

# Management Alert



## Zika - Employer Liability Issues

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### I. Introduction

By now, the worldwide health authorities and media have publicized the Zika virus disease (Zika) that has been reported throughout South America, Central America, and the Caribbean. Although the United States has only experienced a few cases of the virus associated with travel to affected regions, it is only a matter of time before the disease surfaces in more cases throughout the country. U.S. employers and those with international operations should monitor the situation and be prepared to respond to questions from employees and supervisors.

### II. Background

#### A. What is Zika Virus Disease?

Zika is a disease caused by Zika virus that is spread to people primarily through the bite of an infected mosquito. The most common symptoms of Zika are fever, rash, joint pain, and conjunctivitis (red eyes). The illness is usually mild with symptoms lasting for several days to a week. People usually don't get sick enough to go to the hospital, and they very rarely die of Zika. For this reason, many people might not realize they have been infected. An individual's symptoms may appear anywhere from 2 to 7 days after [exposure to the virus](#).

#### B. How is Zika Transmitted?

Zika is primarily transmitted through the bite of infected Aedes mosquitoes, the same mosquitoes that spread Chikungunya and dengue. These mosquitoes are aggressive daytime biters and they can also bite at night. Mosquitoes become infected when they bite a person already infected with the virus. Infected mosquitoes can then spread the virus to other people through bites. It can also be transmitted from a pregnant mother to her baby during pregnancy or around the time of birth. The U.S. Centers for Disease Control (CDC) is studying how mothers pass the virus to their babies. Zika can also be transmitted via contact with bodily fluids of an infected person, such as through contact with blood or through sexual contact.

### C. Where is Zika Currently Found?

Specific areas where Zika virus transmission is ongoing are difficult to determine and are likely to change over time. As of the date of this article, Zika cases have been identified in:

- American Samoa
- Barbados
- Bolivia
- Brazil
- Cape Verde
- Colombia
- Commonwealth of Puerto Rico, US territory
- Costa Rica
- Curacao
- Dominican Republic
- Ecuador
- El Salvador
- French Guiana
- Guadeloupe
- Guatemala
- Guyana
- Haiti
- Honduras
- Jamaica
- Martinique
- Mexico
- Nicaragua
- Panama
- Paraguay
- Saint Martin
- Samoa
- Suriname
- Tonga
- U.S. Virgin Islands
- Venezuela

If traveling, please visit the CDC Travelers' Health site for the most updated [travel information](#).

## III. What are the Legal Ramifications that Employers Should Consider?

There are several employment and other laws which may be directly involved with this disease and must be considered by employers. These are as follows:

### A. Occupational Safety and Health Act

#### 1. General Duty Clause

Under the Occupational Safety and Health Act ("Act" or "OSHA"), the employer has a legal obligation to provide a safe and healthful workplace. One of the agency's enforcement mechanisms is the ability to issue citations with monetary penalties to employers. The "General Duty Clause" (Section 5(a)(1)) of the Act requires an employer to protect its employees against "recognized hazards" to safety or health which may cause serious injury or death.

Given that OSHA does not have a specific regulation which deals with Zika, the Occupational Safety and Health Administration (the "Agency") will utilize the General Duty Clause. In order to determine the scope of the employer's obligation under the General Duty Clause, OSHA is empowered to utilize nationally recognized consensus standards or other authoritative sources. In this case, OSHA would rely upon recommendations issued by the Centers for Disease Control ("CDC"), the National Institute for Occupational Safety and Health ("NIOSH"), the World Health Organization ("WHO") or other similar resources. If the Agency can establish that employees at a worksite are reasonably likely to be "exposed" to Zika (e.g., work-related travel to affected regions, occupations with enhanced exposure to mosquito bites due to working

outdoors), OSHA may require the employer to develop a plan with procedures to protect its employees.

## 2. Multi-Employer Worksite

Under the Act, a host employer may have additional legal obligations to the employees of another employer who may come to the host employer workplace and may potentially be exposed to the hazard (in this case to by exposure to mosquitoes carrying Zika). OSHA can utilize its authority under the "multi-employer workplace doctrine" to issue citations to the host employer when personnel of another employer are exposed. In these instances, citations can be issued by the Agency to the host employer if another employer's staff members are exposed or if the host employer created the hazard or exposed the other employees to the hazard. The host employer or the controlling employer at the site will ultimately be held responsible to correct the hazard.

## 3. Response Plan

OSHA may expect the responsible employer to develop a program based upon a "hazard assessment" of potential exposure at the worksite (hygiene and decontamination) requiring the employer to:

- conduct employee awareness training regarding the hazard;
- develop procedures requiring the issuance and use of personal protective equipment (PPE) (e.g., masks, gloves) if necessary to prevent infection and transmission;
- develop a means of reporting infection and providing medical surveillance for employees who contract the disease;
- maintain appropriate documentation of the foregoing actions;
- preserve medical records;
- record on the OSHA 300 Log any illnesses which are occupationally related.

## 4. Whistleblower Protection

Because of the health hazards associated with this disease, it is possible that an employee could refuse to work because s/he believes that his/her health is in imminent danger at the workplace due to the actual presence or reasonable probability of the disease at the workplace. An employee who makes such a complaint is engaging in "protected activity" under Section 11(c) of the Act and is not subject to adverse action by the employer for refusal to work until the employer can establish through "objective" evidence that there is no hazard or that the employer has developed a response plan that will reasonably protect the employee from exposure to the disease.

## 5. Application to Pregnant Employees

The Zika virus has been documented to result in injuries to fetuses, resulting in severe birth defects such as microcephaly. Generally speaking, an employer will only be liable under the Act for injuries to employees, and not to other parties. However, a pregnant employee's fear of injuries to the fetus may likewise give her grounds to refuse an assignment in which she would be exposed to Zika virus -- such as posting in a tropical area or working in a medical clinic treating the disease -- and her refusal may be protected activity under Section 11(c). If an employer were to discipline her for refusing the assignment, the employer may face an unlawful retaliation claim under the Act.

## **B. Worker's Compensation – Disability Benefits**

In the event that an employee contracts Zika as a result of occupational exposure, (in other words, the illness "arises out of and in the course of employment" which the employee must prove with competent medical evidence), the employee is entitled to receive temporary total disability benefits in lieu of wages, reasonable and necessary medical treatment and an award for any resulting permanent disability (e.g., reduced respiratory capacity, etc.). An employer should evaluate whether it has adequate worker's compensation insurance coverage and coverage limits that include occupational diseases.

If an employee contracts the disease and it is not occupationally related, the employee may be entitled to disability benefits if the employer provides such benefits. Again, the extent of such benefits and any exclusions should be carefully evaluated by

the employer. The employer must consider that Zika is going to involve varied medical issues, such as determining (1) whether the employee is infectious, (2) what type of treatment is necessary, (3) whether the employee presents a health risk to others and, (4) when the employee can safely return to work. Therefore, it is essential that the employer identify a competent medical professional with expertise in infection control who can advise t on all medically-related issues, including worker's compensation.

### **C. Potential Tort Liability**

In the event of employer negligence, under most states' worker's compensation statutes, employees will be limited to the worker's compensation remedies, and the negligent employer will be insulated from unlimited tort liability. The employer will be guaranteed compensation and the employer will be protected from large jury verdicts. However, where an employee can prove that an injury is substantially certain to occur or an employer was willfully negligent, the injured employee may be able to circumvent worker's compensation and sue the employer for unlimited tort liabilities. Accordingly, exposing an employee to a country for which the State Department or Center for Disease Control has issued a travel warning, or a tropical area rife with an epidemic may expose an employer to liability for uninsured workplace negligence claims.

### **D. Family and Medical Leave Act**

Under the Family and Medical Leave Act ("FMLA"), employers who have more than 50 employees are required to provide up to twelve (12) weeks of unpaid leave to a qualified employee who has a "serious health condition." An employee is also eligible under the FMLA in the event of a "serious health condition" affecting its spouse, child or parent(s).

If an employee contracts Zika, given its mild symptoms, the disease may or may not be considered a "serious health condition" under the FMLA. However, if it is determined that it is a "serious health condition," it is therefore a condition warranting the unpaid leave. Similarly, if an employee's parent, spouse or a child contracts the disease, this will likely be a qualifying event entitling the employee, with physician's documentation, to utilize leave time to care for such an immediate family member.

If the employee exhausts the entire twelve weeks of FMLA leave, and is unable to return to work at that time, the employer may wish to consider additional unpaid leave for the employee, although such leave would be outside of the FMLA required reinstatement rights.

### **E. Americans with Disabilities Act**

The Americans with Disabilities Act ("ADA") provides certain protections to employees who may have physical, mental or emotional "disabilities" but who are otherwise qualified to perform the essential functions of their jobs. Typically, a disability is an impairment which substantially limits one or more of the major life activities of an individual (e.g., breathing, working, speaking) which is chronic in nature. Because Zika has rarely resulted in death or serious disability, it is unlikely that it would be considered to qualify as a "disability". However, certain individual cases of Zika may result in complications or other effects from the virus that result in a qualifying "disability."

The ADA may also become a factor if an employee develops a disability as a result of the disease and cannot return to their former work duties because of such impairment. The employer must then be prepared to engage in an "interactive process" with the employee which involves a case-by-case dialogue regarding the employee's ability to return to work, any work restrictions, what accommodations may be available which do not cause undue hardship to the employer or whether the employee's disability presents a direct threat to the health or safety of the employee or other employees. Again, it is recommended that employers engage competent medical advice regarding any accommodations which may be warranted as a result of the long term effects of this disease.

### **F. Premises Liability**

Under general common law principles in most jurisdictions, a landowner (sometimes the employer) who allows third parties to enter upon its premises for business or related purposes (such as clients, vendors, contract employees), owes these individuals a duty of "reasonable care" to protect them against hazards at the premises which are not "open and obvious." In the case of Zika, if the landowner (for example, a healthcare provider, emergency responder, transportation related company) is (or

should be) aware that there are persons at the premises with Zika (whether its own employees or tenants) who may create a health hazard to these third party entrants, there may be a duty to warn such third parties, or to prevent access to certain facility areas, due to Zika's ability to be transmitted by contact with contaminated blood.

In many cases, the legal duty of the landowner for site security and sanitation will be defined by contractual documents, such as leases. The landowner should make sure to review such documents to confirm its obligations regarding third parties who may have access to the property.

## IV. Recommendations

It is recommended that employers become knowledgeable about this disease by accessing recognized sources of information (identified below). In addition, employers should determine, based upon a "hazard assessment," whether a Zika response plan is required. For example, does the employer employ individuals:

1. in industries where exposure may be likely (healthcare, emergency response, professions requiring exposure to biting mosquitoes or outdoor activities) or
2. who have or are expected to travel to/from South America, Central America, and the Caribbean or other geographical areas where the disease has been identified.

If so, the employer may need to consider:

- means and methods to inform employees about Zika and how they may protect themselves before they travel to areas known to have confirmed cases of Zika,
- what procedures will be followed if an employee reports that they have been infected with the Zika virus.

Finally, in the event that the employer engages in activities where there is a possibility of employee infection, the employer should consider consulting with its local Department of Public Health to obtain guidance, as well as engaging with a medical provider who has particular expertise with diseases such as Zika.

## V. Where Can I Find Additional Information on Zika?

### A. Informational Websites

World Health Organization - [www.who.int/mediacentre/factsheets/zika/en/](http://www.who.int/mediacentre/factsheets/zika/en/)

Center for Disease Control - [www.cdc.gov/zika/](http://www.cdc.gov/zika/)

CDC Emergency Response Hotline for health employers - (770) 488-7100

U.S. Department of Health & Human Services - [www.hhs.gov/blog/2016/01/28/zika-101.html](http://www.hhs.gov/blog/2016/01/28/zika-101.html)

OSHA – [www.osha.gov](http://www.osha.gov)

Local Department of Public Health

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