FTR Now

Effective Pandemic Planning

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Employers have a general obligation under health and safety law to take all reasonable precautions in the circumstances to protect their workers. What does this entail, however, in a pandemic situation, such as the one currently facing employers?

In our May 1, 2009 *FTR Now* – "Employer Bulletin: Influenza A(H1N1)" – we discussed some of the important rights and obligations of both employees and employers related to the spread of the H1N1 Influenza Flu Virus ("H1N1" or the "Virus"). In this *FTR Now*, we highlight issues to consider when developing or fine-tuning your own pandemic plan.

Following a discussion of how to create a plan that works for your organization, we have focused on how employers can manage medical information before, during and after a pandemic.

BACKGROUND

The Ontario Ministry of Health and Long-Term Care ("MOHLTC") has warned us that this year it will be a "different kind of flu season". As media reports continue to spotlight regional outbreaks, it is more important than ever for employers to have policies in place to deal with potential pandemic situations so that disease transmission can be both prevented and contained within the workplace.

BE PREPARED: DESIGN A PLAN THAT FITS YOUR WORKPLACE

Having a pandemic plan in place will increase the likelihood that disease outbreak will be better prevented and contained. Moreover, employees will expect that their employers have given thought to this issue in a proactive manner, so have a plan in place now.

In a unionized environment, consider involving the bargaining agent in the development of your plan. This consultative model may reduce the possibility of any challenges to the plan once it is implemented.

Consider establishing a committee to deal with the logistics of an outbreak or pandemic declaration. The committee could undertake a variety of activities:

- Liaise with supervisors and managers to monitor the prevalence of the disease in the workplace.
- Communicate information from health officials to appropriate individuals in the workplace.
- Keep all employees informed of the status of the pandemic and the steps that the employer is taking on an ongoing basis.

In addition, employers can take proactive steps to promote disease prevention by:

- Educating employees about the disease, including symptoms and risks.
- Informing employees of ways they can prevent the spread of disease, such as practicing good hand hygiene in the workplace, and covering up when sneezing and coughing.
- Regularly inspecting and replacing filters on air circulation systems, cleaning common areas, and, in particular, telephone sets, after each shift.
- Increasing cleaning activities when a pandemic has been declared.

- Providing masks and hand sanitizers when appropriate.

In order to reduce disease transmission in the workplace you may need to direct sick or symptomatic employees to remain off work. Accordingly, you should determine in advance how your organization will address employee absences:

- Examine existing policies, including sick leave plans, and the provisions of any applicable collective agreement, to determine whether employees will be paid.
- Determine whether employees may utilize any legislated leaves during their absence. For a more detailed discussion, please see the May 1, 2009 *FTR Now*: "Employer Bulletin: Influenza A(H1N1)"

Furthermore, you should consider reducing the impact of time away from work without pay by:

- Allowing employees to use vacation time to cover their absences.
- Allowing employees to make up the time at a later date and not interrupting their pay.
- Where possible, allowing employees to work from home.

Employers should take reasonable steps to ensure that employees who are absent from work due to sickness are not still contagious upon their return. This may be particularly challenging because a true medical clearance would require a lab test, which employees may not be able to secure in a timely manner and which some medical bodies have suggested would be an inappropriate use of medical system resources. The alternative is to conduct a symptom-based assessment where warranted, ideally through trained medical personnel. For employers regulated by private sector privacy legislation, there are special concerns that we have discussed below.

TELL EMPLOYEES ABOUT YOUR PLAN

An organized communications strategy is key to the success of your pandemic plan. Identify a point of contact for your employees so that they know where to go for information and to whom they should direct their questions. Communicate your plan in a clear and concise manner, ensuring employees understand the rationale for the measures you may adopt, and keep your employees up-to-date.

OPERATIONAL CONCERNS

Where possible, in advance of a pandemic being declared, determine whether your organization will be able to operate and how you will cover potential absences. Consider what you will have to do if you need to close your organization. You should consider reducing direct contact between employees by rescheduling meetings and training where possible, and using email, teleconferencing and other means.

TESTING AND IMMUNIZATION

Consider whether testing of employees or immunization is appropriate for your workplace, and determine how you will need to handle employees who refuse to be tested or immunized. Make sure that your strategy for this is communicated in advance.

BE PREPARED FOR POSSIBLE WORK REFUSALS

Employees have the right to refuse to work if they believe that their health and safety is at risk, so ensure your management staff is familiarized with the legislated work refusal process set out in the *Occupational Health and Safety Act*.

LEGAL CONSIDERATIONS

Be aware of your employees' legal rights, particularly their privacy rights – dealing with employees will often require handling sensitive personal health information. Ensure that you abide by all applicable privacy legislation, as well as all other relevant statutes. If you have questions, seek legal advice.

Ultimately, what will constitute the best plan for your company will depend on your organization's own risk assessment.

MANAGEMENT OF MEDICAL INFORMATION BEFORE, DURING AND AFTER A PANDEMIC

The proper care and treatment of your employees' medical information is a challenge at the best of times. Pandemics and disease outbreaks only heighten the need for best practices. Without a clear medical information management plan in place, employers may be left scrambling to devise one on the spot. It is therefore prudent to consider putting policies into place which detail the kind of information it is reasonable for management to collect, use and disclose when a pandemic has been declared.

Highlighted below are key factors you should consider when developing your pandemic outbreak medical information management plan. Employers must consider the best way to balance legitimate health and safety concerns with the privacy interests of employees.

PRE-PANDEMIC PLANNING – EXPAND THE INFORMATION THAT YOU GIVE

A medical information management plan sets out the medical information an employer will collect from an employee and how that information will be used, disclosed and kept secure. During a pandemic, employers should take special steps to communicate with employees about the rationale for the plan.

Clear direction to your employees outlining why you are collecting certain medical information will help your employees understand why it is necessary and reasonable for you to collect, use and disclose their medical information in response to the situation. This kind of communication should also help them understand how you are balancing the privacy interests of individuals with the overall health and safety of the workforce. If employees understand the rationale for your decisions, they may be less likely to challenge the steps you take, helping to reduce the risk of costly and time-consuming litigation.

When educating your employees you will want to ensure employees understand such matters as: the symptoms of the disease; the risks of contracting the disease; how the disease is transmitted; and ways to reduce transmission in the workplace.

Communication and education should be key components of any pandemic response – be that in the workplace or within our communities.

COLLECTION, USE AND DISCLOSURE OF MEDICAL INFORMATION DURING A PANDEMIC DECLARATION

As part of their pandemic planning process, employers should determine what information they are entitled to ask employees for and how they can use and disclose this information. Employers must consider what information they need to protect the health and safety of their workforce, and how they can achieve this protection in as minimally intrusive a manner as possible.

In ordinary times, employers are advised against requiring an employee to disclose a specific diagnosis. However, there is no absolute rule against obtaining a diagnosis from an employee. Indeed, some decision-makers have recognized that a diagnosis may be necessary information for an employer to have in order to fulfill its health and safety obligations to the entire workforce.

Thus, during a pandemic, when employers have reason to believe that employees are in the workplace in a contagious state, they may arguably ask questions to assess this point. This is a medical assessment, and should ideally be conducted by qualified medical personnel who are apprised of the most recent information on the H1N1 Virus. The information collected should be recorded either in employees' confidential medical file or in a special confidential record that is kept separate from the personnel file. This type of screening is arguably a necessary and appropriate part of pandemic management, but is not without risk. Those employers subject to private sector privacy legislation should beware that the federal, British Columbia and Alberta privacy commissioners have released publications that seem to preclude such action.

In some cases, an employer may seek confirmation of immunization, particularly when the place of employment is a healthcare setting. Similarly, in the context of some outbreaks, an employer may wish to know whether an employee has travelled to an area which is experiencing a high incidence of the disease in question. As can be seen, different kinds of information may well need to be collected, used and disclosed at various points throughout the course of the pandemic.

It is important to remember, however, that the necessity of the collection of this information does not mean that the employer can or should disclose this information in an unrestricted fashion. Rather, employers should use and disclose the health information on a "need to know" basis only. Employers must carefully examine what information needs to be used or disclosed in the circumstances to fulfill their obligations to all of their employees, as well as to those to whom the employer provides services.

IMPACT OF PRIVACY LEGISLATION

Employers must also remember that they may be subject to specific privacy legislation.

Employers who are federally regulated and employers with employees in Alberta and British Columbia are subject to private sector privacy legislation that governs the collection, use and disclosure of employee personal information. In late October, the Office of the Privacy Commissioner of Canada, the Office of the Information and Privacy Commissioner for British Columbia and the Office of the Information and Privacy Commissioner of Alberta published two documents on privacy and management of the H1N1 pandemic. These documents seem to preclude the type of H1N1 screening we have described above. Though they are not statements of law, they do raise special pandemic planning considerations for organizations who are subject to privacy legislation in respect of their employees.

AFTER A PANDEMIC

Ideally, the records generated in the course of managing a pandemic will fit within an established class of records and therefore be subject to an established records retention rule. If not, an employer should establish a retention rule for such records with a view to their value as potential evidence of due diligence.

A BALANCING ACT

Ultimately, the overriding consideration that employers will want to keep in mind is whether the information they require is necessary in the circumstances. Employers must balance their own rights and obligations to manage and protect the workplace with the individual privacy interests of employees. Being prepared for the situations that may arise will help employers make the right decisions at crucial times during a pandemic.

If you have any questions, or would like some assistance in drafting your own pandemic or medical management plan, please do not hesitate to contact Craig Rix (Toronto) at 416.864.7284, Michelle Alton (Toronto) at 416.864.7238, or your regular Hicks Morley lawyer.

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