

Strategies for Dealing with Employees: Immunity in the Age of Ebola

We've come a long way from the days when the only preventive response to an epidemic disease would be to stuff our pockets and noses full of sweet smelling flowers and herbs as was done to ward off the Black death of the 14th century and the Great Plague of the 17th century and associate with the 19th century ditty which we now know as, Ring Around the Rosie. Today's public health fears have shifted away from the Plague to other easily communicable diseases, from AIDS and HIV in the 80s and 90s to bird flu in the early 2000s to Ebola in 2014. As governmental entities, we have a responsibility to protect not only our employees, but to protect the public as well.

Some considerations include workplace safety, travel policies, employee relations, leaves of absence, and refusal to work requests.

Possible Legal Constraints

The following is a summary list of some of the legal hurdles that human resources personnel must consider in planning on how to respond to the spread of communicable disease.

OSHA:

The Occupational Safety and Health Act protects employees by requiring employers to provide a workplace that is free from recognized hazards that are likely to cause death or physical harm. It also protects employees who assert their rights under the Act from discrimination. Because governmental entities often employ first responders and health care workers, OSHA may impact some employment decisions relating to mandatory testing, sanitary restrictions, and required leave. OSHA also has standards that may apply to communicable disease:

- Respiratory Protection Standard: applies to situations in which workers may be exposed to bioaerosols containing pathogens
- Personal Protective Equipment Standard: applies to health care workers, cleaning crews, and other employees who work with infected patients or handle infected property or equipment.
- Bloodborne Pathogen Standard: applies when the pathogen falls within a certain subset of diseases transmittable through blood or other potentially infectious materials.

OSHA has provided some guidance on classes of employees who are most likely to be affected by a communicative disease. These include

- Healthcare workers
- Airline and other travel industry personnel
- Mortuary and death care workers
- Boarder, customers, and quarantine workers
- Emergency responders
- Critical infrastructure/key resource sectors, such as bus drivers and pharmacists

It is vital that employers in these industries evaluate how they currently respond to emergencies and whether those preparedness and response plans are adequate or need modification. OSHA provides industry-specific information on hazards on its website. Some proactive considerations that employers may consider include obtaining personal protective equipment (PPE), implementing cleaning and sanitation procedures, providing additional training. Employers must also offer medical evaluations, blood tests, and follow-up evaluations after a known exposure to a known hazard.

ADA:

The Americans with Disabilities Act protects qualified individuals with disabilities from discrimination. The ADA also

- Prohibits discrimination on the basis of a “perceived disability”
- Mandates confidentiality restrictions on the disclosure of employee medical information with limited exceptions
- Prohibits pre-employment medical inquiries prior to the extension of a conditional offer of employment
- Limits medical inquiries and testing during employment (permitted when “job related and consistent with business necessity” or when required to address a known, non-speculative “direct threat”)

Note that travel (either within the US or internationally) in and of itself does not constitute a “business necessity” that justifies medical questioning or testing. However, travel to or from a key region affected with a highly communicable disease or exposure to a known carrier would likely give an employer the grounds to question an impacted employee regarding the details of travel, potential exposure risks, and symptomology during and after travel without violating the ADA.

Although it is appropriate to urge an employee exhibiting symptoms of a contagious disease to consult a physician, if an employer decides to send an employee for a medical examination or request medical documentation, this decision must be based on objective information. There must be some reason to believe that there was actual exposure; it is not enough that the employee was in an area that has been impacted with the disease. Consultation with legal counsel before sending an employee home suspected of a disease is advisable.

FMLA

The Family and Medical Leave Act protects certain qualified employees of covered employers who to take up to 12 weeks of unpaid leave within a 12-month period by providing them with the right to be reinstated upon their return to work under most circumstances. Qualifying situations under the FMLA include the need to care for a spouse, child, or parent with a serious health condition or the employee's own serious health condition.

The first step in considering the FMLA is the determination of whether the infectious disease qualifies as a "serious health condition." Likely being infected with a communicable disease such as Ebola would be classified as a "serious health condition," but the measles or the flu might not. However, an employer may want to consider, view of the circumstances:

- The extent to which current FMLA leave requirements should be enforced or broadened
- Whether to modify policies to provide for paid leave to encourage infected employees (or those with have been exposed) to stay away from work until they are no longer contagious or the incubation period as passed
- Whether to mandate leave for infected or exposed employees who may want to return to work
- Whether to require heightened, independent medical certifications before exposed employees are allowed to return to work

HIPAA

The Health Insurance Portability and Accountability Act provides privacy protections for individually identifiable health information. Medical information received by an employer in the employer's role as an employer (i.e., for leave requests) is not subject to HIPAA, but information received in the role as health plan sponsor is. The protected information may be excepted from privacy rules for the following:

- Disclosure to public health officials
- Disclosure to individuals exposed to a communicable disease or at risk of spreading such disease
- Certain disclosures for law enforcement purposes

NLRA

The Nation Labor Relations Act provides employees with the right to organize and bargain collectively and protects employees from unfair labor practices. Modifications of sick leave, attendance pay, and other policies which may be implemented to address concerns relating to a potential outbreak may trigger bargaining rights at unionized workplaces. Employees, unionized and non-unionized, may assert that a refusal to work with certain co-workers or to report to work during a perceived or actual outbreak is "protected concerted activity." If modifications in policies are made, an employer should proactively reach out to union representatives in developing the modifications.

EEOC Guidelines

The Equal Employment Opportunity Commission provides guidance for employers on how to handle pandemics, taking into account all of the legal hurdles described above. Although this document is not legally binding on employers, it does provide insight as to how the EEOC may interpret different provision of the ADA. The EEOC also recognizes that analyses and determinations are not concrete, but may be modified depending on the severity and pervasiveness of the pandemic. The EEOC Guidance explains that its determinations will be modified depending on how the World Health Organization (WHO), the Centers for Disease Control and Prevention (CDC), or other objective health organizations determine that certain precautionary measures should be taken.

Some of the permissible employer practices include the following:

Before a Pandemic

- Employers may make inquiries that are not disability-related, such as whether an employee will not be available, for any reason, during an pandemic outbreak, without giving a reason for the absence.
- Employers may require post-offer medical examinations to determine the general health status of the prospective employee, so long as these are given to all employees in the same job categories. Note that an offer may not be rescinded because of the exam results unless the applicant would pose a “direct threat.”
- Employer may not question employees specifically about any medical conditions predisposing them to complications because this would be a prohibited “disability-related” inquiry.

During a Pandemic

- Employers may send home employees who are exhibiting symptoms of the disease.
- Employers may question employees who report illness regarding the nature of their symptoms. Note that in a mild pandemic, the inquiries are not considered disability-related and that in a severe pandemic, the inquiries would be justified on the reasonable belief that the illness poses a direct threat.
- Employers may not question employees who do not exhibit symptoms about any such medical conditions.

Prohibited Actions

Taking an employee’s temperature to determine fever generally constitutes a “medical examination” under the ADA. However, the severity and pervasiveness of a pandemic could modify that prohibition.

Employers may impose vaccination requirements. However, they may not compel all employees to get vaccinated. Some employees may have a disability that prevents compliance, thereby creating an “undue hardship” or “significant difficulty or expense.” Also, under Title VII of the

Civil Rights Act, an employee may be entitled to an exemption because of a sincerely held religious belief and the standard is “more than de minimus cost” to the operation of the employer’s business.

Minimizing Disruption

Some measures to lessen the potential for disruption to the workforce and provision of services to the public include:

- Ensure employees know actual risk factors and symptoms. Communicate clearly.
- Encourage employees to obtain proper medical attention.
- Encourage preventive measures. This could be as simple as encouraging hand washing, providing hand disinfectant, hold vaccination clinics.
- Remind employees about HIPAA and other obligations under the law.
- Remove disincentives from seeking help. This may be to grant leave with pay, to allow employees to work from home, or to ease attendance policies that require physician’s notes.
- Direct physically ill employees to go home.

Helpful Links

- Pandemic Preparedness in the Workplace and The Americans with Disabilities Act: http://www.eeoc.gov/facts/pandemic_flu.html
- Guidance on Preparing Workplaces for an Influenza Pandemic: https://www.osha.gov/Publications/influenza_pandeic.html
- Health Insurer Pandemic Influenza Planning Checklist: <http://www.flu.gov/planning-preparedness/business/healthinsurer.pdf>
- Pandemic and Communicable Disease Emergency Policy: <http://hr.unc.edu/policies-procedures-systems/epa-non-faculty-employee-policies/leave/pandemic-and-communicable-disease-emergency-policy/>