

**SURVIVING THE PANDEMIC:
HUMAN RESOURCE LEGAL ISSUES**

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by

**Robert E. Gregg, rgregg@boardmanlawfirm.com
Jennifer S. Mirus, jmirus@boardmanlawfirm.com**

**Boardman Law Firm
P.O. Box 927
Madison, WI 53701-0927
608-257-9521**

Pandemics, or pandemic threats, arise periodically. H1N1 is the latest in a series which includes the 1980's Swine flu, Asian bird flu and SARS. These past instances have given the opportunity to establish a foundation in policy, practice and law which can be used now to address H1N1 without need for panic.

This does not mean a serious flu outbreak will be *easy* to deal with. It means there are guidelines and precedent to help us prepare and cope with more confidence and effect.

Duty of Care for the Health, Welfare and Safety of the Workplace

OSHA includes a “general duty” clause which requires employers to keep the workplace free of recognized hazards. A pandemic is a recognized hazard.

Pandemic Preparedness Plan

All organizations should have a Pandemic Preparedness Plan, just as there should be other “critical incident” plans for violence, natural disaster, etc. The Plan should be developed, in general, well in advance, before any particular pandemic is

identified. The Plan can then quickly be upgraded and implemented to meet the issues of a particular pandemic.

Basic Plan elements are (1) a team; (2) practicing; (3) cross-training; (4) alternative work sites and workers; (5) supplier services; (6) human resource practice and policies; and above all (7) communication. A Plan Summary is attached as an Appendix to this article. More detailed advice can be found at www.osha.gov.

Affected Employees

Employees and their family members will get the flu. *Any employee who has flu-like symptoms should not be at work.* The current Center for Disease Control guidance is that the employee should not return until after 24 hours of being fever-free and symptom-free without medication.

Employers can conduct screenings (*i.e.*, take temperature and check for symptoms) on a general, or reasonable suspicion basis.

Reduced Work Hours or Sending People Home

Generally, employers may unilaterally reduce work hours. (Employers with Collective Bargaining Agreements must consult with the union in most situations except direct threat.)

1. This must be done on a non-discriminatory basis.
2. *Non-exempt employees* must generally be paid only for hours worked.
3. *Payment of exempt employees* in pandemic situations can raise more complicated situations. Under the Fair Labor Standards Act “salary basis test,” exempt employees must generally be paid their full salary if they work *any* hours in a given work week. (There are certain exceptions, some of which only apply in the public sector). It may be valid legally to adjust salaries of exempt employees for illness-related short-term absence (see FMLA and request the article entitled *Pay and Absence Concerns for Exempt Employees*, by Boardman Law Firm).

Employer mandated involuntary leave in which there is no proof of sickness (due to perception of symptoms, or caution) will require payment of exempt employee salary for any time off less than a full-week term.

4. Unemployment Compensation benefits may be available to those on involuntary leave.

Is Pandemic-Related Absence Protected?

Are employees off the job due to their own or family's pandemic-related illness protected from discharge for "excessive absence?"

1. Public policy. A major exception to Wisconsin's At Will Employment doctrine is "discharge against public policy."

Federal and state laws provide for a "safe workplace." Laws also cover quarantine of seriously ill or perceived ill people. *Expect more* regulations or executive orders encouraging a mandatory absence from work for those who seem to have flu symptoms. In that case, firing an employee for a flu-related absence could violate public policy and give rise to an unfair discharge case.

2. Family and Medical Leave

a. Employees are generally entitled to federal FMLA rights if their employer has 50 or more employees within a 75-mile radius. The State of Wisconsin takes the position that employers with 50 employees anywhere (and all public sector employers) are covered by the Wisconsin FMLA.

b. Pandemic-related illnesses will generally qualify as "serious health conditions," particularly if hospitalization, three days of absence or repeated treatment by a health care provider or continuing regimen of treatment is involved.

c. Federal FMLA. Employees are entitled to up to 12 weeks of unpaid leave for an employee's own serious health condition or to care for a family member with a serious health condition.

d. Wisconsin FMLA. Employees are entitled to up to 2 weeks of unpaid leave for an employee's own serious health condition and/or two more weeks to care for a family member or domestic partner with a serious health condition.

e. Employers can require medical certification of the need for FMLA leave.

f. Employees who take FMLA leave must be reinstated to their former position or a substantially equivalent position.

g. Employers may dock pay from exempt employees who use FMLA time without jeopardizing the employee's exempt status.

h. Employees may be able to substitute accrued paid time for unpaid FMLA leave (or elect not to do so under Wisconsin FMLA).

3. Disability

a. Both federal and state disability law generally provide that temporary medical conditions are not "disabilities." Thus, a temporary pandemic-related illness is not likely to be considered a disability. However, the CDC has warned that people with disabilities such as asthma, diabetes, heart conditions, immune system disorders, etc. are "*at risk*" for H1N1 complications. Thus, effects of such an illness on pre-existing long-term conditions may qualify as a disability-related absence.

b. Employers cannot discriminate against employees with disabilities and must provide reasonable accommodations for disabled employees.

c. If a disability exists, an employer may be required to provide unpaid leave (even beyond FMLA leave), job restructuring, telecommuting, or other accommodations.

d. Disability laws cover an employer's ability to ask employees about medically related issues. Any medical inquiries must be job related and consistent with business necessity. If the employer has a reasonable belief that an employee is a direct threat to him/herself or others in the workplace, then the employer can keep the person out of the workplace as long as there is a direct threat.

e. Employers who take job actions on the basis of perceived conditions or on the basis of an employee's "association with" a disabled individual may be deemed to violate the ADA. So don't engage in generic questioning or "fishing" into employees' medical issues.

f. Encourage employees at higher risk of complications from flu to contact their health care provider as soon as possible. Taking antiviral medicines early might prevent severe complications from the flu, such as hospitalization or death. People at higher risk for flu complications include pregnant women as well as people with chronic medical conditions.

This should be part of the general Plan communication to all employees. *Do not* survey or interrogate employees about their medical conditions. Do not discriminatorily focus on people with disabilities. Finally, immunization is a personal medical choice and cannot be required.

4. Confidentiality

Both the FMLA and disability laws require employers to maintain any medically related information about employees as confidential. Such information should not be kept in general employee personnel files, but rather in separate confidential files. Employers should not disclose medical information about any employees to co-workers. If needed, public health officials should convey necessary information to workforces.

Non-Sick Leave Absence for Family Members

A pandemic may result in closure of schools, day care or other child services. Employees will request leave to deal with these situations. These are not absences due to illness of the family member. The person may be healthy, but has nowhere to go for care or services during the normal work hours. H1N1 is predicted to have a more serious effect on children than adults. So closures are more likely in schools, day care and other child services.

1. Non-serious illness leave is not protected by FMLA.
2. Outside a company policy, there is no protection from “unexcused absence” discipline or discharge for non-sick absences.

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3. Public policy (see earlier) may come into play, depending on whether a “government order” shuts down the schools, day care, etc.
4. *Beware of bad publicity and precedent.* Even if there is no legal protection, firing people in this situation can create a *backlash*. This is the sort of publicity which results in later legislation to “fix the problem” and creates more protective laws and legal liability for employers in the future.
5. *Is it faking?* Employers are often concerned that some employees will take advantage of a situation and claim illness just to get a few days off for R&R. Is rigid “policing” worth the risk? Strict challenges of leave may result in sick people coming to work, infecting a lot of others, and creating many multiples of pandemic absences.

Workers' Compensation claims may result if employees can track their own illness to work, due to the organization's less-than effective practices to prevent infected employees from being at work (or even challenging their absence and "pressuring" sick people to come in).

Unsafe place. Wisconsin Statutes §§101.11 and 102.57 provide extra damages for an employer creating an "unsafe place." Over concern about "checking" and rigid enforcement of policy during a pandemic could well generate this case, especially if the state issues policies or guidance urging caution and absence from work in a pandemic.

A pandemic may be an occasion to relax the scrutiny. There will be some people who "game" the system but, on balance, the overall welfare of the operation should be considered. So, modification of policies may be the best practice. Absence policies and special pandemic memos to employees should include the employer's right to get medical verification for any absence. This can limit any abuse of pandemic leave, but go easy on requiring the verification. [*Be aware* that the U.S. Department of Commerce has recommended that employers either drop or "go easy" on documentation requirements, to avoid over-stressing a health care system which is already stretched due to H1N1 cases.]

The Cautious Employee

Some employees may be so anxious about a pandemic illness that they wish to stay home to avoid infection. In this situation, there is no existing serious condition and no protection under FMLA, and probably not under public policy. It can count as an unexcused absence and result in discipline or discharge.

1. Vacation or other PTO could be used.
2. An employer can deny use of vacation or PTO. Most employers' policies require approval of non-illness-related absences and give the employer discretion to denying any request. In fact, a pandemic may be valid reason to cancel vacations in order to have sufficient staff to make up for those who are out due to the flu.
3. Denial of time off or discipline for unexcused absence must be non-discriminatory.

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4. The "*at risk*" employee may be protected by the ADA. If there is medical verification that infection will create serious complications for an existing condition, then avoidance of exposure may be a reasonable accommodation for the disability.

Sick Leave/Attendance Policies

1. Employees who are not covered by FMLA, or have exhausted FMLA, and are not disabled, have none of the protections of those laws. If they miss work due to illness, an employer can consider that pandemic illness as “*unexcused absence*.”

2. The public policy exception may alter this (see earlier description).

3. *Pandemic circumstances warrant flexibility* and exceptions to the general rules. Flexible leave policies and alternate work schedules will help prevent the spread of flu at your workplace, allow employees to continue to work or function while limiting contact with others, help maintain continuity of operations, and help people manage their health and their family’s needs. (See earlier section on relaxing standards, bad publicity, and the danger of future legislation due to over-strict enforcement in dire circumstances.)

Requiring Extra Work or Different Work

Employers generally have discretion to require employees to put in longer work hours than those typically scheduled and to do *any job necessary* for the operation. A pandemic may be a situation in which other staff are needed to fill in wherever and whenever necessary to cover the work of those who are absent.

1. Cross-training can mean survivability in a pandemic.

2. One must be aware of exempt (salaried) vs. non-exempt (hourly) status. Non-exempt employees must generally be paid time and one half their regular rate of pay for all hours worked in excess of 40 in a work week. Exempt employees are not entitled to overtime pay or compensatory time.

3. *Meeting the needs*. Exempt employees can be shifted to hourly work if necessary. However, doing hourly work may destroy the salaried exemption for that week and require payment of time and a half overtime for anything beyond 40 hours.

4. Employers may be restricted/prohibited from adding additional work hours for employees who are on FMLA leave, or who are disabled and on a limited work schedule due to the disability.

Telecommuting

What positions can effectively telecommute? (accountant? telephone sales? human resources? custodian? welder?) Consider the essential functions of the job. An employer may require telecommuting, assign people to telecommute, or to work from any other location. An employer may also deny telecommuting (except under the ADA reasonable accommodation provisions).

1. ADA may require telecommuting (or not). Two cases illustrate this issue:

a. Employer could not justify no-work-from-home policy. An employee requested to work from home two days a week due to her disability restrictions. Management refused on the grounds that removing the documents she worked with created a security risk. However, at trial, the employee's supervisor testified that her daily presence in the office was not necessary as long as she had documents to work on. Further, the papers at issue were low level, had no security designation, and were not covered by any department security or safekeeping practices. The employer's reason for denial of work from home were without foundation. *Freeman vs. Department of Homeland Security* (D. NJ, 2009).

b. Work from home accommodation validly stopped due to performance record. An employer validly denied a disabled employee's accommodation request to continue telecommuting. The evidence showed she repeatedly missed deadlines and produced significantly less work than others, and less than her prior at-work level. This justified discontinuation of the accommodation. *Robinson v. Dept. of Energy* (9th Cir., 2009).

2. Wages and hours.

a. Electronic devices may make it difficult to be "off the clock." Technology allows employees to do work from home and allows managers to contact employees at any time. Some supervisors seem to expect employees to be readily available for questions or to respond 24/7. Company-provided cell phones, Blackberries, laptops, pagers, etc., make it easy to communicate during "non-work" hours and create an impression that the employee is *on-call* at any time. An upcoming Fair Labor Standards case will address this issue. *Rulli v. CB Richard Ellis, Inc.*, (E.D. Wisconsin, filed March 15, 2009). Maintenance workers who were issued phones or pagers were expected to have them on at all times—day and night. Any call was expected to be returned within 15 minutes, usually to answer questions or provide advice. At times, the workers were expected to go and do work. The suit raises the issue of how much time out of every 24 hours the workers should actually receive pay for this constant on-call duty. It asks for

hourly pay and overtime pay for all the company's maintenance workers, nationwide, for this off-hour/on-call work.

This case is a good warning that supervisors should be cautioned, and periodically reminded, that the convenience of contacting employees at any hour can have FLSA consequences. Employers should also review their policies and procedures for on-call responsibilities to assure they are clear, in compliance with the FLSA, and that worked time is properly recorded. Lack of care in this area can cost a lot in wage and hour liability.

(b) *System for tracking hours.* There should be clear, detailed policies or memos regarding off-site work. The employer should have tangible guidelines on how to keep time and any other important production records. The standard methods are paper time log sheets or computer log on/off. There should be instructions on hours of work, and any requirements regarding prior approval of overtime. Supervisors and other employees should receive instruction about frequency of calling people who are at home and at what hours, to avoid overtime complications.

(c) *Calling those on sick leave.* Those at work often call absent workers to get information or advice. Sometimes it is a crucial issue. Sometimes it is just convenient. Frequent calls can (1) interrupt healing and (2) convert sick leave to *paid time*. Again, both those at work and at home should receive clear information regarding such calls and keep them to a minimum.

3. Salaried employees. Any "work" in a day may require payment for the *full* day (or week) unless the employee's absence qualifies under the federal FMLA.

4. FMLA. Significant interruptions can violate the employee's FMLA rights.

5. Electronic security. *Taking home the e-files.* When people work at home, the laptop is always with them, with all the work data, and with access to the system. In 2006, the U.S. Veterans Administration reported theft of two laptops containing personal information of millions of vets. Both laptops were being used at home. Equifax, whose ad is "protect yourself against identity theft" had to give notice in 2006 of a computer laptop stolen during a business trip. It contained names, social security numbers and other personal identity information on 2,500 employees (52% of the entire workforce).

Children of employees use the same laptop or computer for games. Savvy teens can tap into the other information on the computer. They may share it with others. It's fun! Any work at home should be accompanied by security policies and security systems set up by your IT specialist.

Travel Status

What is an employer's responsibility when an employee gets sick while on job-related travels? The employee may not be "working" for the days of illness.

The Duty of Care for employees' welfare continues to apply. Even though no work is being accomplished, the employer still has a duty to show concern for the person and assist in helping them find care, and return home.

Employers should establish an advance protocol for on-the-road illness. This should be part of the Pandemic Preparedness Plan. The details should be given to each person who is going to be in job-related travel. Among the things to consider are:

- Employee's duty to inform management of illness.
- Employee's duty to follow illness/safety procedures and not infect clients or others.
- Communication process, so employer can either check or be informed of employee's ongoing status and safety.
- Emergency contact process, with local contacts, family, or at least the hotel management to assure safety of employee.
- Assist employee in finding local medical care if needed.
- Assist employee in handling any health insurance complications due to employee being out of state or out of network.
- Assist employee with rearrangement of air or other transportation.
- Assist with unexpected expenses due to illness.

Illness while in travel status is a "mixed" personnel/employment issue. Unless the illness is caused by work-related factors, there is no Worker's Compensation coverage. As for wages, a personnel illness on the road is no different than one at home. The employee is not working, and the same rules on wages and hours, and paid or non-paid sick leave apply as would if the person called in absent due to illness at home base.

The employer is generally not responsible for payment of medical care expenses. The employer may well not be liable for extra hotel nights and travel re-booking charges caused by on-the-road illness. The employer does, however, have a duty to help the person and facilitate their return, and this may mean fronting, or guaranteeing some of those costs. The employee may be charged back for these costs, but the primary current concern should be the welfare of the ill person.

Communicating with Employees

1. Share materials that educate employees on the fundamentals of pandemic illness, symptoms of influenza, modes of transmission and personal and family response strategies. Train supervisors to spot symptoms and how to report and handle the situation of apparent symptoms.
2. Educate employees and continually emphasize the sanitation and prevention practices relevant to the pandemic illness.
3. Anticipate employee fear and preempt the rumor mill. Proactive communication will get you significant good will and prevent having to clarify false information or panicky reactions to rumors.
4. Ensure that your communications are culturally and linguistically appropriate for the workplace.
5. Share appropriate parts of your pandemic preparedness plan with employees.
6. Develop methods for ongoing employee communication. This includes daily or weekly updates and enhanced call-in lines for absence.
7. Remind employees of resources available to *them* (EAP plan, benefit counseling, etc.) Urge employees to be proactive, take care of their own health and take personal responsibility to stay abreast of developments by following reliable sources such as www.pandemic.wisconsin.gov, www.cdc.gov and www.flu.gov.

APPENDIX

PANDEMIC PREPAREDNESS PLAN SUMMARY

This is a Summary of the elements of a Pandemic Preparedness Plan. The Plan itself will be more extensive and include details on a variety of issues. The Summary outlines the areas of the Plan and a general description of the action areas in preparedness.

The Plan elements include:

Plan Team

The team is in charge of the Plan and will be in control of operations during a pandemic or other sort of disaster. In addition to the chief executives and major managers, the team includes a coordinator and back-up coordinators in all of the organization's locations.

Prioritizing

The Plan should be based on study of operations and identify the essential functions and personnel required to maintain business and meet commitments during a period of high absence.

Cross-Training

Employees should be cross-trained to cover priority operations when the usual incumbent is absent.

Alternative Work Sites and Alternative Workers

Identify operations which employees can perform from home, and implement appropriate computer security.

Independent contractors can be used for various projects and processes. These contractors generally work off-site. In disaster preparedness, the organization should identify more contractors in the event they may need to step into work currently done by employees. Contractors also have the expertise to be able to come on-site for production operations in the event of employee absences. (Be careful to assure the contractors actually meet the legal definition for independent contractors.) A group of experienced temporary or seasonal workers could also be used in some industries.

A Preparedness Plan should be careful about reliance on employment agencies or temporary services. It should be envisioned that those services will suffer large absence rates and will be overwhelmed with a demand for temporary workers. Those agencies

may not have employees available, nor people with the experience necessary for the needs.

Travel Status

Policies and practices should be developed in anticipation of employees becoming ill while in travel status. Communicate these to all people who travel. Consider issues of communication, emergency care, local emergency contacts, out-of-state or out-of-network health insurance coverage, and rearrangements of air or other travel.

Suppliers and Support Services

Communicate with suppliers and vendors to assure the least disruption of operations. The Plan also should identify alternative sources, and communicate with those regarding supplies and services if primary sources are unable to meet needs.

Organizations with “just on time” inventory may consider whether to build up a moderate supply of crucial items in advance of the expected start of a pandemic.

Human Resources

Pandemics will require flexibility in HR policies and practices. Rigid policies may need to be modified or suspended during a period of emergency. The organization’s normal HR processes should be examined in advance and temporarily geared to accommodate the situation.

Contracts

A collective bargaining agreement (CBA) requires an employer with a union to bargain over terms and conditions of employment, such as the HR issues of a Plan. The union must be involved in the preparation stages (and any revisions or adjustments prior to implementation) regarding Plan elements which effect employees covered by the CBA.

Communications

A special communications operation should be implemented to handle greater than usual absences, to stay in communication with employees who are ill, tell employees whether to report to work or not, and arrange delivery and pick-up of work product done off-site. The communications operation can be developed to be accomplished from more than one facility for the entire company. (Back up is crucial for pandemic operations.) Portions of the operation can be performed from off-site by employees who cannot come in, or are directed not to report to the facility in order to keep the communications operations away from possible infections, or in the event the office must close for a time.

The planning process should involve communication with and input by employees and contractors regarding their operational and personal concerns about a pandemic and its

effect upon them, their families and income. Also, make employees aware of information sources regarding preparedness, as well as heightening awareness of health insurance and disability policies and practices.

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