

Global HR Hot Topic

Tackling challenges in global human resources administration and compliance

Global Swine Flu Pandemic Plans: Top 10 Legal Issues

Challenge:

As proactive multinationals hurriedly respond to the international swine flu outbreak of Spring 2009, global pandemic plans implicate employment law issues worldwide.

In April 2009 the World Health Organization called the Spring 2009 swine flu outbreak a “public health emergency of international concern” and the *New York Times* said the world was at “the leading edge of a global pandemic.” With no vaccine yet in existence and with public health officials recommending extreme precautions, the emergency became truly global: As of late April, the crisis was most acute in Mexico, the US and Canada, but infections were emerging as far away as Spain, Israel, Scotland and New Zealand.

Because a workplace pulls employees together into close daily contact, the employment context raises real concerns in any communicable-disease outbreak. Employers have a keen interest in keeping staff healthy and in containing the spread of a disease, not only for the obvious reason of employee welfare but also to keep business operations running and to minimize liability exposure.

As an “international concern,” the 2009 swine flu outbreak raises special issues for *multinational* employers: How can a multinational implement pandemic precautions and policies *across worldwide operations*? What legal issues does a cross-border pandemic response policy raise? The elements in an effective pandemic protocol vary widely by employer—with the *medical* issues predominating over the legal. Pandemic plans tend to address topics as disparate as: workplace safety precautions;

insurance coverage; paid time off, mandatory telecommuting and vacation; disaster communications; employee travel restrictions; stranded employee travelers unable to return home; mandatory medical check-up/vaccination/medication; mandatory reporting of exposure (employee reporting to employer and employer reporting to public health authorities); employee quarantine/isolation; terminations for violating protocols; and facility shut-downs.

Medical professionals may be better experts than lawyers to advise on content of a global swine flu protocol, but any global workplace pandemic plan—be it driven by swine flu, avian flu, SARS, or on public-health outbreaks in general—implicates a number of easy-to-overlook issues of *international employment law*. A best practice is to draft a global pandemic response plan template that accounts for legal compliance internationally, and then to adapt that template in each local jurisdiction accounting for local law. In doing that, consider these ten legal issues especially likely to be implicated:

■ Health and safety representatives:

In much of Latin America and Europe, employers must appoint health and safety representatives, or employee health/safety committees, and consult with them on workplace health/safety policies. Because current versions of an employer’s local health/safety plans will almost surely be silent on swine flu, rolling out new pandemic



Each monthly issue of *Global HR Hot Topic* focuses on a specific challenge to globalizing HR, and offers state-of-the-art ideas for ensuring best practices in international HR management and compliance. White & Case’s International Labor and Employment Law Practice helps multinationals globalize business operations, monitor employment law compliance across borders and resolve international labor and employment issues.

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Pointer:

Draft a global pandemic plan that accounts for local employment law issues. Then adapt the plan in each local jurisdiction, modified to account for local law.

procedures requires amending existing local plans. The amendment procedure needs to follow local law and involve local health/safety representatives. Neglecting this step by unilaterally imposing a pandemic policy will amount to an unfair labor practice in countries where the employer sponsors health/safety representatives.

- **Labor/employment law:** Health/safety representation aside, many countries confer on labor representatives (trade unions, works councils) a right to consult on issues affecting the workplace—an obligation similar to “mandatory subjects of bargaining” in unionized US workforces. Labor representatives may not have an absolute right to veto a new pandemic plan, but they will likely have power to void one that was *unilaterally-implemented*. In some countries local government labor agencies will also have a voice. A similar issue exists in Japan and elsewhere where employers need to post written work rules: To be enforceable, adding pandemic contingency procedures with new terms/conditions of employment requires amending current work rules. For that matter, any swine flu procedures must also be consistent with rights in employees’ *individual* employment agreements.
- **Language:** A swine flu response plan rolled out internationally must be understandable. Some jurisdictions (Belgium, France, Quebec, Turkey, much of Central America, others) require that communications or work rules be in the local language. Even where laws are not so strict, to be understood and enforced a pandemic plan needs to be in a comprehensible language. (See our August 2008 *Global HR Hot Topic*.)
- **Medical attention:** In Brazil, Italy and elsewhere, many employers have on-staff doctors. Enlist company doctors as crucial players on the front line of any swine flu outbreak. Outside of company-doctor countries, employers will have a more difficult time requiring employees to get a medical exam or take a vaccine or medications. In countries from Europe

to Canada to Asia, the analysis here will depend on whether an employer mandate to see a doctor is reasonable. Other legal issues as to employer-provided medical care include: regulation of prescriptions; drug importation; employer distribution of drugs/vaccines; employer (or nurse) practicing medicine; doctor/patient privilege.

- **Medical costs/procedures/coverage:** In many countries government medical systems (sometimes partly payroll-funded) pick up sick employees’ medical costs, so treatment bills of local flu-infected staff may not add to an employer’s costs. A problem, though, can arise as to immigrants, expatriates and business travelers away from home-country medical care systems. Be sure mobile employees have coverage and know where to go for medical help.
- **Isolation:** Some employer pandemic plans try to reserve an employer’s right to isolate or “quarantine” possibly-infected employees. Some pandemic plans seek to restrict employee travel (business and personal) into problem areas, or return travel after exposure in a problem area. But isolation orders and travel bans will get scrutinized in light of employee rights. Spell out isolation procedures and travel bans clearly in the plan. Anchor them in reasonable medical advice.
- **Personal injury liability:** Multinationals implement global pandemic plans in part to reduce exposure to personal injury lawsuits from employees (and customers and others) exposed to viruses on-premises. In most countries, worker safety laws and other rules impose an affirmative duty of care on employers. To meet this duty, pandemic plans address safety measures (*distribute masks? distribute Tamiflu or Relenza medication? require vaccines? (the US CDC expects to issue a swine flu vaccine later in 2009)*). In many countries employers can invoke a doctrine like the workers’ compensation bar to defend against employee personal injury claims. But some jurisdictions (even England) have no such defense. Other places, such as in Latin

America, allow employees to surmount the workers’ compensation bar by proving mere employer negligence. Plan accordingly.

- **Discipline:** When a pandemic hits, employees may refuse to report for work or refuse business travel assignments or insist on working from home. Local law may support a no-show employee whose refusal to work is reasonable—but employers usually can discipline for *unreasonable* absences. Implement clear rules prohibiting unreasonable refusal to report. Build clear procedures for communicating when the workplace is safe.
- **Shut-downs:** Swine flu workplace shut-downs spread across Mexico in April 2009. The main employment liability here is *pay*: In many countries an employer that shuts down temporarily must pay those willing to work. (*Sick* workers often collect sick pay, from either the employer or the state, under local sick-pay systems.) Law in some countries, though, lets an employer suspend operations, and pay, because of a genuine *force majeure*. In other countries implementing a furlough may be possible. Any pandemic policy should address these issues in a defensible way.
- **Data privacy:** In a swine flu pandemic, employers will want workers to report whether they or their family members have the flu; where they have recently traveled; and whom they have been exposed to. But jurisdictions with robust privacy laws restrict employers from forcing workers to divulge personal data—particularly health information, which in the EU is subject to special rules for “sensitive” data. Pandemic plans should spell out situations where public health factors make personal inquiries reasonable. Invoke any employer duties to report infections to public authorities and to maintain a safe workplace. Process employee flu-status data carefully.

An earlier version of this alert appeared in February 2007.

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