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WHAT TO DO WHEN YOU GO “AH-CHOO!” AN EMPLOYER’S GUIDE FOR DEALING WITH INFECTIOUS DISEASES

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INTRODUCTION

The flu and cold season is now approaching. Tragically, each year, a number of deaths result from flu and other infectious diseases. Employers again routinely face concerns about how to respond to highly infectious diseases when an employee reports such illness. Commonly



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known diseases such as the flu, chicken pox, and tuberculosis, and newer threats, such as Zika virus, all have the potential to infect employees and shut down operations for weeks because of employee absence due to illness. Frequently, such illnesses are accompanied by co-employee stress as to whether they will also contract the disease because of workplace exposure. With a rising anti-vaccination movement in the United States, many employers have also learned that their millennial workforces are unvaccinated and susceptible to mumps, rubella, and other health threats. Moreover, many employees refuse vaccinations that are offered and employers cannot generally mandate such invasive procedures, especially if an employee objects on grounds relating to their own health conditions (e.g., compromised immune system) and can further refuse based upon the Americans with Disabilities Act (ADA) and religious grounds in certain situations. Employers must consider methods to keep their employees healthy and productive while not running into legal pitfalls. As such, it is critical for all employers to consider pre-planning to respond for when an infectious disease might affect the workplace. While healthcare industry employers must be particularly vigilant, and are covered by a myriad of regulations, this article provides general guidance for non-healthcare industry employers.

LEGAL LIABILITIES AND QUARANTINES FOR INFECTIOUS DISEASES

OSHA

Infectious disease outbreaks are monitored and governed by local and state law under the local Departments of Public Health. Under the Federal Occupational Safety and Health Act's General Duty Clause (Section 5(a)(1)), employers are required to maintain workplaces free from "recognized hazards" that are likely to cause an injury or illness resulting in death or serious physical injury to employees. Typically, OSHA does not get involved in addressing infectious disease as a "recognized hazard" in the workplace, with the exception of the health care industry or healthcare providers where certain infectious diseases or agents are reasonably foreseeable. In

those industries, the Act requires employers to protect their employees from recognized infectious diseases, if there is a feasible means of abating the hazard at work, and to follow accepted medical protocols for responding to infectious diseases.

WORKERS' COMPENSATION

All states maintain workers' compensation regimes which limit recovery for a workplace injury or illness against the employer to those which "arise out of and in the course of" employment. Typically, diseases to which the general population is exposed and which are brought into the workplace by an employee and cause co-employee illness are not compensable nor is the employer required to provide reasonable and necessary medical care for a non work-related illness.

PREMISES LIABILITY

Employers, as owners or lessors of property, may also face premises liability for negligence which results in third parties (such as contractors, servicemen, or other workers on site) contracting infectious diseases at the premises if they fail to take reasonable steps to require to maintain hygiene and sanitation practices within the premises, including proper sanitation and housekeeping in the leased premises. Moreover, some states may permit tort claims against an employer by an employee if the employer intentionally disregards employee safety, such as failing to inform its employees of potentially infectious disease hazards that have been identified at the workplace when there is guidance available from the local Department of Public Health or other recognized health organizations such as the Centers for Disease Control (CDC).

Many employers are unaware that if an infectious disease is reported to local Department of Public Health that such organizations have the authority to issue a limited or general quarantine order for a workplace and to utilize local law enforcement, if necessary, to enforce such action. Conversely, many employers are unaware that the Department of Public Health can

be a very valuable resource for information to combat infectious diseases at the workplace and are reluctant to reach out to such organizations for assistance. The authors are aware of many instances where they have contacted local Departments of Public Health to assist clients and they have been of significant benefit in controlling the spread of an infectious disease while maintaining confidentiality of the process.

PREVENTING OUTBREAKS

The most effective method of preventing outbreaks is having a workforce vaccinated against the infectious agent. Many employers provide on-site voluntary influenza vaccinations to employees to prevent yearly outbreaks of the flu. With regard to other infectious agents, employers can encourage employees to keep up their vaccinations current and maintain the vaccination records in the workplace, which can have the dual effect of reminding employees to maintain an up-to-date record of vaccinations and having such records in place in case of a request by the local Department of Public Health. Such records must be properly maintained as confidential medical information separate from employee personnel records.

Employers should also be aware that *mandatory* vaccination policies may create employment law liabilities. For example, employees may object to mandatory vaccinations on religious beliefs (e.g. Jehovah's Witnesses) or may be precluded from getting vaccinations due to disabilities or health conditions (e.g. HIV, leukemia, genetic disorders, compromised immune system). Furthermore, if an employee believes that a vaccination may create a health hazard for the employee and refuses a vaccination and the employer takes an adverse employment action against the employee for refusing a vaccination, the employee may file an OSHA whistleblower retaliation claim (under Section 11(c) of the Act) arguing that the employer retaliated against them for raising a safety complaint. Accordingly, before mandating a vaccination, an employer may wish to encourage employees to voluntarily receive a vaccination and maintain records of

them and be prepared to respond to employee questions regarding the potential hazards associated with vaccinations.

HOW TO DEAL WITH AN INFECTED EMPLOYEE

Once an employer becomes aware that an employee has actually contracted an infectious disease, it should consider a process to respond in a timely fashion.

- **Step One:** Triage and Refer to Physician for Diagnosis and Treatment

If an employee becomes extremely ill in the workplace, or reports to the manager that they have a contagious disease, the first thing employers should do in response is to inform the employee to immediately leave the workplace and seek medical assistance from a qualified to a medical professional (or call 911, if appropriate). If the employer is made aware by the employee or the employee's healthcare provider of the infectious disease it is dealing with, the employer can consult appropriate resources to determine the nature of the disease, mode of infection and preventative measures. The Centers for Disease Control and Prevention (CDC) is the nation's leading public health agency and offers numerous resources -- both on their website (www.cdc.gov) and by calling (800-CDC-INFO). Operators are available on a 24/7 basis to assist employers dealing with infectious diseases. The CDC can assist in evaluating what diseases may be present in the workplace and determining, based on symptoms present, whether such diseases are infectious. The CDC also posts fact sheets on various diseases on its website that describe the signs and symptoms of the disease in non-technical language, discusses contagiousness, prevention, diagnosis and treatment. Employers should consider posting copies of applicable fact sheets in employee break areas to keep their workplace informed and providing such information to employees in an employee meeting. The employer should also consider inviting a representative of the local Department of Public Health or other qualified health

professional to address its employees if the employee workforce expresses serious concerns about a health hazard.

- **Step Two: Implement Doctor's Recommendations and Issue Mandatory Notifications**

An employer should require the employee who has an infectious disease to remain away from the workplace until the treating physician provides a release to return to work stating the employee is not infectious and able to return to work, since the employee's symptoms may disappear but it is still possible for the employee remain infectious. The employer should not try to determine when it is appropriate for the employee to return without such documentation and should rely upon competent medical opinion. During such absence from work, depending on the nature of the illness the employee may be entitled to leave under the FMLA or the employer's leave policies.

Most jurisdictions require a patient's *treating physician* to report infectious diseases to the local Department of Public Health. In general, employers have no duty to report infectious diseases to the Department of Public Health. In certain industries (such as healthcare, schools, and daycare) there may be a duty to report infectious diseases to local public health authorities. Employers in these industries should consult legal counsel or the public agency itself to confirm any reporting requirements.

The most delicate issue that most employers face is whether they *should or must notify other employees in the workplace* who may have been exposed to the infectious disease hazard. The employer must consider the contagiousness and severity of the reported infectious agent and the individuals with whom a potentially infectious employee may have interacted. Employers must be sensitive throughout the entire process to maintain employee privacy regarding the identity of the infected employee. Covered entities who disclose sensitive employee health information could face liability under HIPAA or state right to privacy laws. As employers

navigate the process of responding to an infectious disease, they need to consider these legal obligations as the situation evolves.

- **Step Three: Managing an Employee's Return to Work**

As indicated above, the employer should not permit the employee to return to work until it has received documentation from a treating physician that an employee can return to work and is no longer infectious.

An employer should also be aware of legal obligations arising out of the Americans with Disabilities Act (ADA). The ADA prohibits discrimination based on a disability and requires covered employers to provide reasonable accommodations to employees with physical disabilities. In most cases, an employee will recover from an infectious disease with no permanent impairment that would constitute a "disability". To the extent an employee may have developed a disability because of the underlying disease, the employer should engage in a robust **interactive process** with the employee to determine what accommodations would be reasonable for the employee to be able to return to work at either the employee's prior job or to another available job for which the employee may be qualified.

CONCLUSION

As noted, the season for infectious diseases is approaching and creates challenges for the employer. If consideration is given by the employer to preplanning a process to respond as soon as the employer receives a report of an infectious disease, it can control the spread of the disease within the workplace and maneuver through the competing interests of responding to the infected individual while protecting the workforce from a general outbreak of the disease without violating any applicable laws or regulations.

NOTE: If you wish to receive complimentary copies of this article and future articles on OSHA and employment law related topics, please contact Mark A. Lies, II at mlies@seyfarth.com.