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The Evolution of a Flu Pandemic: Issues for Employer Response

According to the World Health Organization, there are now 365 confirmed cases of the virus known officially as influenza A (H1N1),¹ which has startled the world with its rapid spread. Since the first confirmed case was reported in Mexico in late March, the virus has spread as far as Austria, Germany, Israel, and New Zealand. Canada has not been spared. Currently, there are 34 confirmed cases of H1N1 in Canada.² This rapid spread has, in part, prompted the World Health Organization (WHO) to upgrade its pandemic alert level from phase 4 to phase 5. Phase 5 is the second highest alert phase and one phase before the declaration of a global pandemic. Phase 5 indicates that human-to-human transmission of the virus is occurring in at least two countries and that a pandemic, characterized by community level outbreaks in at least one country, may be imminent.³

The quick spread of H1N1 and the upgrade of the WHO pandemic alert level has garnered much media attention. Employers are understandably concerned about the impact of the potential influenza outbreak on their businesses and their employees. Of course, no one can accurately predict how the current outbreak will proceed or provide specific advice covering all eventualities. We will, however, identify key legal issues that may arise as employers prepare to deal with a potential influenza pandemic and its impact on the workplace. While this information may apply to most workplaces generally, employers, such as those operating health care facilities treating the ill, will be required to respond more immediately and to address issues beyond the scope of this bulletin. Employers operating in a unionized environment should consider developing their responses in consultation with union representatives.

OCCUPATIONAL HEALTH AND SAFETY LEGISLATION

Occupational health and safety legislation imposes general duties on employers to provide a safe workplace. In the course of normal operations, this duty requires employers to take steps to ensure that employees are safe at work from workplace hazards, substances, machinery and equipment. During a potential influenza pandemic, this duty raises specific employee health-related issues for employers. The steps that an employer must take to provide a safe workplace will focus on reducing the probability of employees contracting H1N1 at work. In determining the precise nature of the steps to be taken, guidance may be drawn from Ontario's experience with the Severe Acute Respiratory Syndrome (SARS) outbreak in Toronto in 2003. During the SARS outbreak, the Ministry of Labour and public health authorities provided advice to employers on how to discharge their duty to provide a safe workplace in the face of a public health crisis. Employers were advised to:

- Ensure that employees did not come to work when suffering from flu-like symptoms;
- Promote good hygiene practices in the workplace, and pay particular attention to ensuring that the work environment was clean (in particular taps, door handles, door knobs, banisters and washroom facilities ought to be thoroughly maintained to prevent the spread of infection);
- Ensure that engineering controls such as ventilation systems are appropriately maintained to reduce the spread of infectious agents; and,
- Distribute, and instruct employees in the use of, personal protective equipment as appropriate (e.g., masks, gloves, tools, etc.).⁴

The advice given is equally applicable in the H1N1 outbreak. Following the advice of public health officials during this current outbreak will also help employers discharge their duty to provide a safe workplace. All employers should continue to monitor local, provincial, national, and in some cases, international public health news. Links to some of the organizations that provide regular news and advice are provided below:

- Health Canada: http://www.phac-aspc.gc.ca/alert-alerte/swine_200904-eng.php
- World Health Organization: <http://www.who.int/csr/disease/swineflu/faq/en/index.html>
- Center for Disease Control: <http://www.cdc.gov/h1n1flu/>

Employers should also be mindful of their obligation to provide information to employees under occupational health and safety legislation, which could extend to the obligation to inform employees about the risk of H1N1 infection in the workplace and steps taken by the employer to mitigate this risk. This obligation will evolve as the H1N1 outbreak develops. Employers may also encounter questions about whether masks, respirators and safety glasses will be distributed and whether they will protect workers. Generally speaking, there appears to be little evidence that masks will protect workers, except those in close contact with patients in health care facilities

WORK REFUSALS

Given the media's intense focus on the influenza outbreak and the anxiety it is creating, it is possible that some employees may refuse to come to work or to perform certain work tasks if they believe that they may become infected with the H1N1 virus. Employers should be informed about the right of employees to refuse unsafe work and how to respond when this occurs. The right to refuse unsafe work is enshrined in the Ontario *Occupational Health and Safety Act*, Part II of the *Canada Labour Code*, and comparable legislation across Canada.

Generally speaking, employees have the right to refuse work in situations where they have reason to believe that their health and safety is at risk. This right to refuse is limited for employees in jobs that normally encompass the unsafe condition or if the refusal would endanger the life, health or safety of another person. Police, fire fighters, and medical and health care professionals, for instance, may not be entitled to refuse work.

If an employee refuses work, the employer must follow the legislated work refusal process. In Ontario, for instance, the employer must investigate the risk and if a resolution cannot be reached between the employee and the employer, a Ministry of Labour inspector will conduct an investigation of the workplace. In one case, decided in the context of a work refusal by airline ticket agents concerned about the exposure to SARS in their workplace, a Labour Canada Officer determined that a "danger" did not exist at the workplace arising from the absence of the provision of gloves and masks to be worn by all ticket agents. This decision was upheld on appeal. A work refusal had occurred and had been resolved by permitting employees to wear masks and gloves at their discretion, rather than requiring the employer to institute a mandatory mask and glove wearing policy. Employers should be aware that they are prohibited from disciplining or threatening to discipline employees for refusing work unless and until the work refusal process has been completed and a Ministry of Labour inspector has concluded that there is no danger. At this point advice should be sought about whether discipline is appropriate.

EMPLOYMENT STANDARDS LEGISLATION

In a pandemic, employees may require time off in excess of their sick leave entitlement due to quarantine, personal illness or because they are caring for sick family members. Employment standards laws in a number of jurisdictions provide for unpaid emergency leave. In Ontario, for example, employers who employ more than 50 people must give employees 10 days of unpaid emergency leave due to personal illness, injury or medical emergency, or illness, injury or medical emergency relating to certain family members. Other jurisdictions, like the federal jurisdiction, do not provide for unpaid emergency leaves.

In very serious cases of H1N1, employees may also be entitled to compassionate or family medical leave to care for a critically ill family member. In Ontario, employees are entitled to family medical leave of up to eight weeks of leave in a 26 week period if a health practitioner certifies that a family member is suffering a serious medical condition and near to death. Comparable compassionate care leave provisions are contained in nearly all Canadian employment standards legislation.

Depending on the severity of any influenza pandemic in Canada, governments may choose to legislate additional job-protected leaves of absence. In the 2003 SARS breakout, for example, the Ontario government introduced the *SARS Assistance and Recovery Strategy Act* that granted employees job protected leaves of absences related to SARS. It is premature to speculate on whether such measures may be taken during the potential H1N1 pandemic.

HUMAN RIGHTS LEGISLATION

Employers must also be mindful of their duties and obligations under human rights legislation. Differential treatment on the basis of actual or perceived disability may violate human rights legislation. The definition of disability, particularly in Ontario, has been interpreted broadly. During the 2003 SARS outbreak, the Ontario Human Rights Commission issued a public statement that it would treat SARS as a “disability” for the purposes of the legislation. It is reasonable to conclude that employees who contract H1N1 may similarly be considered to be disabled.

Employers should be aware of their obligation not to discriminate on the basis of any perceived or actual disability, including H1N1 infection. Employers should review their workplace policies and procedures, particularly sick leave policies, to ensure that they do not place an undue and unjustifiable burden on disabled employees. Employers should also be mindful of the misperception that H1N1 may affect certain ethnic backgrounds more than others. It is important for employers to ensure that employee fears of contracting H1N1 do not result in discrimination or harassment of disabled employees on ethnic or racial grounds. Since H1N1 was first identified in Mexico, employers should be particularly concerned to ensure that employees of Mexican and Latin American descent are not improperly targeted.

Most importantly, employers have an obligation to accommodate disabled employees to the point of undue hardship. In the context of H1N1 infection, accommodation may include such measures as allowing employees to work from home, participate in meetings by conference calls, and to work flexible hours. The duty to accommodate is discharged at the point of undue hardship. What constitutes undue hardship will depend on a variety of factors including risks to health and safety and cost.

MANDATORY TESTING

The issue of mandatory bio-medical testing for employees is a complicated one. Case law suggests that it will only rarely be permissible, and then only in the clearest cases of reasonable suspicion of infection and a pressing interest in the identification and management of disease. The fact that many persons infected with H1N1 may be asymptomatic raises additional issues about selecting employees for testing. Given its complexity, testing is never preferable to a strongly worded and consistently enforced policy on communicable illnesses. Such policies can be drafted to require that employees who are experiencing any symptoms of illness must stay away from the workplace (perhaps working from home where appropriate) and can be enforced on a *zero-tolerance* basis. In the short term, employers may consider temporarily increasing vacation or sick leave entitlements to facilitate *zero-tolerance* enforcement. The potential risk of abuse of this extended leave is probably outweighed by the risk of a widespread infection in the workplace.

PANDEMIC PREPAREDNESS

In these early stages of concern, as we await word on whether the world is experiencing a full H1N1 pandemic, it is wise for employers to take steps to prepare their workplace. Understanding the duties and obligations under occupational health and safety, employment standards, and human rights laws is one concrete step towards ensuring that your organization is prepared to respond to a pandemic and its impact on the workplace.

Beyond understanding duties and obligations, employers may benefit from policy and operational changes. One such policy change is the drafting of a policy on communicable illnesses. This policy should cover such topics as: the types of illness covered, how and when employees should disclose illnesses or diagnoses, when employees should--and when they must--stay home, whether employees will be paid for time in quarantine, what travel limitations will be put in place, and how each case will be considered individually. A communicable illness policy will provide basic information to employees and will aid in the management of any outbreak.

Employers should also prepare an emergency or pandemic response plan that provides a guideline for maintaining operations and service during pandemics and other disasters. At its most basic, an emergency response plan identifies the hazards that trigger the plan and provides for the continuation of essential business functions and decision making during an emergency. More advanced plans may include:

- Succession plans that prepare other employees to perform key workplace tasks;
- Administration and logistical arrangements including the establishment of “clean” work sites, and communicable illness and travel policies;
- Emergency communication procedures to inform stakeholders;
- Measures to ensure the health and safety of employees and the protection of property;
- Processes for the restoration of normal operations.

As a first step, employers should consider forming an internal emergency or pandemic response committee to oversee the preparation of an emergency plan. Statistics show that few employers have taken these basic steps. Now is the time to act.

Pandemics must be taken seriously because they are capable of spreading rapidly. We continue to monitor the situation and will provide you with more detailed information as the situation develops.

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ENDNOTES

¹ World Health Organization, “Influenza A (H1N1) – update 8” (1 May 2009) online: WHO <http://www.who.int/csr/don/2009_05_01a/en/index.html>.

² Public Health Agency of Canada, “Cases of Human Swine Influenza in Canada” (30 April 2009) online: <<http://www.phac-aspc.gc.ca/alert-alerte/swine-porcine/surveillance-eng.php>>.

³ World Health Organization, “Influenza A (H1N1) – update 6” (30 April 2009) online: WHO <http://www.who.int/csr/don/2009_04_30_a/en/index.html>.

⁴ Ministry of Labour, “Workplace Laws and SARS” (10 December 2003), online: MOL <http://www.labour.gov.on.ca/english/hs/sars/sars_faq.html>.

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