

# Pandemics: Preparing and Protecting Your Business

## A Special Two-Part Series on Business Continuity, Insurance Coverage and Claim Issues

Despite the obvious health and safety concerns for employees and the general population during the current H1N1 outbreak, the business world is also experiencing aches and pains that need to be addressed.

A reduced demand for goods, services, and raw materials, as well as disruptions in the supply chain, have created a serious impact on companies. However, one way to combat the backlash of a pandemic is to focus on risk management practices.

### PART ONE: Business Continuity

Although many organizations may have a business continuity plan in place, they are typically set up for loss of buildings, computer networks and other equipment, which are not affected by a pandemic. Since a pandemic affects the employees who use these systems and their ability to perform their jobs, it is critical to plan for the potential impact a disaster may have on employees.

The Occupational Safety and Health Administration (OSHA) recommends that workplaces consider the following impacts on their business operations:

#### How a Severe Pandemic Influenza Could Affect Workplaces

Unlike natural disasters or terrorist events, an influenza pandemic is widespread, affecting multiple areas of the United States and other countries at the same time. A pandemic is an extended event, with multiple waves of outbreaks in the same geographic area; each outbreak can last from 6 to 8 weeks. Waves of outbreaks may occur over a year or more. Your workplace will likely experience:

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*“It makes good sense for every business to take stock now, of the ways in which it might affect their operations and the types of insurance that may protect them.”*

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- **Absenteeism:** A pandemic can affect as many as 40 percent of the workforce during periods of peak influenza illness. Employees could be absent because they are sick, must care for sick family members or for children if schools or day care centers are closed, are afraid to come to work, or the employer might not be notified that the employee has died.

- **Change in patterns of commerce:** During a pandemic, consumer demand for items related to infection control is likely to increase dramatically, while consumer interest in other goods may decline. Consumers may also change the ways in which they shop as a result of the pandemic. Consumers may try to shop at off-peak hours to reduce contact with other people, show increased interest in home delivery services, or prefer other options, such as drive-through service, to reduce person-to-person contact.

- **Interrupted supply/delivery:** Shipments of items from those geographic areas severely affected by the pandemic may be delayed or cancelled.

#### How to Maintain Operations during a Pandemic

As an employer, you have an important role in protecting employee health and safety, and limiting the impact of an influenza pandemic. It is important to work with community planners to integrate your pandemic plan into local and state

planning, particularly if your operations are part of the nation's critical infrastructure or key resources. Integration with local community planners will allow you to access resources and information promptly to maintain operations and keep your employees safe.

#### Develop a Disaster Plan

Develop a disaster plan that includes pandemic preparedness (See [www.pandemicflu.gov/plan/businesschecklist.html](http://www.pandemicflu.gov/plan/businesschecklist.html)), review it and conduct drills regularly.

- Be aware of and review federal, state and local health department pandemic influenza plans. Incorporate appropriate actions from these plans into workplace disaster plans.
- Prepare and plan for operations with a reduced workforce.
- Work with your suppliers to ensure that you can continue to operate and provide services.
- Develop a sick leave policy that does not penalize sick employees, thereby encouraging employees who have influenza-related symptoms (e.g., fever, headache, cough, sore throat, runny or stuffy nose, muscle aches, or upset stomach) to stay home so that they do not infect other employees. Recognize that employees with ill family members may need to stay home to care for them.

- Identify possible exposure and health risks to your employees. Are employees potentially in contact with people with influenza such as in a hospital or clinic? Are your employees expected to have a lot of contact with the general public?
- Minimize exposure to fellow employees or the public. For example, can more of your employees work from home? This may require enhancement of technology and communications equipment.
- Identify business-essential positions and people required to sustain business-necessary functions and operations. Prepare to cross-train or develop ways to function in the absence of these positions. It is recommended that employers train three or more employees to be able to sustain business-necessary functions and operations, and communicate the expectation for available employees to perform these functions if needed during a pandemic.
- Plan for downsizing services but also anticipate any scenario which may require a surge in your services.
- Recognize that, in the course of normal daily life, all employees will have non-occupational risk factors at home and in community settings that should be reduced to the extent possible. Some employees will also have individual risk factors that should be considered by employers as they plan how the organization will respond to a potential pandemic (e.g., immune-compromised individuals and pregnant women).
- Stockpile items such as soap, tissue, hand sanitizer, cleaning supplies and recommended personal protective equipment. When stockpiling items, be aware of each product's shelf life and storage conditions (e.g., avoid areas that are damp or have temperature extremes) and incorporate product rotation (e.g., consume oldest supplies first) into your stockpile management program.
- Make sure that your disaster plan protects and supports your employees, customers and the general public. Be aware of your employees' concerns about pay, leave, safety and health. Informed employees who feel safe at work are less likely to be absent.
- Develop policies and practices that distance employees from each other, customers and the general public. Consider practices to minimize face-to-face contact between employees such as e-mail, websites and teleconferences. Policies and practices that allow employees to work from home or to stagger their work shifts may be important as absenteeism rises.
- Organize and identify a central team of people or focal point to serve as a communication source so that your employees and customers can have accurate information during the crisis.
- Work with your employees and their union(s) to address leave, pay, transportation, travel, childcare, absence and other human resource issues.
- Provide your employees and customers in your workplace with easy access to infection control supplies, such as soap, hand sanitizers, personal protective equipment (such as gloves or surgical masks), tissues, and office cleaning supplies.
- Provide training, education and informational material about business-essential job functions and employee health and safety, including proper hygiene practices and the use of any personal protective equipment to be used in the workplace. Be sure that informational material is available in a usable format for individuals with sensory disabilities and/or limited English proficiency. Encourage employees to take care of their health by eating right, getting plenty of rest and getting a seasonal flu vaccination.
- Work with your insurance companies, and state and local health agencies to provide information to employees and customers about medical care in the event of a pandemic.
- Assist employees in managing additional stressors related to the pandemic. These are likely to include distress related to personal or family illness, life disruption, grief related to loss of family, friends or coworkers, loss of routine support systems, and similar challenges. Assuring timely and accurate communication will also be important throughout the

duration of the pandemic in decreasing fear or worry. Employers should provide opportunities for support, counseling, and mental health assessment and referral should these be necessary. If present, Employee Assistance Programs can offer training and provide resources and other guidance on mental health and resiliency before and during a pandemic.

## **PART TWO: Insurance Coverage and Claim Issues**

Along with the safety of employees and the effects on businesses operations during an influenza outbreak, it is also important to consider the company's current insurance policies and to review the protections provided by them, including property, business interruption, workers compensation and liability insurance, among others.

Below, attorneys from \*Anderson Kill & Olick, P.C. consider key issues likely to arise from claims under these types of insurance policies.

### **1. Is Business Interruption Coverage Available for a Swine Flu Pandemic?**

Depending on the facts, it may be possible for a swine flu pandemic to give rise to business interruption coverage. Such coverage typically is purchased by businesses as part of their property insurance policies, in the form of a rider or endorsement or an optional additional coverage. Business interruption coverage is designed to protect businesses from losses that they may suffer unexpectedly due to unavoidable interruptions in their daily operations.

Business interruption coverage may apply in a variety of circumstances, such as a forced shut-down, or a substantial impairment in access to, a business' physical plant or warehouses. Recent, infamous examples of events giving rise to such business interruptions are the events of September 11, 2001 and Hurricane Katrina in Florida.

In most property policies, business interruption coverage is only triggered when the site suffers property damage. Physical damage, however, can include contamination of equipment. Moreover, some policies, particularly those written for

policyholders in the hospitality industry, do provide coverage for losses stemming from infectious disease without requiring physical damage to premises. Further, civil authority coverage, which is triggered when authorities shut off access to an area in which a business is located, can be triggered without physical damage to the policyholder's premises.

The unfortunate events of 9/11 and Hurricane Katrina illustrated clearly that, for a business to be fully protected, it is essential for its risk manager, or other person responsible for its insurance, to maintain a complete set of all insurance policies in a secure location outside of the business premises. Otherwise, if a business is unexpectedly deprived of access to its premises, it will find itself deprived as well of access to the very policies that it needs to file a business interruption claim.

At this point, any business that has not already secured a set of its insurance policies, and key non-insurance documents as well, in a secure, off-site location should do so immediately. It may be a small inconvenience to make these arrangements, but that inconvenience is more than offset by the benefits that the business would garner on the day that it needs those off-site copies.

## 2. Is there CGL or D&O Coverage for Claims Related to Swine Flu?

Commercial general liability, or "CGL," coverage is designed to cover policyholders against claims brought against them by others, alleging that the policyholder's conduct caused bodily injury to the claimant such as sickness and disease resulting from exposure to harmful conditions. Since most claims by sickened non-employees would fit this description, CGL coverage will be a key source of protection against such claims.

For example, businesses subject to "invitee liability" – e.g., restaurants and hotels, cruise operators, conference organizers, and others that draw people together – may face claims from anyone who becomes ill shortly after visits to their premises. These businesses should be alert to this risk, and be prepared to give notice to their liability insurance

companies as soon as they become aware of actual, or even potential, claims.

The same is true for businesses that could conceivably be held accountable for exposing people to the disease through their products or services. Although this category seems small, potential candidates are businesses that provide transportation services, such as airlines, as well as businesses in the food service industry, such as caterers and supermarkets.

Any policyholder that receives even one such claim faces the risk – due to the way in which this disease is contracted and spread – of being the target of many more claims. Thus, it is important that notice is given as soon as possible to the CGL insurance company. Early notice will ensure that the CGL insurance company is not able to try to deny coverage based on the contention that it could have helped stem the policyholder's exposure to additional claims if only it was given notice sooner, and therefore, was prejudiced by some supposed delay in notice.

It is possible that individuals other than those personally sickened by the flu outbreak (e.g., shareholders in companies adversely affected by the flu outbreak) may make claims against companies or their executives based on allegations that management's acts or omissions caused such claimants to suffer financial losses. Although most D&O policies contain exclusions for claims alleging bodily injury, such claims for financial damages are covered under D&O insurance. As with CGL coverage, it is important for policyholders that become aware of such claims against them to give notice to their insurance company as soon as possible, and certainly before the policy period or reporting period for their current D&O coverage expires.

## 3. Will Afflicted Workers Be Covered Under State Workers' Compensation Laws?

Assuming one or more of a company's workers become ill, will those afflicted workers be entitled to workers' compensation benefits? That depends on how the workers became ill and the nature of the illness. Virtually every state workers'

compensation statute provides that an employee will be entitled to benefits for what is known as an "occupational disease." To constitute an "occupational disease," two conditions must be met: (1) the disease must be proven to be due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation or employment; and (2) the disease cannot be an ordinary disease of life, to which the general public is equally exposed outside of employment.

The distinction between an occupational and an infectious disease, however, is not always easy to make. While occupational diseases are covered and ordinary diseases generally are not, the latter may in some circumstances be covered if a direct causal connection to the workplace can be established.

## 4. Does a Flu Outbreak Constitute An "Occupational Disease"?

If a business faces one or more workers' compensation claims arising out of an alleged illness, the business will have to determine whether or not to challenge that claim. Whether or not a given illness would constitute an "occupational disease," and thus be covered under state workers' compensation law, is an issue of fact. There is limited case law dealing with the spread of contagions in the workplace to provide insight into the factors a court would examine to determine whether a given outbreak would be sufficiently connected to the workplace to constitute an "occupational disease."

In California, an outbreak of kerato conjunctivitis—a contagious eye disorder—among employees at a steel company was found to be "proximately caused by and to have arisen out of the employment" and "constituted a special exposure in excess of that of the commonality." In a case called *Bethlehem Steel Co. v. Industrial Accident Comm.*, the California Supreme Court held in 1943 that conjunctivitis was apparently "epidemic" in the shipyards of the defendant and that, "although there were many cases of the disease among the public, there [was] nothing in the record to show that the same proportion as in the shipyards was affected."

Washington, too, requires a direct link between the occupational injury or disease and the employee's scope of employment. In affirming an award of workers' compensation to an employee who contracted asthma from exposure to dust, smoke and fumes at his workplace, the court found a correlative link between the affliction and the nature of the employment. In *Simpson Logging Co. v. Department of Labor and Industries*, the court held:

Under the present act no disease can be held not to be an occupational disease as a matter of law where it has been proved that the conditions of the extra-hazardous employment in which the claimant was employed naturally and proximately produced the disease and that but for the exposure to such conditions the disease would not have been contracted.

It is clear that an employee seeking workers' compensation coverage for illness would need to demonstrate either that there was a proximate link between the disease and the employee's employment or that he or she was subjected to some special exposure in excess of that of the commonality.

#### 5. How Many Self- Insured Retentions Will Apply In The Event Of Outbreak?

If workers are able to demonstrate that they have contracted an illness through their employment and are therefore entitled to

workers' compensation benefits, one question that is likely to arise is the number of self-insured retentions that will apply for a given outbreak.

Many workers' compensation insurance policies, particularly policies providing excess coverage, provide insurance coverage beyond an initial self-insured retention (essentially, a deductible) for each accident and/or each employee for disease, after which unlimited coverage is provided for workers' compensation coverage up until the applicable statutory caps. Thus, if an illness is deemed to constitute a "disease," most policies would apply a separate retention for each individual employee asserting a "disease claim." This is the likely outcome if workers contract a disease such as the swine flu—pandemic outbreaks typically constitute "diseases" and not "accidents" for purposes of determining the number of applicable retentions under workers' compensation policies. Employers facing multiple claims could thus face extremely high exposure.

If, however, an illness outbreak is triggered by a causal event at the workplace and directly flows from the work being performed, it may be argued that the resulting disease has been produced by an accident, thus reducing the number of applicable self-insured retentions. One commentator noted the following:

If the cause of an infectious disease is traceable to a specific incident(s) at or related to work, then contracting the disease meets the definition of accident and qualifies as a covered injury. For example, if contracting typhoid fever could be traced to polluted water in a factory, then the illness is a covered injury.

Whether a given outbreak infecting multiple workers would be regarded as an "accidental event" or an "occupational disease" depends on the specific circumstances leading to the initial exposure to the disease. If a specific event led to the spread of the contagion, an outbreak could be considered an "accident" causing bodily injury as opposed to a disease. Thus, a business would only be required to pay one self-insured retention, no matter how many employees were actually exposed to contagion or contaminant.

*\*This article originally appeared in the May 2009 issue of Anderson Kill's Policyholder Alert by Diana Shafter Gliedman, Marshall Gilinsky and Rhonda D. Orin. Anderson Kill represents policyholders in insurance coverage disputes, with no ties to insurance companies, no conflicts of interest, and no compromises in its devotion to policyholder interests alone. The information appearing in this article does not constitute legal advice or opinion. Such advice and opinion are provided by the firm only upon engagement with respect to specific factual situations.*

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