

VACCINATE YOUR COMPANY:

How to Prepare for a Global Health Crisis





CHEAT SHEET

- *Travel considerations.* Under the OSH Act, an employee may refuse to accept an assignment because he or she reasonably believes that his or her health would be endangered.
- *Stop the spread.* Employers may require employees to adopt infection control practices during a pandemic, such as telecommuting, regular hand washing, proper sneezing etiquette, and the use of personal protective gear.
- *Building a resistance.* The US Department of Health and Human Services has advised employers to begin pandemic planning by identifying a “pandemic coordinator and/or team with defined responsibilities for preparedness.”
- *Word of mouth.* Employers should actively train employees on how to respond to a health crisis by addressing misconceptions and being a resource for questions or concerns.

By Jennifer Sadoff and David Kurtz Few things engender more fear and fascination than the latest pandemic reaching our front doors. Movies like *Outbreak*, *Contagion*, and *28 Days Later* are cultural landmarks. *The Walking Dead*, a US-based television drama about a viral outbreak that leads to a zombie apocalypse, continues to rank among the highest rated shows on television. Unfortunately, the nightly news also delivers a nonfiction dose of real health crises. In 2009, the World Health Organization (WHO) labeled the H1N1/swine flu a pandemic, marking the first pandemic (a worldwide epidemic) since the 1968 Hong Kong Flu. The streets were quickly filled with people wearing surgical masks and every public sneeze sent crowds scurrying. In 2014, the Ebola scare reached the United States. Despite only a handful of confirmed domestic cases, the news of the famously lethal virus spread rapidly and led to unparalleled public health fears. In 2016, the threat of the Zika virus stirred fear in pregnant women and their partners about the health of their unborn children, even if they lived far from areas with a known transmission.



The workplace is not immune from health crises when they strike. Employers may be required to take action to protect their employees. Under the General Duty Clause of the US Occupational Safety and Health Act (OSH Act), for example, employers have a general duty to provide a safe workplace for their employees.¹ And, even absent an explicit legal duty, a thoughtful employer should be careful not to discount employee fears, whether rational or irrational. In the post-H1N1 era, all employers, to some degree, have been forced to react to new health risks by responding to concerns or determining how to handle news of a truly sick employee. But how far must a business go to comply with the law, mitigate risk, and respond to such distress? As with many areas of employment law, what may appear to be common sense solutions can run afoul of various statutes, including the US Americans with Disabilities Act (ADA), Title VII of the US Civil Rights Act of 1964 (Title VII), and the OSH Act. This article will assist employers when responding to common legal quandaries by providing examples of prudent practices for managing health epidemics and pandemics in today's workplace.

Common legal pitfalls

Employee travel

In the global marketplace, domestic and international travel is increasingly an essential job function for many employees. But what if the job required travel to Brazil or Miami during the height of the Zika crisis? In October 2016, for example, the United States Centers for Disease Control and Prevention released numerous travel advisories warning pregnant women about travel to various parts of Miami-Dade County given the possibility of Zika transmission and the very real risk to their unborn children.² Must employers grant employee requests not

to travel to certain areas? May an employer proactively *bar* employees from making such trips fearing liability? May an employer fire an employee for refusing to travel due to rational fear of infection? What about *irrational fear*?

Over the years, many well-intentioned employers have unwittingly violated discrimination laws by proactively reassigning pregnant employees from tasks involving health risks. For example, an employer may decide that a female employee in her eighth month of pregnancy “just shouldn't travel” and instead have a man handle a beneficial out-of-state opportunity. As a general rule, however, employers may not legally bar pregnant employees, or employees with pregnant partners, from traveling to certain areas due to pregnancy-related health risks — even ones like Zika. As the US Equal Employment Opportunity Commission (EEOC) noted in its Enforcement Guidance on Pregnancy Discrimination and Related Issues, “[a]n employer's concern about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for a woman with childbearing capacity.”³ On the other hand, if an employee makes a request not to engage in such travel, various laws may require employers to consider granting those requests. For example, if a pregnant employee asks to be excused from travel to a Zika-infested area for a work-related task, employers must consider granting that request, even if the travel is truly important. Indeed, employers need to seriously consider requests

from any employee, even if the worker does not fall within the known “risk” category related to such travel. Under the OSH Act, an employee may refuse to accept an assignment because he or she believes reasonably that their health would be endangered.⁴ An employer may not subject that employee to adverse action under the law absent “objective” evidence that no hazard exists. Of course, the line between “reasonable” and “unreasonable” is often tough to draw in situations where even experts cannot adequately assess the magnitude of the health risk.

Suspicious of illness

Imagine that, during the height of a flu pandemic threat, Dawn, your company's controller, warns you that Bob — one of the accounts payable clerks — appears exceptionally sick. According to Dawn, he's sneezing, coughing, and, rather than using tissues, appears to be wiping his nose with his hand. Dawn also informed you, immediately before the monthly close of the books, that she will not be returning to work until something is done. Can you investigate the allegations against Bob and determine whether he's actually sick? Can you discipline Dawn if she fails to show up to work given that the OSH Act protects employees who choose reasonably not to subject themselves to dangerous work situations?

More than any law, the ADA — as well as parallel US state disability discrimination laws — governs an employer's response to the potential health threat.⁵ As the EEOC has



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recognized, “[t]he ADA is relevant to pandemic preparation in at least three major ways. First, the ADA regulates employers’ disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities. Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a ‘direct threat’ (i.e., a significant risk of substantial harm even with reasonable accommodation). Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.”⁶

In 2009, the EEOC issued a technical assistance document entitled “Pandemic Preparedness in the Workplace and the Americans With Disabilities Act,” which provides several helpful tips for employers to ensure compliance with the ADA in responding to epidemics and pandemics before, during, and after their existence (advice that remains relevant today).

- Employers may not survey their employees before or during a pandemic to determine if any employee is especially susceptible (e.g., has a compromised immune system). On the other hand, employers may identify which employees may be more likely to be unavailable for work in the event of a pandemic (e.g., for non-medical reasons such as the unavailability of public transportation).
- Employers may require new employees to undergo a post-offer medical examination, so long as (1) all entering employees in the same job category are required to undergo such testing and (2) the results of the test are kept confidential. Employers may not, however, rescind a job offer simply because the employee is at risk of increased complications from the current health crisis, unless objective

medical evidence establishes that the applicant would pose a “direct threat” to the workplace.

- An ADA-covered employer (any employer with 15 or more employees) may send employees home if they display telling symptoms during a pandemic.
- During a pandemic, an ADA-covered employer may ask employees who report feeling ill at work or who call in sick if they are experiencing symptoms typical of the pandemic. For example, sneezing and coughing during an influenza pandemic.
- When an employee returns from travel (even personal travel) during a pandemic, the employer may ask if the employee is returning from locations where the infection is widespread. Employers can even tell an employee not to return to work for several days until it is clear that he or she has no symptoms. Be careful, however, as such inquiries could inadvertently expose one’s national origin or other protected traits. For example, you may learn that an employee visited relatives in his or her birth country. This is information which might later be used by that employee in a national origin discrimination action. It is essential that such questions be general and that they be asked of everyone with unknown travel.
- Employers may require employees to adopt infection control practices during a pandemic, such as telecommuting, regular hand washing, proper sneezing etiquette, and wearing of personal protective gear. Although the EEOC specifically referenced telecommuting in its guidance, employers should use caution in requiring such arrangements in response to a pandemic. Telecommuting requests have become one of the most

hotly debated potential ADA accommodations, with employers being required to show that a request to telecommute is an undue hardship when it is sought to accommodate a disability. By requiring (or even allowing) employees to telecommute during a pandemic, an employer may later find it difficult to declare a request unreasonable when made by those same employees during the ADA interactive process.

- Although certain employers (e.g., healthcare institutions) may impose mandatory vaccinations — particularly in response to major public health threats — employers may not require that employees be vaccinated regardless of their medical condition or religious beliefs. Employees subject to mandatory vaccinations may be entitled to an exemption based on a disability or their “sincerely held religious belief, practice, or observance.” That being said, employers can encourage employees to receive various vaccines and can even make it easy for them by providing for such inoculations to be administered at the workplace.
- Employers may ask employees about an absence from work, even if the employer suspects it is for a medical reason, such as one related to an ongoing pandemic. As the EEOC made clear in its Pandemic Preparedness guidance, an “employer is always entitled to know why an employee has not reported for work.” Employers may also require employees who have been away from the workplace during a pandemic to provide a doctor’s note certifying fitness to return to work. As a practical matter, however, doctors and other healthcare professionals may be too busy during and immediately after a pandemic to provide fitness-for-duty documentation.

Best practices

If the last eight years are any indication, worldwide health emergencies will continue to present challenges for employers. As with many difficult employment law issues, being proactive is the best approach. The following are suggestions for employers to prepare them for the next epidemic:

Form an active epidemic team. The United States Department of Health and Human Services has advised employers to begin their pandemic planning by identifying a “pandemic coordinator and/or team with defined roles and responsibilities for preparedness and response planning.”⁷ A team can involve multiple individuals, including representatives from senior management, human resources, information technologies, facilities management, and other company departments facing the brunt of a health crisis. The group should meet regularly to outline how preparedness practices fit in with company policy. While smaller companies may not need to appoint a full “team,” they are nonetheless advised to identify a pandemic coordinator who can serve as the go-to resource for when health crises strike.

Review, update, and enforce your employee policies. Well-written policies may anticipate and provide advance preparation for many of the issues facing employers during a health crisis. A pandemic/epidemic response protocol, can, among other things, provide expectations for employees as to how such situations will be handled. A broad, flexible, and communicable disease policy can help ensure that there are protocols for handling employee health concerns as they arise. Sick leave and other leave policies are intended for and anticipate situations like pandemics and epidemics. Employees should know that they are expected to stay at home when ill.

Enact and follow infection control techniques. Employees should be reminded about proper infection

prevention techniques, such as regular hand-washing and proper etiquette for sneezing and coughing (tissues, no use of hands, etc.). Employers may encourage vaccinations and even arrange for workplace shots. Many employers have hand sanitizer available for employee use. Posters and signs may be placed in bathrooms, employee break areas, and other places to remind employees of company practices. Consider curtailing company-required or company-sponsored travel to countries with significant rates of infections as appropriate, or at least allowing an employee an “out” in such circumstances. Much business can be conducted flawlessly via video conferencing capabilities.

Education. Employers actively train employees on sexual harassment, violence in the workplace, and other key items. But how often do employers educate employees as to health crises? Such education can go a long way to calm fears and help employees feel comfortable coming to work during an epidemic or pandemic. Employers should address misconceptions that may lead to unfounded workplace concerns. Training on a disease like Zika, for example, may address basic facts about the disease, such as how it is spread and its symptoms, and refer employees to publications such as Center for Disease Control (CDC) and OSHA updates. Employees may also be educated about the policies in place to deal with health crises. And, where employees are acting irrationally (e.g., by not attending work where no rational reason exists for such decision) despite education as to the breadth of a public health issue, employers can educate them that there may be real job consequences. Likewise, supervisors and managers should be advised about the company’s approach to handling public health concerns so they can answer employee questions directed to them. These supervisors and managers should also be able to consult a

known resource (e.g., the pandemic coordinator) with any concerns.

Remain aware of government guidance. During public health crises, the CDC, state health departments, and a host of additional state and federal agencies are phenomenal sources of information for employers. Their websites contain extensive information on the latest health crises, and the agencies are staffed with individuals ready to answer questions from employers seeking guidance. By following government guidance — which sometimes provides broad leeway for employers to act depending upon the seriousness of a situation — employers can help protect themselves from allegations of discrimination or other wrongdoing in connection with their handling of workplace health issues. If an employer has any doubt about the recommended employer protocol, the best move is to check in with the appropriate government agencies before acting.

Don’t be afraid to identify and respond to risks. As long as questions are asked of everyone equally, without regard for national origin or other protected categories, employers may require, for example, that employees report any travel to certain countries with active public health crises and ask further questions to analyze the employee’s health risk. Employers should not ignore the obvious symptoms of an ailing employee in the workplace and may ask the employee to go home. While employers should obviously be cognizant of their legal requirements under the various discrimination laws, they should not act in fear of them when taking fair, non-discriminatory actions designed to protect the safety of the workforce and visitors to the workplace.

Go above and beyond. The occurrence of certain communicable illnesses and conditions in the workplace do not legally require action, but a thoughtful employer will nonetheless respond proactively

after weighing the circumstances. For instance, while a company has no legal duty to report a case of head lice in the workplace, a prudent employer would be well-advised to inform employees (perhaps via an all-facility email or poster) that an incident of head lice has been reported, and that employees may wish to consider treatment if they exhibit symptoms. The announcement can make clear that the incident has nothing to do with the cleanliness of the facility of the employees in question, and provide a resource for any questions. Despite the “yuck” factor, employees will appreciate you looking out for their best interests and being proactive.

Prevent and respond to acts of discrimination and harassment. Some employees have acted out against fellow employees from certain countries during pandemics. For example, given its start in Africa, some employees avoided (or otherwise discriminated against) coworkers from African countries during the peak of the Ebola scare. Such actions, even if founded in fear and not discriminatory animus, could violate state and federal national origin discrimination laws, particularly if not immediately addressed and remedied by an employer, and lead to claims of a hostile work environment.

Multinational employers must take a worldwide approach. While this article focuses on the US regulatory scheme, multinational companies should implement a pandemic and epidemic response across their worldwide operations, which may require an analysis of compliance with laws in other countries. This approach is especially important where employees from other countries travel to and from areas experiencing a local epidemic. For instance, some countries — including the United Kingdom and Australia — have enacted “duty of care” laws requiring employers to guarantee a safe work environment, including situations involving foreign travel.⁸ In some countries — including much of Latin America and Europe — employers must appoint health and safety representatives or committees, and confer with them on health and safety policies in the workplace.

Keep calm and stay compliant. The laws are somewhat complicated, but the basic mission is simple. While dealing with epidemics, pandemics, and health crises can be frightening for employers and employees alike, a thoughtful, comprehensive, and legally compliant approach can go a long way to quelling and accommodating employees’ reasonable fears while maintaining a healthy, high-functioning workplace. **ACC**

NOTES

- 1 29 U.S.C. § 654(a)(1).
- 2 www.cdc.gov/zika/intheus/florida-update.html.
- 3 www1.eeoc.gov/eeoc/publications/zika-eeo-laws.cfm?renderforprint=1.
- 4 www.osha.gov/right-to-refuse.html.
- 5 The ADA applies outside the United States to (1) US Citizens employed outside the United States by a US firm and (2) US Citizens employed outside the United States by a non-US firm “controlled” by a US firm. 42 U.S.C. §§ 2000e(f), 12111(4). Four factors are considered in determining whether sufficient “control” exists: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control.
- 6 www.eeoc.gov/facts/pandemic_flu.html.
- 7 US Dep’t of Health and Human Servs., Business Pandemic Influenza Planning Checklist: Item 1.1, www.pandemicflu.gov/professional/business/businesschecklist.html.
- 8 The OSH Act, by its terms, does not apply to US employees working abroad. The statute’s application is expressly limited to “employment performed in a workplace in a state, the District of Columbia, The Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Lake Island, Outer Continental Shelf lands . . . Johnston Island, and the Canal Zone.” 29 U.S.C. § 653(a).

ACC EXTRAS ON... Health regulation

ACC Docket

Chemical Regulation Enters the 21st Century: A New Day for the Toxic Substances Control Act (Nov. 2016). www.accdocket.com/articles/resource.cfm?show=1377601

Cybersecurity and Medical Devices: Reality Bytes (Oct. 2014). www.accdocket.com/articles/resource.cfm?show=1377601

Top Ten

The Telehealth “Top Ten” for 2015 (July/Aug. 2015). www.acc.com/legalresources/publications/topten/telehealth-top-ten-for-2015.cfm

Ten Things That Health Care Lawyers Should Be Thinking About (Dec. 2014). www.acc.com/legalresources/publications/topten/things-health-care-lawyers-should-think-about.cfm

QuickCounsel

Personalized Medicine: A New Paradigm (July/Aug. 2016). www.acc.com/legalresources/quickcounsel/personalized-medicine-a-new-paradigm.cfm

Brazil Garment Industry – Health and Safety Issues Overview (Jan/Feb. 2015). www.acc.com/legalresources/quickcounsel/health-and-safety-issues.cfm

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