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Limit Legal Concerns Arising from Swine Flu Outbreak with Global Pandemic Plans

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Because a workplace pulls employees together into close daily contact, the international swine flu outbreak has raised issues of real concern for multinational employers. Multinationals 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 worldwide business operations running and to minimize liability exposure.

To respond to these concerns, certain multinationals may decide to launch global pandemic plans. What a pandemic plan says, though, and how it is implemented raises special legal issues, particularly for multinational employers. Donald C. Dowling Jr., international employment counsel for White & Case, discusses global swine flu pandemic plans and the legal issues that a multinational must consider when drafting and implementing such a plan.

Q: What kinds of topics should a global pandemic workplace plan address?

A: The elements in an effective pandemic plan vary widely by employer—with the medical issues predominating over the legal. Pandemic plans tend to address topics as disparate as: workplace safety precautions; 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 infection; and facility shut-downs.

Q: How does a pandemic workplace plan raise special concerns for a multinational company?

A: A multinational will need to implement a pandemic plan across its worldwide operations. However, local laws, including labor, employment and health laws, could impact the plan's legality on a local basis—both in terms of the plan's content and its implementation. Failure to take into account those local laws could create local legal liability for the multinational.

Q: So how does a multinational best address these local legal concerns?

A: A best practice is to draft a global pandemic response plan template that accounts for legal compliance internationally, and then adapt that template in each local jurisdiction accounting for local law. As a practical matter, a comprehensive pandemic policy will be drafted to account for swine flu, but will be broad enough to account for other pandemics, and perhaps for emergencies beyond pandemics.

Q: What are some of the local legal concerns concerning how the plan is created?

A: In much of Latin America and Europe, employers must appoint health and safety representatives, or employee health/safety committees, and confer 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 or pandemic issues, rolling out new pandemic 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.

Health/safety representation aside, many countries confer upon labor representatives (trade unions, works councils) the right to “consult” on issues affecting the workplace—an obligation similar to “mandatory subjects of bargaining” in unionized U.S. 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 or pandemic procedures must also be consistent with rights in

employee's individual employment agreements.

Q: A pandemic plan might need to address requiring an employee to get medical attention. How do local practices and laws factor into treatment of this issue?

A: In Brazil, Italy and elsewhere, many employers have on-staff doctors. An employer should 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; and doctor/patient privilege.

Q: The question of who covers medical costs and how the plan will address this will vary from country to country, correct?

A: Yes. 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 employer 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 help.

Q: Are there any special considerations as to a plan that gives the employer the right to isolate an employee—either to prevent transmission of the disease to others or to prevent the employee from getting the disease?

A: Yes. 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 to work after exposure in a problem area. But isolation orders and travel bans will get scrutinized in light of an employee's local legal rights. The best practice is to spell out isolation procedures and travel bans clearly in the plan and to anchor them in reasonable medical advice.

Q: When a pandemic hits, employees may refuse to report for work or refuse business travel assignments, or insist on working from home. What should a plan say about disciplining such an employee?

A: Local law may support a no-show employee whose refusal to work is reasonable—

but employers usually can discipline for unreasonable absences. To maximize employer support for discipline in such a situation, a multinational should implement clear rules prohibiting unreasonable refusal to report to work, as well as build clear procedures for communicating to employees when the workplace is safe.

Q: A pandemic may cause an employer to shut down the workplace—that happened in Mexico in April 2009. What should the plan say about pay in this situation?

A: 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. Mexico is one of these countries. In other countries, implementing a furlough may be possible. The pandemic plan should address these issues in a way that is defensible locally, and should account for situations where the employer elects to shut down even absent any binding government order to suspend operations.

Q: Can local data privacy rules affect a pandemic plan and its implementation? If so, how?

A: In a swine flu pandemic, employers will want workers to report on whether they or their family members have the flu, where they recently traveled and to whom they have been exposed. But countries 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 maintain a safe workplace. Make sure that employee flu-status data are carefully processed, as well. In many cases these issues should be consulted on, in advance, with worker representatives and local health/safety committees.

Q: Is there any requirement that a pandemic plan rolled out internationally be translated into the local language of a multinational’s local operation?

A: In many countries, the answer is yes. Some jurisdictions (Belgium, France, Quebec, Turkey, many Central American countries, others) require that communications or rules to local employees be in the local language. Even where laws are not so strict, to be understood and enforced locally, a pandemic plan needs to be in a language comprehensible to the local operation’s workforce. Communications about the plan to worker representatives and government agencies will almost invariably have to be

in the local language (although some countries, such as in Scandinavia, may also allow English even in this circumstance).

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