

Chicken Soup Is Not Enough

Keep your workplace safe – from disease and liability – when employees get sick

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In the last two years, we've seen outbreaks of no fewer than four major diseases. While some of the illnesses do not result from person-to-person contact (such as Legionnaires' disease), many of them (like measles, Ebola and enterovirus) do. These diseases can cause a good deal of workplace disruption, and a number of major employment laws may be implicated when managing employee requests for time off to treat an illness. We'll touch on this – and also discuss ways in which strong company policies can help smoothly manage these potential challenges should they unfortunately arise.

Plan Ahead

Creating effective policies: An ounce of prevention, as the adage goes, can stave off much of the headache of dealing with illness in the workplace. Examples of this preparedness can include creating a full pandemic plan, outlining business continuity plans or including emergency chain-of-command information in an employee handbook. While a detailed pandemic plan is not necessary for all employers, it can be particularly helpful for employers with large workforces, those that work internationally, and those that move a large volume of people in and out of their property on a daily basis. Employee handbooks can also outline all relevant policies, including travel or office attendance restrictions,

nondiscrimination assurances, descriptions of when employees may be granted access to or barred from the workplace, and privacy-assurance statements. Of course, making sure managers properly enforce these policies will make it easier for an employer to implement them and reduce the employer's exposure to liability.

Avoiding OSHA liability: The Occupational Safety and Health Act, which is enforced by the Occupational Safety and Health Administration (OSHA), requires employers to protect employees against recognized hazards to safety or health that may cause death or serious physical harm.¹ If employees at a particular worksite are reasonably likely to be exposed to a particular illness, an employer needs to create procedures to protect those employees. Under the multi-employer workplace doctrine, employers who manage a workplace that might host workers from another employer – such as hospitals, airports or construction sites – are also responsible for addressing workplace hazards that might place these other employees at risk.² Employees who suspect the presence of health hazards in the workplace may be permitted to refuse working until the employer can objectively establish that it has developed a proper response plan.³

Chicken or alphabet soup? OSHA, HIPAA, FMLA, and ADA all factor in workplace disease policies.

Stop Illness at the Door

Beyond drafting and properly implementing workplace policies that address these issues, employers can also take active measures to stop disease from entering the workplace. For instance, employers are generally permitted to require at-will employees to get a flu shot as a condition of

employment. Employers cannot, however, force all employees to receive a flu shot if, for example, a particular employee has a religious objection or a disability covered by the Americans with Disabilities Act (ADA) that makes vaccination dangerous.⁴ Because of the possibility of these exceptions, employers may be better off encouraging employees to receive a flu shot, rather than requiring it.

Employers can also require new employees to undergo post-offer medical exams to determine their health status, particularly when an outbreak threatens. Generally speaking, such exams are only permissible if *all* employees entering the same job category are required to undergo the tests, and only as long as all information collected is kept confidential.⁵ Employers are not allowed to rescind job offers based on post-offer medical examinations unless the applicant would pose a direct threat to other employees (within the meaning of the ADA) and no reasonable accommodation could reduce the risk of exposure.⁶

Protecting employee confidentiality: It is also important for employers to remember the obligation to keep information regarding the health of any of its employees confidential pursuant to, among other things, the



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Health Insurance Portability and Accounting Act (HIPAA). Generally, employers are not permitted to disclose information about a sick employee without his or her permission.⁷ Employers may, however, disclose information about an anonymous employee's contagious disease status when such disclosure is necessary to protect potentially exposed co-workers from a true risk.⁸

Complying with Title VII: Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against applicants and employees on the basis of race, color and national origin, among other characteristics. While your handbook likely includes a nondiscrimination policy that reflects this prohibition, it should be noted that disease exposure – particularly that which is heightened by travel to certain countries – can lead to discrimination claims if, for example, the exposure results from travel to a country dealing with an outbreak of an illness and that country also happens to be an employee's country of origin.

Employee travel presents a particular challenge to employers seeking to maintain a healthy workforce. As a general rule, employees' *personal* travel cannot be restricted, although employers may freely limit business travel and ask about any potential exposure to a virus during personal travel.⁹ If exposure is suspected, employers can permit an employee to work remotely or require the employee to seek medical approval before returning, but such restrictions raise the risk of discrimination claims. Overall, concerned employers are best advised to focus on consistency, confidentiality and caution when taking any steps to keep employees healthy.

As we learned in *Maine Health & Human Services v. Hickox*,¹⁰ ensuring compliance with Title VII when facing the outbreak of an illness is often easier said than done. In *Hickox*, a Maine nurse, Kaci Hickox, was quarantined by the state after performing volunteer work to combat Ebola in Sierra Leone.¹¹ Hickox alleged that the state violated her civil rights when it discriminated against her based upon her international travels, even though she had no symptoms of Ebola.¹² Although the case eventually settled,¹³ employers need to be careful not to take action with regard to sick or potentially exposed employees based on countries they may have visited or their nationality, as well as any other protected characteristic.

Absent an employer's response plan, employees can refuse to work if health hazards exist.

Manage Disease in the Workplace

Understanding the ADA: The ADA has a significant impact on employers' health and infectious disease planning. Besides prohibiting employer discrimination, the ADA also prohibits disability-related inquiries or medical exams, except those that are job-related and consistent with business necessity.¹⁴ What qualifies as a disability under the ADA is quite broad, and many infectious diseases conceivably fit the bill.¹⁵ If an employee can satisfy this standard and show that he or she has a disability, then the ADA only permits employer actions with regards to a sick employee when the employee presents a "direct threat of harm" or a "significant risk of substantial harm" to others that "reasonable accommodations" cannot eliminate or reduce.¹⁶ The Equal Employment Opportunity Commission (EEOC) has identified four factors to use in assessing a direct threat: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.¹⁷ This test creates a high bar and depends heavily upon determinations made by the Centers for Disease Control (CDC), as well as local public health authorities.¹⁸ Employers are well-advised to closely monitor information from public health authorities before taking any action regarding workplace illness to avoid running afoul of the ADA.

Anticipating FMLA leave: The Family and Medical Leave Act (FMLA) is a federal statute that requires covered employers to provide unpaid, job-protected leave to eligible employees who request such leave for specified family and medical reasons.¹⁹ Eligible employees may take up to 12 workweeks of leave in a 12-month period for "a serious health condition that makes the employee unable to perform the essential functions of his or her job."²⁰ The definition of a serious health condition includes a period of incapacity lasting for more than three calendar days that is accompanied by health-provider care.²¹ Because FMLA

leave may run concurrently with paid sick and vacation leave, employers should consider requiring employees to utilize such paid time (when available) for at least part of their FMLA leave to minimize the impact on the business's workflow.

Reducing the risk of transmission: Minimizing the risk of transmission is most important when an employer suspects or confirms the presence of infectious disease in the workplace. In accordance with OSHA regulations, employers who notice a visibly-ill employee may force that employee to leave work until the employee has recovered, and compensation is not required absent applicable laws mandating paid sick leave.²² Moreover, the employer may request or encourage an employee to work from home during any contagious period, which the ADA considers a reasonable accommodation. Pursuant to the ADA, employers can also request a doctor's note certifying that an ill employee is fit to return to work. However, employers must be aware that the FMLA requires employers to uniformly apply this practice to all employees returning from FMLA leave.²³ If you have sick employees at higher risk for complications in the wake of infection, such as those with a pre-existing disability, they should be encouraged to telecommute even when a lower risk of contagion exists. On-site medical exams, such as taking an employee's temperature, should be avoided unless the CDC or local public health agencies have determined that a particular outbreak is severe. Again, employers should make it a priority to monitor news from relevant public health agencies, especially when there is particular risk of infection.

Besides dealing with your own employees, consider whether a sick employee potentially exposed any clients, vendors, contractors or members of the public. When considering whether to notify these third parties about any potential exposure risk, employers should again turn to the CDC or local health authorities, who will issue information classifying the level of severity of a particular illness or outbreak. Assessing the true level of risk is important prior to taking any action that could potentially cause unnecessary panic and disrupt business operations.

Determining when contagions are compensable: The workers' compensation system provides compensation benefits to employees

who suffer work-related injuries. Whether exposure to a contagion qualifies as a compensable injury is subject to relevant state workers' compensation statutes; as a general rule, courts will not categorize simple exposure to a contagious illness as a compensable, work-related injury unless the work created a unique hazard of contracting the disease.²⁴ Consequently, unless an employee can show that the likelihood of contracting a particular

illness was heightened because of the peculiar nature of his or her job, he or she is probably ineligible for workers' compensation.

Employers should make sure that they are prepared to best handle any future outbreaks. Employers can do this by creating and implementing pandemic and business continuity plans, focusing on reducing transmission, protecting any fragile or at-

risk employees, and minimizing the adverse effects on clients or supply chain partners. By following these steps – even for seasonal or low-level illnesses – employers in all industries will be well-positioned to manage difficult situations and make well-informed decisions during what can be an unexpected and stressful time.

To review the footnotes to this article, visit <http://www.metrocorpcounsel.com>