

BRYAN CAVE

PANDEMIC INFLUENZA:

Is Your Organization Prepared For The Sleeping Giant to Awake?

September 15, 2009

Overview

- **Proactive Steps To Minimize the Impact on Business and Potential Liability Risk**
 - Key Facts about H1N1 Influenza (Swine Flu)
 - How to Protect You and Your Employees from Infection
 - The Elements of a Pandemic Preparedness Program
 - Potential civil liability concerns
 - Potential insurance coverage

Overview (cont.)

- Workplace issues
 - Privacy concerns
 - Potential legal issues related to the interplay of -
 - The Americans with Disabilities Act (ADA)
 - The Family and Medical Leave Act (FMLA)
 - The Health Insurance Portability and Accountability Act of 1996 (HIPAA)

Presenters

- Jay Zweig, Partner, Bryan Cave LLP
 - Mr. Zweig has more than 20 years experience in counseling and representing employers in all areas of employment law and related commercial litigation
- Anthony Merrill, Associate, Bryan Cave LLP
 - Mr. Merrill consults and defends clients on matters regarding infectious disease outbreaks, including water-borne and air-borne pathogens
- Questions? - anthony.merrill@bryancave.com

H1N1 - Why the concern?

- Marc Lipsitch of the Harvard School of Public Health -
“This epidemic will travel faster than usual, because the population is more susceptible”
 - Most people have no immunity to H1N1 influenza
 - Not the typical seasonal flu virus
 - Those who survive a seasonal flu usually develop antibodies to that virus, which protect them from later outbreaks of flu viruses with a similar molecular structure
 - Few born after 1957 have encountered anything like the H1N1 virus

Why the Concern?

- Early April 2009
 - Few cases of new strain of H1N1 reported by Mexican health professionals
- June 11, 2009
 - The World Health Organization (“WHO”) raised the H1N1 (initially reported as Swine Flu) pandemic alert level to Phase 6, indicating that “a pandemic is under way”
 - The first in 41 years

Why the Concern?

- Spread to more than 100 countries around the world, infecting millions from Chile to China
- Moving especially fast through Europe
- More than 2,800 documented deaths from the disease, although that number probably understates the case
- Dr. Margaret Chan, head of the WHO
 - “We are at the early stages of a global pandemic”

Why the Concern?

- The first outbreak never really ended
- Over the summer, the disease has continued to spread through children's camps and military bases
- Colleges and universities are reporting outbreaks among students returning for the fall semester.
- Colder fall and winter months, when people spend more time indoors in close quarters, flu cases always rise dramatically

Why the Concern?

- William Schaffner, flu expert, Vanderbilt University
 - “The virus is still around and it’s ready to explode”
 - “We’re potentially looking at a very big mess”

Are You Prepared?

The Sleeping Giant!



Good News?

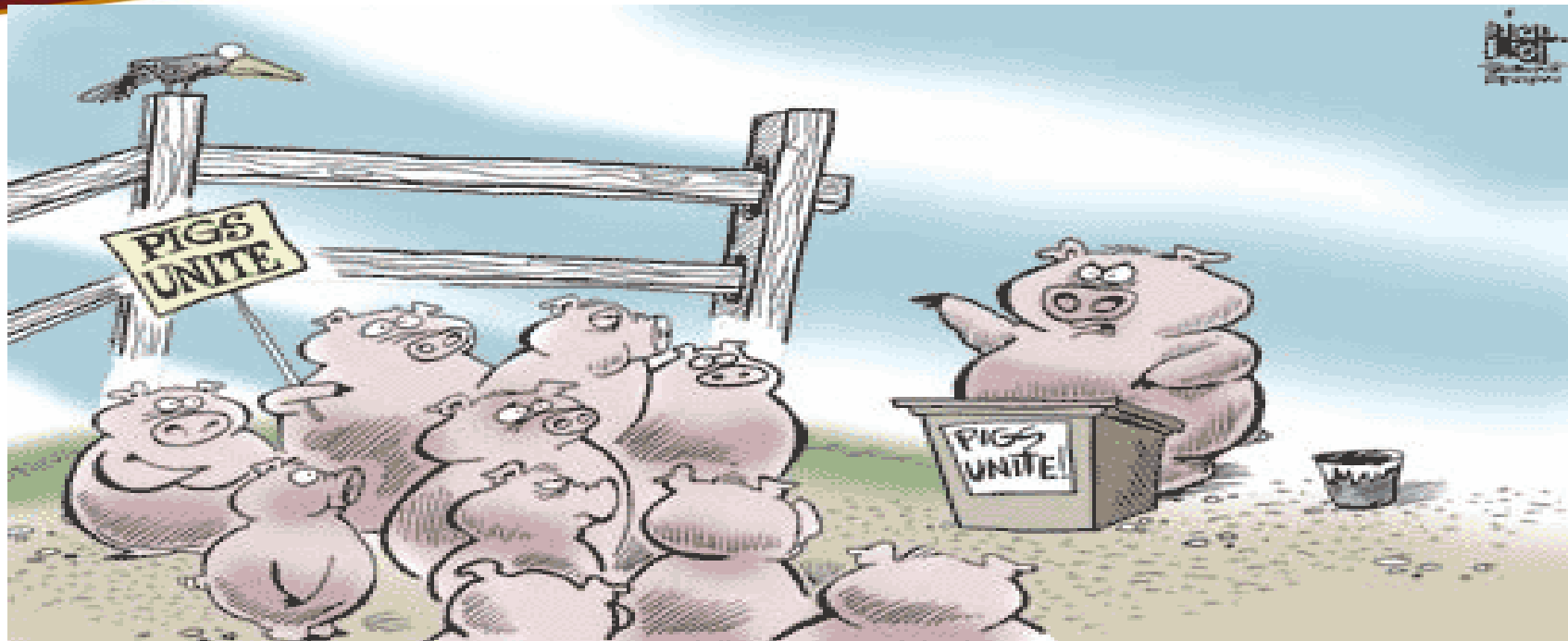
- H1N1's effects are nasty, but so far have been much milder than truly deadly influenzas of the past
- As a result, many health experts predict that the pandemic will not live up to the worst-case scenarios
- President's Council of Advisors on Science and Technology ("PCAST")
 - 2009 H1N1 flu is unlikely to resemble the deadly flu pandemic of 1918-19

Still Need to Prepare

- PCAST – Unlike benign version of swine flu in 1976, the current strain “poses a serious health threat” to the nation
- The panel expects a resurgence in the virus coinciding with the fall flu season, and peaking by mid-October
- Experts fear that H1N1 could sicken 60 million to 120 million people in the U.S.
 - As many as 1.8 million could be hospitalized - 300,000 victims landing in intensive care units
 - Overwhelming hospital emergency rooms
 - Drastically impacting the nation’s workforce

CDC & U.S. Gov Recommendations

- August 19, 2009 - the federal government issued a set of guidelines to encourage employers to prepare for potentially severe H1N1 influenza this fall and winter
 - Review and understand sick leave policies
 - Encourage employees to be vaccinated against seasonal and H1N1 influenza
 - Cancel non-essential meetings and travel
 - Increase employees' work areas in order to space employees further apart.



THE TURKEYS HAVE BIRD FLU. THE COWS HAVE MAD COW DISEASE. I'M TELLING YOU, BOYS... UNLESS WE WANT TO SEE MORE HAM SERVED ON THANKSGIVING, WE'RE GOING TO HAVE TO GET OUR OWN DISEASE!

Proactive Steps

- Two Overarching Concerns
 - Maintain a safe workplace
 - Adopt/implement practices to protect
 - Employees
 - Customers
 - Visitor
 - Ensure the continuity of business operations

Key Facts about H1N1 Influenza

- The current outbreak of swine flu A (H1N1) is evolving rapidly and being closely monitored by the CDC & WHO
- Caused by the Influenza A virus - same as seasonal flu
- H1N1 flu can be more serious than seasonal flu

What is H1N1 (Swine) Influenza?

- H1N1 Influenza (swine flu) is a respiratory disease that regularly causes outbreaks of influenza in pigs
- Swine flu viruses cause high levels of illness and low death rates in pigs
- Swine influenza viruses may circulate among swine throughout the year, but most outbreaks occur during the late fall and winter months similar to outbreaks in humans
- The classical swine flu virus (an influenza type A H1N1 virus) was first isolated from a pig in 1930

How many swine flu viruses are there?

- Like all influenza viruses, swine flu viruses change constantly
- Pigs can be infected by avian influenza and human influenza viruses as well as swine influenza viruses
- When influenza viruses from different species infect pigs, the viruses can reassort (i.e. swap genes) and new viruses that are a mix of swine, human and/or avian influenza viruses can emerge
- Over the years, different variations of swine flu viruses have emerged
- At this time, there are four main influenza type A virus subtypes that have been isolated in pigs: H1N1, H1N2, H3N2, and H3N1
- However, most of the recently isolated influenza viruses from pigs have been H1N1 viruses.

How does swine flu spread?

- Influenza viruses can be directly transmitted from pigs to people, from people to pigs, and people to people
- Human-to-human transmission is thought to occur in the same way as seasonal flu:
 - Direct contact with infected people
 - Breathing in airborne droplets from coughs or sneezes
 - Touching something with flu viruses on it and then touching their mouth or nose
 - Possible that the virus can live on surfaces for hours to days

Can people catch swine flu from eating pork?

- No
- Swine influenza viruses are not transmitted by food
- You can not get swine influenza from eating pork or pork products.
 - Eating properly handled and cooked pork and pork products is safe
 - Cooking pork to an internal temperature of 71°C (160°F) kills the swine flu virus as it does other bacteria and viruses

What are the symptoms of swine flu in humans?

- The symptoms of swine flu in people are expected to be similar to the symptoms of regular human seasonal influenza
- Symptoms are typically include:
 - Fever
 - Runny nose
 - Headache
 - Body aches
 - Extreme tiredness
 - Some people may also experience diarrhea and vomiting
- Expected to be more contagious & more severe

Prevention - Wash or clean your hands often

- Wash your hands frequently with soap and warm water -- then rub your hands vigorously together and scrub all surfaces
 - If your hands do come in contact with the virus from a contaminated surface, washing with soap will help minimize the risk of passing the virus from your hands to your face or to other people
 - Wash for 15 to 20 seconds -It is the soap combined with the scrubbing action that helps dislodge and remove germs and viruses
- When soap and water are not available, alcohol-based disposable hand wipes or gel sanitizers - the alcohol in the gel kills germs and viruses that cause colds and the flu

Prevention

- **Avoid touching your eyes, nose, or mouth**
 - Viruses are often spread when a person touches something that is contaminated with viruses and then touches their eyes, nose, or mouth
- **Cover your mouth and nose when you sneeze or cough**
- **Keep your environment clean**
 - Commonly touched surfaces such as door handles, elevator buttons, faucet handles should be frequently disinfected
 - Establish & follow policies for cleaning and disinfecting
 - Possible for viruses to live on surfaces like doorknobs, desks, and tables for hours to days. Wearing gloves will help minimize this risk

Prevention

- **Minimize close contact and avoid crowded areas**
 - Maintain your distance from other people, particularly if they seem to have cold or flu symptoms.
- **Stay home when you are sick**
 - When you are sick or have flu symptoms, stay home, get plenty of rest, and check with a health care provider as needed.
- **Travel With Caution**
 - Avoid travel in locations where the swine flu has been identified and if unsure refer to the WHO or CDC website for updates

Preparation

- Significant potential for severe business disruption because of the H1N1 virus outbreak
- Now is the time to prepare for how a widespread outbreak would affect your business operations

Preparation

- Pandemic planning requires attention to:
 - Employee health and safety as well as customer health and safety
 - Coordination with global, federal, state and local authorities; communication plans
 - Service and supply chain integrity preservation
 - Systems for dealing with the tremendous paperwork during and after the pandemic

Preparation - Before a Pandemic

- Develop a specific pandemic plan, including:
 - Wall charts
 - Checklists
 - Guidelines and instructions for employees, foremost among these being -
 - Conspicuous and repeated reminders to wash hands often
 - Cover the mouth while coughing and sneezing
 - Stay away from work and seek medical treatment when symptoms appear

Create a Task Force

- Stay current of the latest news and issues
- Monitor the organization's preparations
- Task force may include:
 - HR
 - Executive office
 - Finance
 - Operations
 - Legal

Task Force

- Organized to communicate effectively throughout the organization
 - Clarify lines of authority and communication protocols
 - Develop or review company delegations of authority for emergency operations
 - Be clear about decision-making authority and how decisions will be relayed/announced
 - Develop or review orders of succession for emergency operations

Develop a Plan

- Develop a comprehensive plan for conducting business with multiple scenarios ranging from a reduced staff, to reduced staff in key areas, to no staff
 - Develop a best case/worse case scenario plan
 - Review policies already in place – leave policies, travel policies, etc.
 - Understand what it means to be “out of the office” – what impact
 - Review contracts that require you to perform or that require others to perform
 - Consider the development and implementation of a personal hygiene program
 - Hand sanitizers, etc.

Develop a Plan

- Assess the impact that disruption may have on –
 - Staff
 - Clients
 - Suppliers
 - Contactors
 - Vendors
 - Service Providers
 - Other dependencies
- Communicate with and involve your people

Pandemic Plan

- Create a business continuity checklist
- Create an emergency supplies checklist –
 - Antiviral drugs - Tamiflu
 - Thirteen (13) Tamiflu-resistant infections around the world
- Develop response policies, especially guidelines regarding when employees should leave work, and when previously ill employees may return to the workplace

Pandemic Plan

- Develop policies for payment of wages and benefits, including death benefits
- Draft appropriate agreements for first responders and essential staff, including necessary training
- PR/Media response

Actions to Reduce Impact on Employees & Consumers

- Implement guidelines to reduce the frequency and type of face-to-face contact, such as meetings and events
 - Encourage the use of videoconferencing technologies
 - Cancel non-essential meetings and travel
 - If possible, increase employees' work areas to space employees further apart
- Develop hotlines and dedicated Web sites to communicate pandemic status and actions to employees, clients, and vendors
 - Make sure to update this information regularly as the situation continues to evolve
- Develop procedures for reporting of illnesses and for travel
 - Company-wide voicemails
 - Internal website
 - Pre-arranged conference calls

Actions to Reduce Impact on Employees & Consumers

- Develop and disseminate programs and materials reviewing pandemic information, including flu signs and symptoms and modes of transmission
- Disseminate information on government preparedness plans
 - www.cdc.gov/h1n1flu
 - <http://flu.ogilvy.com>
 - www.pandemicflu.gov
 - www.who.int/csr/disease/swineflu/en/index.html

Actions to Reduce Impact on Employees & Consumers

- Provide access to infection control supplies, such as hand sanitizer products and tissues
 - Place trash receptacles for their disposal in locations throughout the company
- Enhance communications, computer technology and infrastructure, as needed, to support employee telecommuting and remote customer access
- Ensure that medical consultation and advice is readily available for emergency response
 - Review with employees lists of health care providers in relation to available health insurance

Actions to Reduce Impact on Employees & Consumers

- HHS – “Encourage employees to be vaccinated against seasonal and H1N1 influenza. If possible, employers should offer on-site vaccinations”
- Guarding against the swine flu (H1N1) requires a separate vaccine
- The seasonal flu vaccine guards against three strains of flu -the H1N1 flu vaccine guards against only that one
- The seasonal flu vaccine does not guard against H1N1
- Available to “anyone who wants to reduce the likelihood of becoming ill with influenza or spreading influenza to others” - CDC
- It is not recommended that children under 6 months be vaccinated for the flu

2009 H1N1 Influenza Vaccine

- The U.S. government is working closely with manufacturers to take steps in the process to manufacture a 2009 H1N1 vaccine
- Working together with scientists in the public and private sector, CDC has isolated the new H1N1 virus and modified the virus so that it can be used to make hundreds of millions of doses of vaccine
- Vaccine manufacturers are now using these materials to begin vaccine production

When Will The 2009 H1N1 Vaccine Be Available?

- Making vaccine is a multi-step process which takes several months to complete
- The 2009 H1N1 vaccine is expected to be available in the fall
- More specific dates are not available –
 - Depends on several factors including manufacturing time and time needed to conduct clinical trials
 - Estimated at mid-October
 - NIH began pregnant women trials September 10, 2009

Who Will Be Recommended to Receive the 2009 H1N1 Vaccine?

- Shortage of 2009 H1N1 vaccine not expected, but availability and demand can be unpredictable
 - There is some possibility that initially the vaccine will be available in limited quantities
 - In this setting, CDC's Advisory Committee on Immunization Practices has recommended that following groups receive the vaccine before others:
 - Pregnant women
 - People who live with or care for children younger than 6 months of age
 - Health care and emergency medical services personnel with direct patient contact
 - Children 6 months through 4 years of age, and children 5 through 18 years of age who have chronic medical conditions

H1N1 Vaccine

- Do those that have been previously vaccinated against the 1976 swine influenza need to get vaccinated against the 2009 H1N1 influenza?
 - The 1976 swine flu virus and the 2009 H1N1 virus are different enough that its unlikely a person vaccinated in 1976 will have full protection from the 2009 H1N1
 - People vaccinated in 1976 should still be given the 2009 H1N1 vaccine

H1N1 Vaccine

- Where will the vaccine be available?
 - Every state is developing a vaccine delivery plan
 - Vaccine will be available in a combination of settings such as
 - Vaccination clinics organized by local health departments
 - Healthcare provider offices
 - Schools
 - Other private settings, such as pharmacies and workplaces.
 - For more information, see <http://www.cdc.gov/h1n1flu/vaccination/statecontacts.htm>

Actions to Maintain Communications and Business Operations

- Compile emergency contact information for all management and employees, including cell phone numbers and e-mail addresses
 - Disseminate this information, as appropriate, if the epidemic reaches a pandemic stage.
- Determine which activities are critical to maintain operations
- Cross-train employees to perform the basic functions essential to company operations, such as –
 - Accounting
 - Payroll
 - Information technology

Actions to Maintain Communications and Business Operations

- Develop a comprehensive communication plan and update it frequently
- This plan should include –
 - Key contacts and their back-ups
 - The decision-makers
 - The appropriate chain of communications
 - The process for tracking and communicating business and employee status
 - Privacy control systems
- Use all methods available to share this information, including e-mail, company Web site, and mobile communication devices

Actions Relating to Pandemic Policies

- Review, create, or modify policies for employee compensation and sick leave absences
 - Include a policy for when a previously ill person who is no longer infectious can return to work
- Review, create, or modify policies for flexible work locations, including an employee's home and/or satellite offices
- Review, create, or modify policies to prevent influenza spread at the worksite
 - Promote respiratory hygiene and cough etiquette
 - Exclude people from the workplace if they exhibit flu symptoms until it is determined that they are not contagious

Actions Relating to Pandemic Policies

- Review, create, or modify policies for employees who have been exposed to pandemic influenza or are suspected to be ill
 - This may include mandatory testing and immediate mandatory sick leave
- Develop protocols for the release and dissemination on pandemic preparedness and the company's response plan

Develop a Plan – Other Contingencies

- Attention should be given to:
 - School closure implications
 - Transportation complications (metro, commuter rail, buses, air travel)
 - Building access
 - Security issues
 - Staffing needs
 - Transportation implications for providing or receiving goods & services
 - Banking (including payroll, check processing and cash needs)
 - Telecommunications demand (ability to work from home, connecting to the office IT systems, etc.)



**There is no one-size-fits all
solution**

During a Pandemic

- Do Not Panic – Follow your plan
- Develop procedures for adapting or changing the plan to meet evolving pandemic conditions
- Implement a system for communicating with key personnel, employees, customers and government and health officials

After a Pandemic

- Develop procedures for assessing the company's situation on all critical levels
- Communicate with employees and customers
- Offer counseling programs for grieving or affected employees
- Adapt procedures and policies as needed
- Address claims

Potential civil liability concerns

- Liability claims? I cannot be sued because some got sick, can I?
 - Novel claims – rest upon basic theories of negligence
 - Examples – Legionella, etc.

Potential civil liability concerns

- Duty, breach, causation, harm
- Standard of Care – Ordinary or reasonable person
 - Preparation
 - Response
 - Recovery

Potential civil liability concerns

- Potential liability scenarios
 - Event organizers
 - Travel
 - Food preparation
 - Hospitals
 - Hotels

Insurance Coverage

- Liability coverage for third-party lawsuits
 - Standard duty to defend in CGL policies
 - Careful of exclusions
 - Force majeure
 - Expected & Intended
 - Bacterial exclusions

Insurance Coverage

- The Insurance Services Office (ISO) has created a grouping of “business income” policies that may offer insurance coverage in the case of a pandemic:
 - (1) business interruption
 - (2) loss of profits
 - (3) use and occupancy
 - (4) rent insurance

Business Interruption Coverage

- Separate and distinct from property insurance - covers losses caused by events outside of the insured's control
- In the case of a pandemic, potential business interruptions arise from
 - Government or media alerts to not travel to particular areas, thus impeding normal business operations
 - Employees' fear of going into work
 - Loss of attraction
 - Civil authority prohibiting entry onto insured's premises; or, in the case of the hospitality or travel industry, cancellations and diminution of business

Business Interruption Coverage

- Ensure that its property insurance policy has business interruption protection - a court will not read that coverage into a standard property insurance policy
- Ensure policy includes protection in the case of disease, or viral or bacterial outbreaks
- Does the policy require that the loss be a physical loss (like a fire)
- Is coverage triggered only upon a total cessation of business or upon a diminution of business.
- Identify a measurable loss

Loss of Profits Coverage

- Loss of profits coverage, while similar to business interruption coverage in many aspects, is distinguishable from business interruption in that it allows the insured to recover regardless of whether the insured experienced an actual “business interruption”
- Allows a business to, essentially, insure the receipt of profits when the business has a reasonable probability of receiving those profits
- Like business interruption coverage, lost profits coverage needs to be expressly provided for in the policy. A policy may also limit the perils that cause the loss of profits.
- Each policy differs in how it will measure and award damages for loss of profits
 - A policy may, for example, set a specific amount for loss of profits coverage
 - Many policies may also offer protection in the event of a partial loss of profits, which would entitle the insured to a partial recovery of the set amount

Other Potential Coverage

- Use and Occupancy Coverage
- Rent Insurance Coverage –
 - Lessors
 - Lessees

Workplace privacy concerns and potential legal issues

- Balance employee privacy rights with public and company health concerns
- The legal analysis related to this issue involves the interplay of the
 - Americans with Disabilities Act (ADA)
 - The Family and Medical Leave Act (FMLA)
 - The Health Insurance Portability and Accountability Act of 1996 (HIPAA)
 - State and local laws
- Use common sense and good HR skills

Workplace privacy concerns and potential legal issues

- Investigate and Interview The Possibly Infected Employee
 - Learn the facts – not rumors
- Request Written Consent To Disclose
 - Ask infected employee for written permission to inform co-workers
- Consult Counsel On How To Handle A Non-Responsive or Uncooperative Employee

Workplace privacy concerns and potential legal issues

- Provide Written Notice Of Disclosure
 - Employer may need to disclose limited information about the employee's health condition to those with a need to know –
 - Government health officials
 - Health care providers
 - Co-workers
 - Employer appropriately will limit disclosure and then will disclose only the minimum information necessary

Workplace privacy concerns and potential legal issues

- Avoid Using Identifiable Information
- Provide Time Off
- Instruct Supervisors On Confidentiality And Retaliation Risks
 - Maintain the confidentiality of employee health information
 - Provide guidance on how to respond to questions so as to avoid undue panic rumors
 - Educate supervisors on the spread of infections, types of treatment, and the company's planned preventative steps

Workplace privacy concerns and potential legal issues

- There is no one answer to the many complicated privacy and health issues that this type of situation in the workplace can raise
- As with most employment issues, prompt and sensitive investigation, documentation, and consultation with your counsel are your best protections

Questions?

Need Further Assistance?

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