (describing Massachusetts’s workers compensation statute in regards to illness within scope of employment).
under the ADA, so additional, job-protected leave is likely to be granted unless the employer can demonstrate that the additional time off would create an undue hardship for the employer.11

6. Medical Inquiries Must Comply with the ADA

While providing leave under the FMLA and ADA are relatively easy solutions for dealing with confirmed cases of Ebola, the more complicated situation arises for employers when the employer has an employee who is not sick, but the employer has a reasonable belief that the employee may have been exposed to the Ebola virus (e.g., the employee has recently returned from a high-risk area like Sierra Leone).12 In this situation, the employer can and should ask certain questions: Where did the employee go? Did the employee have contact with anyone who was caring for someone with Ebola? Is the employee experiencing any flu-like symptoms at this time? Employers should tread carefully with this final question to make sure that the line of questioning is not so broad that it is likely to inadvertently reveal an employee’s other disabilities. Such a line of questioning could violate the ADA because employers may only make disability-related inquiries or conduct medical exams when they are job-related and consistent with business necessity.13 Even requiring an employee to monitor his or her temperature can be considered a medical examination, so an employer will want to ensure that it has sufficient facts to support such a request.14

7. Considerations when “Quarantining” an Employee

Unless an employee happens to work for the CDC, employers cannot

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quarantine employees in the true sense—that is the government’s job.15 Employers can, however, ask the employee to stay home from work.16 An employer may be concerned that an employee may have been exposed to the Ebola virus and may not be comfortable allowing the employee to return to the workforce. If so, the employer should consider allowing the employee to telecommute during the estimated twenty-one day incubation period for the Ebola virus, provided that the employee is employed in a position where the work can be performed remotely.17 If the employee is unable to telecommute during the incubation period, employers can place the employee on a leave of absence. A paid leave is more apt to mitigate any real impact to the employee, but it may not be financially practical for all employers, especially if there is a risk that multiple employees could require such a leave. Additionally, if the impacted employee is employed in a sales role, or other production-based job, and the employee misses his or her sales targets because he or she was unable to participate in job related functions for three weeks, the employee is apt to claim that he or she has been damaged. Employers should think carefully before pursuing a forced leave of absence. The ADA also prohibits discrimination against individuals who are regarded as having a disability; even if an employee placed on leave is never sick, the anti-retaliation requirements of the ADA can follow employers for some time.18 Employers should be mindful of this in the event they need to discipline or terminate an employee placed on leave, even after the Ebola risks have passed.

8. The Occupational Safety and Health Act

The Occupational Safety and Health Act ("OSH Act") contains a general duty clause which requires employers to keep the workplace free from recognized hazards that are causing, or are likely to cause, death or serious physical harm.19 Most employers

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16 Cf Pandemic Preparedness in the Workplace, supra note 14 (explaining legally acceptable prevention measures to prevent workplace flu).
19 See Occupational Safety and Health Act, 29 U.S.C. § 654 (2010) (establishing general duties of
can meet this standard by educating employees about what the Ebola virus is, how Ebola is spread, and how best to avoid Ebola. But if the employer operates in a health care setting, the employer should go one step further and provide personal protective equipment ("PPE") and train employees on proper usage.\textsuperscript{20} Where applicable, employers should review Occupational Safety and Health Administration ("OSHA") guidelines for cleaning and decontamination and if employers operate in an industry where workers touch blood, employers should ensure that employees are aware of, and operating within, OSHA’s blood-borne pathogen standards.\textsuperscript{21} Employees should also report any situation where they have a reasonable belief that the work environment presents an imminent or serious risk to health or life.\textsuperscript{22} If necessary, employers must then take remedial action and cannot require employees to return to a workplace where there is a continuing or imminent risk to life and health.\textsuperscript{23}

Employees with irrational fears about contracting the Ebola virus at work are unlikely to trigger employer liability under the OSH Act, but employers should be mindful of the OSH Act’s whistleblower provisions, which prevent retaliation against employees who bring good faith claims under the Act.\textsuperscript{24} Again, it is wise to tread carefully before an employer becomes too aggressive with an employee who will not come to work or perform certain work functions if the employee raises a legitimate workplace safety concern.\textsuperscript{25}

9. Employer Mandated Flu Shots

Anytime an employer institutes a new program where an employee must accept the terms of the program or risk termination of employment, it is not apt to be well employed and employees under Act).\textsuperscript{20} See generally 29 C.F.R. § 1910.132 (2011) (regulating provision of PPE for employees).
\textsuperscript{24} See Occupational Safety and Health Act, 29 U.S.C. § 660(c) (2010) (providing for whistleblower protections under OSH Act).
received, but what may be detrimental to employee morale is not necessarily illegal. Generally speaking, in the absence of an employment contract or collective bargaining agreement, most states will follow the “at will” employment doctrine, so employees may be terminated with or without cause or notice, at any time, for any reason, so long as the reason is not discriminatory or contrary to public policy. Outside of the health care setting, most employers do not require a fully-vaccinated workforce, but many hospitals have mandatory policies that make receipt of the yearly flu vaccine a term and condition of employee’s employment unless the employee can show that: (1) there is an underlying medical condition or disability that would pose a danger to the employee if he or she receive a flu shot; or (2) the employee raises a Civil Rights Act Title VII religious objection to receiving the flu shot. If an employee wishes to pursue one or both of these exceptions, the employer should engage in an interactive process to determine whether the employer will grant the requested reasonable accommodation and, if granted, if the employee must wear a facemask during flu season. Unlike Ebola, which is contagious when an individual is symptomatic, the flu can be transmitted days before someone is symptomatic. Despite instances of backlash from nurses and other healthcare professionals regarding a mandatory flu vaccination policy, many hospital employers will still argue that the flu shot is the best way to prevent the flu among hospital workforces.

26 See, e.g., Matthew A. Shapiro, Labor Goals and Antidiscrimination Norms: Employer Discretion, Reasonable Accommodation, and the Cost of Individualized Treatment, 32 YALE L. & POL’Y REV. 1, 25-26 (discussing background of “at-will” rule).


28 Is it Flu or Is it Ebola? CENTERS FOR DISEASE CONTROL (Nov. 13, 2014), http://www.cdc.gov/vhf/ebola/pdf/is-it-flu-or-ebola.pdf (describing differences between transmissions of flu vs. Ebola). Flu symptoms typically develop within two days of exposure. Id. Ebola cannot be spread until symptoms present. Id.

29 See, e.g., Felice J. Freyer, Brigham and Women’s Nurses Sue Over Flu Shot Mandate, BOSTON GLOBE (Sept. 25, 2014), http://www.bostonglobe.com/metro/2014/09/24/nurses-union-sues-block-proposed-flu-shot-mandate-brigham-and-women-hospital/SQBXdxd10QwTie5Fyg1d1/story.html (reporting on legal action of Massachusetts’ Nurses Association in opposition of flu vaccine mandate). See also CDC Says “Take 3 Actions” to Fight the Flu, CENTERS FOR DISEASE CONTROL (Sept. 9, 2014), http://www.cdc.gov/flu/protect/preventing.htm (recommending flu vaccine as first step in flu prevention). Healthcare workers, in particular, are encouraged to get the flu vaccine, given these healthcare workers’
10. Stay Calm and Wash Your Hands

Luckily for the United States, the Ebola virus has not reached pandemic status and the biggest risk to the health, safety and productivity of our workforce continues to be the flu.\(^\text{30}\) Each year, approximately 200,000 people are hospitalized from seasonal flu-related complications, as compared to the handful of United States employees who have contracted Ebola in the United States.\(^\text{31}\) Reinforcing simple hand-washing procedures, sponsoring voluntary flu clinics and encouraging employees to stay at home when they are ill, continues to be an employer's best option to maintain a healthy workforce. Should a major outbreak of Ebola erupt in the United States, employers should turn to the CDC and other health guidelines as a primary resource, but employers can also leverage the pandemic preparedness guidance issued by the Equal Employment Opportunity Commission in 2009, as a helpful first step.\(^\text{32}\)

The recent Ebola outbreak prompted many employers to create or revisit their pandemic plans. The preceding suggestions are designed to provide employers with a preliminary roadmap for implementing an effective pandemic plan, but employers can easily expand upon the foregoing or incorporate aspects that are apt to provide the most impact to their respective organizational structures and corporate cultures.

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\(^{30}\) See Influenza (Seasonal), \textit{WORLD HEALTH ORGANIZATION} (Mar. 2014), http://www.who.int/mediacentre/factsheets/fs211/en/ (identifying flu's toll on workforce).
