PREPARING FOR A SWINE FLU PANDEMIC: ISSUES FOR EMPLOYERS

I. Introduction.

A/H1N1 swine flu has spread to nine countries on four different continents in recent weeks, with at least 148 confirmed and many more suspected human cases. World Health Organization ("WHO"), Swine Influenza, Update 5, April 29, 2009; New York Times, World Health Organization Raises Swine Flu Alert Level, April 29, 2009. The current virus strain is transmittable between humans. The World Health Organization has raised its alert level to Phase 5, the next to highest level of alert, and reports that “[t]he situation continues to evolve rapidly.” This means that employers should not view a potential pandemic as a merely theoretical issue.

A recent U.S. government report recommended that “government entities and the private sector plan with the assumption up to 40 percent of their staff may be absent for periods of about two weeks at the height of a [swine flu] pandemic wave, with lower levels of staff absent for a few weeks on either side of the peak.” National Strategy for Pandemic Influenza Implementation Plan ("Implementation Plan"), Homeland Security Council, May 2006, at 13. The U.S. Chamber of Commerce warns that a pandemic flu could kill over a half a million people, require two million people to be hospitalized, and cost an estimated $160-$675 billion. Pandemic Planning, U.S. Chamber of Commerce.

For employers, a potential pandemic raises significant employee safety and health issues, as well as the specter of the business continuity challenges that accompany high employee absenteeism and incapacitation rates. With WHO predicting that a swine flu
pandemic is very probable, there is a high likelihood for significant international social
disruption if - or when - such a pandemic occurs.

Accordingly, just as employers plan for other natural and man-made disasters,
employers must prepare for a possible swine flu pandemic. The following article will address
some of the major legal issues that may be implicated, including occupational safety and health
laws and regulations, employee privacy and leave rights, disability discrimination, employers’
duty of care, vaccination issues, contractual obligations, and organized labor issues. Finally,
the article will address potential preventative and protective measures that employers should
consider.

II. LEGAL ISSUES.

Occupational Safety and Health Issues.

Federal and state occupational safety and health laws and regulations require
employers to protect the safety and health of employees in the workplace.

Under the federal Occupational Safety and Health Act, every employer has a general
duty to maintain a safe workplace free of recognized hazards that may cause death or serious
physical harm to employees. See 29 U.S.C. § 654 (a). The Occupational Safety and Health
Administration (“OSHA”) must prove the following elements to establish a violation: (1) a
condition or activity in the workplace presents a hazard to an employee; (2) the condition or
activity is recognized as a hazard; (3) the hazard is causing or is likely to cause death or serious
physical harm; and (4) a feasible means exists to eliminate or materially reduce the hazard.
Similarly, some states like California require every employer to provide a safe and healthful place of employment. Cal. Lab. Code § 6400. An employer must furnish safety devices and adopt safe practices and procedures which are “reasonably adequate” to meet the goals of Section 6400. *Id.* § 6401. An employer cannot require or permit “any employee to go or be in any employment or place of employment which is not safe and healthful.” *Id.* § 6402. As required by California law, “[n]o employer shall fail or neglect to do any of the following:

"a. To provide and use safety devices and safeguards reasonably adequate to render the employment and place of employment safe.

"b. To adopt and use methods and processes reasonably adequate to render the employment and place of employment safe.

"c. To do every other thing reasonably necessary to protect the life, safety, and health of employees.” *Id.* § 6403.

These general requirements would likely apply in a swine flu pandemic, so employers should have at least a basic plan to prevent the transmission of swine flu within the workplace, to train employees on disease avoidance techniques, and to handle employees who become ill at work.

California employers must maintain a written Injury and Illness Prevention Program (“IIPP”). Swine flu arguably is a “new or previously unrecognized hazard” about which California employers must provide training and instruction as part of their IIPP. *See* Cal. Lab. Code § 6401.7(c); Cal. Code Regs. tit. 8, § 3203 (a) (7).
Family and Medical Leave Act Rights.

Among other disease-control measures, the U.S. government has recommended that employers establish employee compensation and sick leave absences “unique to a pandemic (e.g., non-punitive, liberal leave), including policies on when a previously ill person is no longer infectious and can return to work after illness.” Implementation Plan at 183.

Some employers may already have such policies in place. Regardless of an employer’s leave policies, however, employers of more than 50 employees are required to provide their employees with 12 weeks of unpaid leave per year for their own serious health condition, or the serious health condition of a close relative, under the federal Family and Medical Leave Act (“FMLA”), 29 U.S.C. §§ 2601 et seq., and comparable state laws, such as California’s Family Rights Act, Cal. Gov’t Code §§ 12945.1-12945.2. Swine flu will likely qualify as a serious health condition, so that employers are required to allow eligible employees to take unpaid leave if they are suffering from swine flu or if they are caring for close relatives (a child, a spouse or parent) with swine flu.

Disability Discrimination.

Employees suffering from swine flu or who have been exposed to swine flu may be legally protected under federal and state law as disabled individuals. The Americans with Disabilities Act (the “ADA”), 42 U.S.C. §§ 12101 et seq., and other state nondiscrimination laws such as California’s Fair Employment and Housing Act, Cal. Gov't Code §§ 12900 et seq., forbid discrimination against employees who are disabled or regarded as disabled if they are otherwise qualified to perform the essential functions of their jobs, with or without a reasonable accommodation.
The ADA does not require employers to allow contagious employees to continue working (unless the employee is otherwise fit for duty and a reasonable accommodation such as telecommuting exists), but it may forbid employers from firing employees because of their illness, or from discriminating against employees who have recovered. The ADA also requires the employer to take reasonable steps to prevent any discrimination by co-workers.

**Privacy Rights.**

Under the ADA, an employer may require medical examinations so long as they are “job related” and “consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A). Employers should be cautious in requiring such examinations, however, and should not seek any information other than a simple statement regarding the employee’s fitness for duty.

If an employee has fallen ill with swine flu and has exposed others in the workplace, the employer arguably has a duty to notify the exposed co-workers, but should do so while protecting the ill employee’s privacy rights as much as possible.

**Vaccinations.**

Assuming that an effective vaccine were produced in sufficient quantities to be available to all individuals, it is far from clear that employers may legally require their employees to be vaccinated. Any mandatory-vaccination policy may also raise issues of reasonable accommodation for employees who have religious objections to such medical treatment.

**Contractual Issues.**

Employers should review and consider revising their employment contracts to include a so-called *force majeure* provision that would allow the employer to terminate employees,
otherwise contractually employed for a set term, in the event that there is a government closure of business or quarantine.

Employers should also consider contracting for additional workers through alternate or contingent workforce agreements.

Organized Labor Issues.

Employers with a unionized work force may have a duty to bargain with the appropriate labor organizations regarding any changes to the terms and conditions of employment resulting from a pandemic. Employers should also review existing terms and conditions to ensure there is a disaster management provision (e.g., the ability to retain alternative or temporary labor due to high employee absenteeism).

III. POSSIBLE PROTECTIVE AND PREVENTATIVE MEASURES.

The Homeland Security Council’s Implementation Plan and OSHA’s Guidance on Preparing Workplaces for an Influenza Epidemic (“Guidance”) include a number of useful recommendations for employers with regard to drafting and implementing protective and preventative measures. See, e.g., Implementation Plan, Chapter 9 and Appendix; Guidance at 26-28. A few of the major recommendations are discussed below.

Disease Control Methods.

First, employers should educate their employees about good hand-hygiene methods. Second, employers should evaluate their own particular physical facilities to determine what infection control supplies are necessary (e.g., soap and water, alcohol based hand sanitizer, sanitary waste receptacles), and at what stage of a possible pandemic there should be increased
cleaning of workspaces and shared equipment. Particular measures should be considered for food handling in employer-run cafeterias and in areas (such as the retail establishment counters) where employees significantly interface with the public.

**Social Distancing.**

Social distancing methods include any strategy that limits or eliminates the close physical interaction of employees with other people, such as telecommuting, staggering work shifts, canceling or limiting face-to-face meetings and conferences, and not requiring employees to travel for business.

Employers’ policies should clarify the various triggers for the social distancing methods. For example, they should address (1) when international or domestic business travel should be suspended; (2) when the employer should limit large meetings such as conferences; and (3) how the employer should protect employees who, because of their duties, must work with the public or larger groups of people.

**Travel Restrictions.**

Consider travel restrictions. Under most – but not all – circumstances, an employer may require an employee to travel to a pandemic-affected area, if such travel is required by business necessity. Should the employee refuse to travel, the employer is likely within its rights to terminate or otherwise discipline the employee, but employers should seek legal counsel before taking such a step.

**Evacuation Plan.**

Employers with expatriate employees or other employees working away from home should consider what steps they would take to evacuate those employees from affected areas.
**Quarantines.**

Governmental or employer quarantining of employees who may have been exposed to swine flu potentially raises a variety of legal issues, including: (1) disability discrimination issues under the ADA (e.g., employees may argue that they were “regarded as” having a disability and discriminated against on that basis); and (2) wage and hour issues (e.g., if nonexempt employees are quarantined while traveling on business, the employer may be required to pay for much of the time spent in quarantine, including overtime). Exempt employees who are otherwise ready and able to work arguably must be paid their normal salary while in quarantine, regardless if they are at home or traveling.

**Communication with Employees.**

To improve employee morale and control the spread of rumors, employers should consider how best to communicate their efforts to prepare for and respond to a swine flu pandemic, including information about quarantines and plant closures. Some examples include instituting regular briefing sessions and communicating via an internal company intranet site.

**IV. CONCLUSION.**

Preparing for a swine flu pandemic is complicated and presents a number of logistical and business continuity issues for employers. Given the impact of other recent disasters such as hurricanes like Katrina and Ike and the California wildfires, it is clear that employers have no choice but to safeguard their employees and businesses through careful preparation, while weighing the legal issues discussed in this article.

For additional information, please check the following resources: U.S. Department of Health and