

## FIGHTING A FLU SCARE

### Legal ramifications of a pandemic from an employer's perspective

For employers watching the TV these days, it must feel like the swinal countdown. If cable-news pundits and global health organizations are to be believed, it's not a question of if one of your employees is going to turn up with the 2009 H1N1, it's a matter of when. And when that happens, it's critical that you and your management team stand ready.

There's no question about it. If H1N1 maintains the pace of its infectious spread, most employers are going to find themselves faced with both sick employees heading home to recover and healthy employees staying home for fear of getting sick — resulting in a widespread, significant slowdown of business. Making matters even more complicated, some sick employees may refuse to be tested for the virus for financial reasons or out of fear of exposure.

As the case count rises daily, employers need to anticipate — and think through the implications of — the likelihood of employee illness, heightened family obligations and overall workplace distraction. In the face of this recession, most of us can ill afford further interruptions to business as usual. So how should employers balance their legal obligations with operational efficiency?

As an employer, your first obligation is to provide a safe and healthy work environment. Creating and communicating clear policies and then enforcing them effectively and consistently will be your best first step. Start by making sure employees with flu-like symptoms don't come to work. Period.

Then, take pains to remind your other employees about the basics: avoid close contact with sick people; wash hands thoroughly and frequently; use alcohol-based, anti-microbial (not just anti-bacterial) hand sanitizers; cover mouths when coughing and noses when sneezing; throw out used tissues immediately; and avoid touching your eyes, nose and mouth. In addition to anti-



#### EMPLOYMENT LAW

**John T. Palter**

bacterial soaps and anti-microbial hand sanitizers, employers should also provide alcohol-based wipes for phones, keyboards and computers, and arrange to inspect air ventilation and purifying systems.

Your other obligations are legal. In particular, employers need to keep top of mind OSHA regulations that protect certain employees from retaliation if they refuse to work because of good-faith concerns about workplace safety. Employers also have obligations under the Health Insurance Portability and Accountability Act, the Family and Medical Leave Act, Americans with Disability Act and various other federal and state laws.

HIPAA prohibits disclosure of health records and prohibits the use of medical conditions as a basis for work-related decisions. Under the FMLA, qualifying employers must provide leave and restore employees to their jobs when they return from family or medical leave. Additionally, the ADA requires reasonable accommodation for certain life-restricting disabilities. Boil all of that down, and it means that employers have to balance their need to undertake reasonable efforts to keep contagious workers home with protecting employees' privacy rights. Falsely accusing someone of having a pandemic flu, for example, could well be considered defamatory.

Depending upon the circumstances, employees may be also entitled to sick or vacation time, worker's compensation, disability

insurance payments or other paid benefits, continued health insurance or unemployment benefits. Your best bet may be to work with your HR team and, if appropriate, corporate counsel to make sure you have a clear understanding of benefits promised in the employment handbook and other workplace policies. You'll then need a well-articulated plan for rolling them out as the need may arise.

Your final, but perhaps primary obligation is to maintain office productivity. As you create or review your existing crisis-management plan:

- Be flexible with your remote computing initiatives.
- Implement business and travel restrictions.
- Articulate social-distancing and medical screening policies.
- Cross-train employees and think through core function disruptions.
- Ensure a continuous and adequate supply of inventory, services and products from third-party suppliers.
- Consider extending time-off policies or voluntary, special-pay policies.

Unfortunately, you shouldn't assume that your property or business-interruption insurance will cover the loss. Property or business-interruption coverage generally is limited to "physical" damage to property used by the insured at the insured's premises. Insurers could argue that the presence of a virus on the premises does not constitute "physical damage" — or even "damage" — to property under the policy.

This is not the time to wallow. Your business objective must be to maintain a safe and productive work force until this storm, too, passes.

**PALTER** is a trial lawyer and managing member of Riney Palter PLLC ([www.rineypalter.com](http://www.rineypalter.com)). Contact him at [jtpalter@rineypalter.com](mailto:jtpalter@rineypalter.com)