



Management Alert

Important Legal Considerations for Drafting an Effective Pandemic-Response Policy for Multinational Employers

With rising concerns about a global swine flu pandemic, all U.S. employers—but especially those with multinational operations—need to determine how best to tackle complex legal issues raised by the illness. Importantly, any international policies created to deal with potential issues caused by a flu pandemic must take into account the local legal requirements of other countries.

These legal requirements can include obligations relating to employee consultation/notification, health and safety, workers' compensation, working hours, overtime and leave, data protection/privacy laws, and business continuity plans—which can differ in every jurisdiction where the company has operations.

Employers must review any existing employment policies, benefit plans, employment contracts/offer letters, collective agreements, and applicable legislation to ensure that they are aware of potential legal consequences before a pandemic strikes—or, as importantly, before implementing a plan to deal with it.

Employee Consultation/Notification Requirements

Some countries impose affirmative obligations on employers to consult with and listen to employees on issues affecting their work, including arrangements to address a pandemic situation. For example, where an employer's European operations have works councils, employers may be obliged to consult with them before any flu-response policy can be put into effect. Similarly, most multinational employers are now aware that the labor law changes at the beginning of last year in China now mean that employees (or their union) need to be consulted about any important changes to or introductions of employee policies. Employers must also be prepared for situations where local laws give employees and/or their representatives a right to be heard or to be consulted on the issue because it is a health and safety issue.

Employee Health and Safety

Almost universally, employers are obliged to provide their employees with a workplace that is safe and without risks. This responsibility includes responding to new or evolving situations that may pose a risk to employees. A pandemic is almost certain to require additional actions by the multinational employer. Not only do ill employees pose a potential risk to themselves by continuing to work, but they of course place others in the workplace at risk. Appropriate risk-mitigation strategies are needed. However, actions designed to help protect employees can lead to other legal issues.

Workers' compensation arrangements differ from country to country. Some are provided through private insurance; some are run by the government; some are a combination of the two. In principle, illnesses contracted at work should be treated no

differently than any other injury suffered while working. A response to workers' compensation issues that is appropriate to an employer's headquarters may not be appropriate in other countries.

Working Hours, Leave, and Work Attendance

The circumstances of a pandemic may require an employer to direct employees to stay away from work. This may occur for a number of reasons. As a result, key considerations for an effective pandemic-response policy include how to address a reduction in working hours or temporary business closure, and any related issues, such as employee compensation during a temporary reduction or closure. This is particularly relevant because many countries will require employee consent before work hours or compensation can be reduced.

If considering allowing or requiring employees to work from home, employers need to implement appropriate safeguards to monitor and manage employee performance, and to protect the employer's ability to comply with all the legal issues associated with having employees working from home. These include ensuring compliance with overtime and working hours laws (which are different from country to country), payment of allowances or expenses incurred by the employee in working at home, ensuring occupational safety for the employee working at home, privacy, and other legal and operational requirements. Many countries will require employee consent to a change in the work location and can require that this consent be formally documented in a specific agreement.

Expat employees working on assignment overseas may request/demand that they be returned home; yet there may be no job for the employee at home.

Finally, employers must consider how they will address any potential work refusals or failure to attend work by employees who are neither ill nor eligible to take leave(s).

Privacy Matters

Many countries outside the United States strictly regulate the collection, use, and transfer of employees' personal information, particularly sensitive personal information such as health and medical data. Employers should not assume that they can demand disclosure of an employee's illness, nor even request employees to do so in certain countries. Even more caution is required when requesting information that strictly relates to their personal life (e.g., asking about where they or their families have taken vacation recently). In circumstances where information about an employee's illness, suspected illness, or personal life has been disclosed, even with the employee's consent, transferring information such as medical histories, records of absences due to illness, and insurance claim information from one country to another—whether internally within the company or to a third-party provider—must be carefully managed. Administrative and technical safeguards must be put in place to protect the data. Many countries in Europe, Asia-Pacific, and South America, as well as Canada, do not recognize the United States as offering adequate privacy protections and so do not recognize that local employers have a right to transfer their employees' personal information to the United States (and often prohibit it). This issue is particularly relevant for U.S.-based companies that wish to centralize pandemic-related decision-making in the United States and, in doing so, request reports of absentees and illnesses from their offices around the globe.

That said, if a pandemic does develop, employers can expect that government agencies will impose mandatory reporting obligations. These might include obligations upon employers. From past experience (e.g., the protracted negotiations between the United States and the EU on the sharing of airline passenger details post-9/11), we know that employers will need to strike

a delicate balance between the public interest in ensuring information about the pandemic is shared and disseminated, against the private interests of individuals in protecting their privacy. It is almost assured that different countries are going to take different views about where this balance lies.

Business Continuity Plans

Lastly, employers should review and update their current policies and procedures dealing with business continuity processes, including crisis plans, disaster recovery, denial of access, loss of production, alternative management options (virtual, offshore, maintaining a reserve), communication strategies, and travel policies. There are many issues to consider when planning. Some of the key issues businesses should consider when developing a continuity plan include:

- Identify essential business activities (and the core people and skills to keep them running), and ensuring that these are backed up with alternative arrangements, where possible.
- Identify the infrastructure and resources required for the organization to continue operating at the minimum acceptable level.
- Develop mitigation strategies for business disruptions, including possible shortages of supplies, and developing contingency plans for continued operation—including where a whole city or country effectively “shuts down.”
- Develop a strategy to address situations where employees on business trips or short-term assignments become “stuck” because of restrictions on travel.
- Ensure that relevant employees, customers, and suppliers are aware of the contingency arrangements, and that the arrangements will work.

Conclusion

In light of all of the uncertainties surrounding the threat of a swine flu pandemic, multinational employers need to develop a response that is both medically informed and adapted to individual countries’ legal requirements. *For more information on this topic, please contact the Seyfarth attorney with whom you work or any member of our International Labor & Employment Group (www.seyfarth.com/International).*

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