

Taking the Panic Out of Pandemic Planning

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DON'T PANIC

The H1N1 virus (swine flu) and the threat of a possible pandemic have received massive attention from the world's media and its governments. People are being told to prepare for the virus' next wave. Employers are devising pandemic plans. Governments are stockpiling antiviral medications and devising vaccination schedules. Pandemic-planning has become the buzzword of 2009.

While the World Health Organization (WHO) declares the pandemic has already arrived,¹ and media outlets have fallen in line with dutiful 'doom and gloom' projections, H1N1 has yet to develop into an actual pandemic in Canada.² Ontario's provincial status indicator has been raised from "Routine" (Level 1) to "Enhanced" (Level 2), one step from "Emergency" (Level 3),³ which may lead to a statutory declaration of emergency and corresponding quarantine and other orders. In this climate of heightened health stakes, employers not taking account of exceptional management obligations and employee entitlements could find themselves ill prepared to deal with the consequences of a full-blown pandemic.

Just Prepare

In the wake of the avian flu threat and SARS crisis, many employers have been forced to confront pandemic issues from a legal and management perspective. For most, drafting a pandemic plan has been an avoidable reality.⁴ All employers should consider establishing workable pandemic plans to address prevention and to prepare for emergency management

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¹ The World Health Organization recently raised its Pandemic Alert level to Phase Six, the highest level on the scale. In June, they declared the first global flu pandemic in 41 years.

² Standard pandemic estimates place infection rates at between one-third and one-half of a given population.

³ We recommend Ontario employers routinely monitor the MOHLTC's website for H1N1 and related emergency updates: www.health.gov.on.ca. A list of all provincial health ministries websites can be found here: <http://www.hc-sc.gc.ca/hcs-sss/delivery-prestation/ptrole/index-eng.php#1>.

⁴ A survey conducted by Canadian Manufacturers & Exporters in May 2009 revealed that only 13% of survey companies had a pandemic plan.

issues such as critical employee shortages. Employers can begin by asking: *Are proper sanitation measures and supplies in place? Who are my critical employees? Can employees work from home? How would the company maintain communication with employees? How would the company deal with asymptomatic, but virus-exposed employees? Do employees know how we would address these issues?*

Managing a Pandemic

Employers' obligations toward their employees and workplaces during a health emergency are informed by statutes with which most employers are already familiar, as well as by additional legislation like Ontario's *Emergency Management and Civil Protection Act*.

Employment Standards Act, 2000 (ESA)

Under the ESA's personal emergency leave provisions, employees may be entitled to up to ten days of unpaid leave in the event he/she is infected with H1N1, or up to eight weeks for infected family members with a valid doctor's certificate. This leave is in addition to any entitlement an employee has to a declared emergency leave and/or family emergency leave.

In the event of a declared emergency, the provincial government is likely to issue wide-spread orders that will affect your employees, including restricting public transportation or closing schools and offices. In addition, doctors will have broad powers to issue personalized orders to individuals, directing them to take specific actions, including quarantine and medical examination. These leaves would generally last for the duration of the declared emergency.

Occupational Health and Safety Act (OHSA)

The OHSA places potentially broad obligations on employers in the case of pandemic. However, there are general proactive measures employers can take to discharge their duties in this regard, including advising employees of the possible risks associated with H1N1 and devising policies and procedures for pandemic contingencies.

The OHSA's general duty provision (s. 25(2)(h)) obliges employers to take all measures reasonable in the circumstances to protect the health and safety of their workers. For example, it would likely be reasonable for employers to require sick or symptomatic employees to stay at home. It may also be reasonable to require asymptomatic but virus-exposed employees to stay home. To encourage this, employers may wish to consider temporarily expanding sickness or vacation benefits so that these employees do not suffer financial penalty. In the absence of such expanded benefits, employers may need to pay these employees in order to avoid possible constructive dismissal claims.

The OHSA also entitles most workers to refuse to perform work that is “likely to endanger himself, herself or another worker.”⁵ Employers may therefore need to devise OHSA-compliant procedures to address H1N1-related work refusals.

Specific employer obligations under the OHSA include providing all necessary personal protective equipment (PPE) to workers, such as surgical masks or, in certain workplaces, antiviral medications (e.g. Tamiflu to front-line emergency personnel). If, as during the SARS crisis, a worker refuses to use PPE as directed, employers may be entitled to send the worker home.

Human Rights

Employers are prohibited from discriminating against employees on the basis of disability or perceived disability. Should the Ontario Human Rights Commission take the position it did regarding SARS, a pandemic-level H1N1 virus will likely be considered a disability under the Ontario Human Rights Code (the Code). Accordingly, employers will have to provide reasonable accommodation, such as allowing employees to work remotely, providing the option of flexible work arrangements, or providing paid leave options. Further, any adverse treatment of sick employees compared to their health coworkers may receive scrutiny under the Code.

Entitlement to Compensation

Healthy employees sent home during a pandemic – absent a declared emergency – should continue to be paid. Where emergency orders preclude healthy employees from attending the workplace, there is likely no obligation to pay them. However, they may be entitled to employment insurance benefits. In all other circumstances, applicable contractual provisions contained in written employment contracts, company policies, and/or collective agreements will guide entitlement to compensation for being away from work during a pandemic.

Medical Testing

Employers do not have the power to compel an employee to submit to medical examination, although they may require proof of fitness to return to work. Where employers are concerned with exposure among employees, it is preferable to address the situation through policies relating to employee leaves and sickness/vacation benefits. It is recommended that employers consult legal counsel before requesting an employee submit to a medical test in these circumstances, or when considering adopting a mandatory testing policy as part of pandemic planning.

⁵ The exception applies to certain workers who perform inherently dangerous work or whose work refusal would endanger others. For example, firefighters, police officers, correctional institution staff, hospital workers and emergency medical technicians. Due to the technical nature of this exception, employers considering taking the position that certain workers are not permitted to refuse work are advised to seek legal counsel before doing so.

Key Points

In the event of a pandemic, depending on whether there is a declared emergency or not:

- Sick employees may be entitled to several different types of unpaid leaves under the ESA, and may be entitled to sick leave with pay, short term disability benefits, or employment insurance benefits.
- Employers may be entitled to send healthy employees home, but should continue to pay them.
- Employers are entitled to medical certificates establishing fitness to return to work, but cannot force an employee to submit to a medical examination.
- Employers will have to take proactive measures in the workplace to minimize their employees' exposure to the virus – e.g. providing sanitation facilities, allowing remote work arrangements, and generally encouraging ill and possibly contagious employees to refrain from attending the workplace.

For more information, please contact:

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Please join us at our Annual Employers' Conference on November 12, 2009, where I will be speaking about pandemic legal issues.



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