

May 22, 2006

## Avian Flu Is Not Just For The Birds

### *The Employer's Guide to the Legal and Workplace Implications of an Avian Flu Outbreak*

#### Introduction

By now, most people are familiar with the “avian influenza,” or “bird flu” virus (the avian flu, virus, or disease), which has been reported throughout Asia and, most recently, in Europe. Although the United States has yet to experience a human outbreak of the virus, it is only a matter of time before the disease surfaces. Essentially, basic infection control measures implemented and enforced at the workplace are the cornerstone in preventing and managing the transmission of the virus. Employers should consider that these preventative measures also greatly reduce the risk of serious legal implications in the event of an outbreak among employees.

#### What Are the Legal Ramifications Employers Should Consider?

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

##### **Occupational Safety and Health Act**

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. According to Section 5 of OSHA, commonly referred to as the “General Duty Clause,” it requires that an employer protect its employees against “recognized hazards” to safety or health which may cause serious injury or death. The employer will likely be expected to develop an Emergency Action Plan, conduct employee training and provide respiratory protection and sanitation materials and practices.

##### **Worker's Compensation — Disability Benefits**

In the event that an employee contracts avian flu as a result of occupational exposure, (in other words, the illness “aris-

es 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. In order to make this determination whether the disease is work-related, the employer will require competent medical advice.

##### **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 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 his/her spouse, child, or parent(s). Employees may be entitled to additional leave under state law, collective bargaining agreements, handbooks or existing policies.

##### **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.

Thus, avian flu, which is expected to involve temporary infection, and hopefully recovery, would not appear to qualify as a “disability.” The ADA may become a factor, however, 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.

### **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 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.

## **What Should the Employer Do to Address the Threat of an Avian Influenza Outbreak?**

Employers must take all reasonable steps to prevent employees from being exposed to the virus. To accomplish this, employers should develop policies and procedures in order to provide the requisite duty of care to employees. Employers should therefore consider the following measures:

### **Sanitation**

Provide and maintain a clean work environment through regularly disinfecting office equipment, door knobs, and other commonly exposed items, in addition to maintaining sanitary restrooms. The use of products such as Lysol and/or bleach is recommended for cleaning with adequate supplies of antibacterial soap, disposable towels, instant drying hand sanitizer or disinfecting towels for restroom and office use.

Provide for proper ventilation in heating and air conditioning systems, through the use of regular maintenance, air filter changes and open windows for appropriate circulation.

Provide for easily accessible sanitary gloves, goggles, alcohol swabs, bottled water, masks and tissues. At present, it is not believed that surgical or dust masks will provide protection against infection. Certain respirators (N95) are believed to be effective to prevent infection. Periodic review of medical kit supplies is a must.

### **Communication**

Support staff in both adopting good personal hygiene regarding hand washing, coughing etiquette, etc. while requiring those employees who are sick to remain at home until fully recovered.

Hold informational meetings regarding the etiology, symptoms, transmission and potential reporting of avian flu. Encourage staff to be vaccinated against seasonal flu while keeping records of those who participate. Discourage staff travel to known places of infection and encourage disclosure for those staff that may have a risk of infection due to travel to possibly affected areas. Employees must also be apprised of additions/deletions to company policy or procedure regarding avian flu with available information via web sites and hotlines accessible and current.

In the event of an outbreak of symptoms, infected staff should be able to report to an on-site health coordinator with a “medical quarantine room” accessible. Procedures for the care and transport of the patient to the nearest emergency room or to a general physician must be established with a plan in force to address the prevention of further transmission. Informing vendors, suppliers and customers that there may be a risk of infection, as well as the formal procedure of reporting to area hospitals, state public agencies and emergency responders is also warranted.

### **Recordkeeping**

Maintain an updated list of employees who have taken sick leave, as well as a record of personnel who have had contact with infected people. Employers must require updated lists of their staff’s contact people in the event symptoms appear, with instructions to seek medical attention immediately.

Lists of all employees (ensuring that everyone is accounted for in the event of infection), vendors, customers, and suppliers must be available for immediate notification of exposure.

A working list of area hospitals, treatment centers/clinics, local, state and federal health agencies, and/or emergency responders should be posted in the office.

### **Planning**

Formulate a preparedness plan in the event of a nationwide pandemic. Companies should consider designating certain employees and response teams with definitive roles and responsibilities to assist in infection containment and control, host several training exercises and drills to test the plan, identify employees with special needs, and make sure to incorporate the requirements of such individuals into your plan. Provide written copies of your plan to all personnel and inform them that their cooperation is essential.

Share the plan with insurers, area health care facilities, local, state and federal public health agencies, and/or emergency responders; and educate yourself on their capabilities, resources, and contingency plans.

Create policies for employee compensation and absences due to sick leave that are non-punitive and liberal. Include policies addressing when an ill person is able to return to work once they are free of infection.

Establish an alternative for employees to work from home in the event of a workplace outbreak. This includes providing essential employees with remote voice-mail and computer access, and stocking the office with extra portable computers for people to use outside the office. Identify critical inputs such as the raw materials, suppliers, subcontractor services/products, and logistics that are required to maintain business operations during a pandemic.

Establish alternative work plans, such as operating the business at an alternative location, providing sufficient communications and technology infrastructures as needed to enable employees to telecommute and have remote computer access, and a system for notifying customers, vendors, suppliers, etc.

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In consideration of these recommendations, an employer will now be able to use the appropriate resources to implement and enforce a well rounded and comprehensive plan of infection prevention and control.

For more information, you wish to visit the following websites:

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

The World Health Organization — [www.who.int](http://www.who.int)

*If you have any questions on the avian flu and what employers need to do to prepare for an outbreak please contact the Seyfarth Shaw LLP attorney with whom you work or any Environmental, Safety and Toxic Torts attorney on our website at [www.seyfarth.com](http://www.seyfarth.com).*

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