

CARPE DIEM --
**NO TIME IS BETTER THAN THE PRESENT TO BEGIN DISASTER
PLANNING FOR AN AVIAN FLU PANDEMIC**

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*“Once a pandemic virus emerges, it is too late to begin planning or to begin collaboration.
There will only be a 20-30 day window between emergence and pandemic.”¹*

I) Overview of Pandemics and The Potential for an Avian Pandemic

a) Historical Pandemics

i) Notable Worldwide Pandemics Since 1918 -- The 1918 pandemic killed over half a million Americans and more than 20 million people worldwide. One-third of the U.S. population was infected, and life expectancy in our country was reduced by thirteen years. The 1918 pandemic was followed by pandemics in 1957 and 1968. The 1957 pandemic resulted in the death of approximately 70,000 Americans, while the 1968 pandemic killed 34,000 Americans. Collectively, these pandemics killed millions of people across the globe.

(1) The SARS Outbreak

(a) A few years ago, the SARS outbreak provided a preview of the potential disruption which could be caused by an influenza pandemic. An infected doctor carried the SARS virus out of China. Within a month, it spread to Canada, Vietnam, and Singapore. In a short period of time, the SARS virus spread to nearly thirty countries on six continents. It infected more than 8,000 people and killed 800.²

(b) The SARS outbreak cost the Asian Pacific region approximately \$40 billion.³ The airline and tourism industries were hit particularly hard because travel to Asia dropped 45 percent the year after the outbreak.⁴

¹ Nancy Hatch Woodward, *Pandemic*, HR MAGAZINE (May 2006) at 47 (*quoting* Dr. Klaus Stohr, World Health Organization Global Pandemic Project).

² President George W. Bush, Address at the National Institutes of Health on Pandemic Flu Strategy (Nov. 2, 2005).

³ *Id.*

⁴ *Id.*

ii) Potential for a Pandemic

(1) Pandemics occur approximately three to four times a century. In the context of the potential for an Avian Pandemic, experts in the area have noted that “we are kind of overdue” for a pandemic and that “the Pandemic influenza threat is real and preparedness is essential.”⁵

b) Potential Avian Pandemic

i) What is Avian Influenza?

(1) Avian influenza, commonly referred to as “bird flu” or “influenza A (H5N1)” is a contagious disease caused by viruses that normally only affect birds, and at times, pigs. However, avian influenza has crossed the species barrier and infected humans.

(a) As of May 23, 2006, a total of 218 human cases have been confirmed in Azerbaijan, Cambodia, China, Djibouti, Egypt, Indonesia, Iraq, Thailand, Turkey, and Vietnam.⁶ Of these 225 cases, 128 have resulted in death.⁷

(b) Cases of avian influenza in birds have been reported in the Republic of Korea, Vietnam, Japan, Thailand, Cambodia, the Lao People’s Democratic Republic, Indonesia, China, Malaysia, Russian Federation, Ukraine, Kazakhstan, Mongolia, Turkey, Romania, and Croatia.⁸

(2) The vast majority of avian influenzas do not infect humans. However, the strain responsible for the recent outbreak, avian H5N1, has been identified as a strain with pandemic potential. All that is necessary is a slight mutation to make the virus extremely contagious among humans. Once such a mutation occurs it will no longer be primarily a bird virus, rather, it will be a pandemic.

⁵ According to Michael Earls, a spokesman for Trust for America’s Health, a Washington DC, non-profit organization, “we are kind of overdue” for a pandemic. The American Society for Microbiology wrote, “[t]he ASM agrees that the pandemic influenza threat is real and preparedness is essential.” Further, the World Health Organization commented that the risk of an Avian Pandemic is “serious” and it believes that the world is closer to another influenza pandemic than it has been since 1968.

⁶ *Cumulative Number of Confirmed Human Cases of Avian Influenza A/(H5N1) Reported to the WHO*, WORLD HEALTH ORGANIZATION (June 6, 2006) available at http://www.who.int/csr/disease/avian_influenza/country/cases_table_2006_06_06/en/index.html.

⁷ *Id.*

⁸ *Avian Influenza (“bird flu”) Fact Sheet*, WORLD HEALTH ORGANIZATION (Feb. 2006).

ii) Pathways for Human Infection

(1) Currently, it is believed that the H5N1 virus can only be transmitted to the human population through direct infection, that is, human contact with infected poultry meat or feces, known as the “re-assortment event.”⁹ Of the few avian influenza viruses that have crossed the species barrier to infect humans, however, the H5N1 has caused the most severe disease and death. The H5N1 virus follows an aggressive path resulting in viral pneumonia and multi-organ failure.¹⁰

(a) Known routes of Exposure to Avian Influenza

1. Agricultural Setting – Animal manure containing influenza virus can attach to dust and soil and cause infection when the dust is inhaled. Contaminated farm equipment, shoes, feed, cages, etc. can carry the virus from farm to farm. The virus can also be carried on the bodies and feet of animals.¹¹
2. Food Handling, Preparation Setting – There is concern that avian influenza could be transmitted from uncooked birds or bird products. One study by the World Health Organization found the H5N1 form in imported frozen duck meat.¹² Eggs from infected poultry might also be contaminated with the virus.

(b) Potential routes of Exposure to Avian Influenza

- (i) Adaptive mutation¹³-- This is the risk posed by H5N1 which concerns us the most. An adaptive mutation of the H5N1 virus will result in a form that is highly infectious for humans and spreads easily from person to person thereby resulting in a global outbreak.¹⁴

⁹ Terry Stephens, *The Emerging Global Pandemic: Human Resource Implications*, MERCER (Spring 2006) at 5.

¹⁰ *Avian Influenza Frequently Asked Questions*, WORLD HEALTH ORGANIZATION (Dec. 5, 2005) available at www.who.int/csr/disease/avian_influenza/avian_faqs.

¹¹ *Guidance for Protecting Workers Against Avian Flu*, U.S. DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, available at www.osha.gov/dsg/guidance/avian-flu (citing *Avian Influenza Frequently Asked Questions*, WORLD HEALTH ORGANIZATION (Dec. 5, 2005) available at www.who.int/csr/disease/avian_influenza/avian_faqs).

¹² *Guidance for Protecting Workers Against Avian Flu*, *supra* note 11.

¹³ Stephens, *supra* note 9, at 5.

¹⁴ *Avian Influenza Frequently Asked Questions*, *supra* note 11.

1. Human Infections – According to the U.S. Department of Labor’s Occupational Safety and Health Administration, most human influenzas are spread by virus-infected respiratory droplets which are expelled during coughing and sneezing.¹⁵

iii) How Fast Will It Spread?

(1) Once an influenza pandemic has started it could spread worldwide in as little as twenty to thirty days.¹⁶

iv) Major Implications of a Pandemic

(1) Prolonged government disruptions.

(2) Businesses will be forced to shut down.

(3) It is estimated that a pandemic could cost the global economy more than \$3 trillion, and the United States as much as \$670 billion.¹⁷

(4) The estimated effect on the current U.S. population of a moderate and severe outbreak of the flu are set forth in the table below.¹⁸

Estimates of the Effects on the Current US Population

Characteristic	Moderate (1958/68-like)	Severe (1918-like)
Illness	90 million (30% of the population)	90 million (30% of the population)
Outpatient Medical Care	45 million (50% of those ill)	45 million (50% of those ill)
Hospitalization	865,000	9,900,000
ICU Care	128,750	1,485,000
Breath Apparatus Needed	64,875	754,000
Deaths	209,000	1,903,000

¹⁵ *Guidance for Protecting Workers Against Avian Flu*, *supra* note 11.

¹⁶ Woodward, *supra* note 1, at 47 (*citing* Dr. Klaus Stohr, World Health Organization Global Pandemic Project).

¹⁷ Woodward, *supra* note 1, at 48 (*citing* Sherry Cooper, global economic strategist and executive vice president of Harris Bank and BMO Financial Group).

¹⁸ Woodward, *supra* note 1, at 49.

II) The Law – Workers’ Compensation and Medical Leave Considerations

a) Introduction

i) In the event of a pandemic, it will be critical, among other things, for all employers to have reviewed their workers’ compensation and medical leave policies. The primary laws governing workers’ compensation and medical leave include the Family and Medical Leave Act (“FMLA”) and Pennsylvania Workers’ Compensation Act.

b) Family and Medical Leave Act

i) Overview

(1) FMLA applies to employers who employ 50 or more employees during 20 or more calendar weeks in the current or preceding calendar year. The FMLA requires covered employers to provide eligible employees with up to twelve weeks of unpaid leave each year to, *inter alia*, (1) care for a child, spouse, or parent with a serious health condition; (2) address an employee’s own “serious health condition.” A “serious health condition” is defined as an illness, injury, impairment or physical or mental condition that involves an overnight hospital stay, incapacity for three or more calendar days, or a chronic health condition involving a regimen of continuing treatment. Although ordinary flu is not covered (according to FMLA regulations), avian flu will be covered, if the above conditions are met.

(2) FMLA also requires covered employers to continue benefits coverage, including healthcare coverage, during the leave. After completion of the leave, the employee must be restored to the same or equivalent position, with reinstatement or continuation of benefits, as if the employee had never left.

ii) What Employers Are Covered by FMLA?

(1) “An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year Public agencies are [also] covered employers without regard to the number of employees employed. Public as well as private elementary and secondary

schools are also covered employers without regard to the number of employees employed.”¹⁹

iii) Which Employees Are “Eligible” To Take Leave Under FMLA?

(1) An eligible employee is an employee of a covered employer who: (a) has been employed by the employer for at least 12 months; (b) has been employed for a least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave; and (c) is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.²⁰

(c) Pennsylvania Workers’ Compensation Act

i) The Pennsylvania Workers’ Compensation Act of 1915 (“the Act”), amended in 1972 to include occupational diseases, is the primary law in effect today, for purposes of wage loss and medical coverage for work-related injuries and illnesses.

(1) In addition to injury claims, the Act covers disability or death of an employee “which results in whole or part from employee’s exposure to the hazard of occupational disease after June 30, 1973.”²¹

(2) The Occupational Disease Act of 1939 (“O.D. Act”) was the first Act in Pennsylvania to compensate for occupational diseases. The O.D. Act, however, only applies if an employee’s last exposure occurred before July 1, 1973 and, thus, is irrelevant to a discussion of avian flu.

(3) Avian Flu Claims under Section 108(n) of the Act

(a) Section 108(n) provides in relevant part, “[a]ll other diseases (1) to which the claimant is exposed by reason of his employment, (2) which are causally related to the industry or occupation, and (3) the incidence of which is substantially greater in that industry or occupation than in the general population.”²²

¹⁹ 29 CFR 825.104(a).

²⁰ 29 CFR 825.110(a) (Note: The 12 months need not be consecutive months).

²¹ Pennsylvania Workers’ Compensation Act, Section 301(c)(2), 77 P.S. § 411(2).

²² Pennsylvania Workers’ Compensation Act, 77 P.S. § 108(n) (2006).

- (i) The 1973 amendments expanded the term “injury” to include certain enumerated diseases, provided:
 - 1. Disability or death occurs within 300 weeks after date of last employment in hazardous occupation; and
 - 2. Some portion of the hazardous exposure occurs after June 30, 1973.
- (ii) What qualifications are required of the avian flu pandemic in order for it to fall within the scope of section 108(n)?
 - 1. While avian flu is not expressly set forth as one of the enumerated diseases in Section 108, the scope of Section 108(n) “All other diseases,” is likely to encompass avian flu.²³
 - a. In order to qualify for relief under Section 108(n) claimant must prove:²⁴
 - i. Exposure to the disease by reason of the employment;
 - ii. The disease is causally related to the industry or occupation; and
 - iii. There is a substantially greater incidence of the disease in that industry or occupation than in the general population.²⁵ (This prong will likely be the most difficult to establish should a pandemic occur.)
 - b. Example of case in which the claimant has qualified for benefits under Section 108(n), include:

²³ See *Krawchuk v. Philadelphia Electric Co.*, 439 A.2d 627 (1981).

²⁴ *May Dep’t Stores v. WCAB (Smith)*, 525 A.2d 33 (Pa. Commw. Ct. 1987). It is prudent to note that in *Armco, Inc. v. WCAB (Mattern)*, the Commonwealth Court found that the claimant did not meet all of the required criteria for § 108(n), nonetheless, the Court awarded benefits because the proof met the criteria for an award as an injury pursuant to section 301(c)(1), 77 P.S. § 411(1). *Armco, Inc. v. WCAB (Mattern)*, 647 A.2d. 985 (Pa. Commw. Ct. 1994).

²⁵ *Andres v. WCAB (USX Corp.)*, 717 A.2d 593 (Pa. Commw. Ct. 1998).

- i. Pulmonary Emphysema: Employee found to be suffering from pulmonary emphysema as a result of exposure to various dusts and fumes during his employment.²⁶

NOTE: Prior to a pandemic, in which the influenza can be transmitted from human to human, since the injury must be specific to a type of employment, if you are not a meat processing plant, farm, etc. then it is unlikely that the claimant's suit will be successful.

NOTE: If a pandemic occurs it will be difficult for the claimant to establish the causation prong because any exposure to the general public could be a source of the influenza.

(4) Avian Flu Claims Under Section 301(c)(1) & (2) – “Injury” Claims

- (a) These sections present other potential theories of recovery for an employee who contracts avian influenza. The traditional 301(c)(1) theory may be used when the claimant is unable to fit into Section 108(n).

- (i) Section 301(c)(1) defines the term “injury” as follows, “[t]he terms ‘injury’ and ‘personal injury’ as used in this Act, shall be construed to mean an injury to an employee, regardless of his previous physical condition, arising in the course of employment and related thereto, and such disease or infection as naturally results from the injury or is aggravated, reactivated, or accelerated by the injury The term ‘injury arising in the course of his employment,’ . . . shall include all injuries caused by the condition of the premises or by the operation of the employer’s business or affairs thereon”²⁷

²⁶ See *Borovich v. Colt Indus.*, 424 A.2d 1237 (Pa. 1981).

²⁷ Pennsylvania Workers’ Compensation Act, Section 301(c)(1), 77 P.S. § 411(1).

1. Section 301(c)(1) also makes clear that job-related aggravation of a disease is a category of “injury” for compensation purposes.²⁸
 2. *McClosky v. WCAB (J.H. France Refractories, Inc.)*, 460 A.2d 237 (Pa. 1983)-- no proof is required that there is a substantially greater incidence of the disease in the industry than in the population at large under section 301(c)(1).
- (ii) Section 301(c)(2) defines “injury” in the following manner: “The terms ‘injury,’ ‘personal injury’ and ‘injury arising in the course of his employment,’ as used in this act, *shall include*, unless the context clearly requires otherwise, *occupational disease as defined in section 108 of this act . . .*”
- (5) To Meet the necessary burden of proof under an “injury” theory, Claimant will likely need to establish direct exposure to the virus through a known means of transmission.
- ii) Compensation and Liability
- (1) Compensation – Disability or Death Must “Result From the Occupational Disease. Where a disability is caused by both work-related and non-work related causes, the occupational disease must be a substantial contributing factor to the disability or death.”²⁹
- (a) Disability Benefits
- (i) Persons exposed to a serious risk of contracting a disease that is known to be highly contagious or infectious and potentially deadly have been “injured” for purposes of receiving compensation.³⁰

²⁸ *Pawlosky v. WCAB (Latrobe Brewing Co.)*, 525 A.2d 1205, 1209 (Pa. 1987).

²⁹ *McClosky v. WCAB (J.H. France Refractories, Inc.)*, 460 A.2d 237 (Pa. 1983).

³⁰ *Jackson Twp. Volunteer Fire Co. v. WCAB (Wallet)*, 594 A.2d 826 (Pa. Commw. Ct. 1991) (Ambulance worker exposed to AIDS and Hepatitis B viruses attending the victims of a crash was entitled to payment for necessary tests to determine if the viruses were contracted).

- (ii) An injury need not be pinpointed to a specific event or definable incident as long as the injury arises in the course of employment and is related thereto.³¹
 - (b) Death Benefits
 - (i) It is not necessary to show that the occupational disease was the sole or direct cause of death, but it is not sufficient to show that the disease was merely a contributing factor.³²
 - (ii) Where an occupational disease is one of the two secondary causes of death it will be considered to be a major contributing cause of death if a physician testifies that the claimant would have lived longer without the occupational disease.³³
 - (c) Medical Benefits
 - (i) Pursuant to Act 57, claimants are now required to treatment with a medical provider on the employer's list of designated physicians for 90 days.³⁴ Employers may want to take steps to add a physician to their list who is knowledgeable as to avian flu treatment and risk management protocols.
- (2) Liability
- (a) Employer Liable
 - (i) Claims made pursuant to section 108(n) of the Act.
 - 1. The employer liable for compensation is the employer in whose employment the employee was last exposed.³⁵
 - 2. An injury claim made pursuant to section 301(c)(1), can be made against two employers and the WCJ can determine liability based on the evidence.³⁶

³¹ *Williamette Industries v. WCAB (Lockett)*, 647 A.2d 665 (Pa. Commw. Ct. 1994) (carpal tunnel syndrome).

³² *McClosky v. WCAB (J.H. France Refractories, Inc.)*, 460 A.2d 237 (Pa. 1983).

³³ *Bethlehem Mines Corp. v. WCAB (James)*, 528 A.2d 1078 (Pa. Commw. Ct. 1987).

³⁴ Pennsylvania Workers' Compensation Act, Section 306(f.1)(1)(i), 77 P.S. § 531(1)(i).

³⁵ *Ertz v. Glen Nan, Inc.*, 371 A.2d 533 (Pa. Commw. Ct. 1977).

³⁶ *Westinghouse Electric Corp. v. WCAB (Kloshen)*, 648 A.2d (Pa. Commw. Ct. 1994).

III) Practical Considerations

- a) Fundamental Questions of Risk Analysis³⁷
 - i) What assets and resources does the business rely upon to achieve its objectives?
 - ii) How might the risk of avian flu affect the business' assets and resources?
 - iii) In particular, how might they cause business results to differ from those that are expected?
 - iv) How might these differences in results affect the business' ability to achieve its goals.
- b) Steps Your Business Can Take Today to Minimize the Negative Impact of an Avian Flu Pandemic
 - i) Communicate with Employees
 - (1) Employees need to be aware of the threat of a pandemic so that they can prepare for it in both professional and social settings.
 - (a) Early planning, in the event of an outbreak, is the only way people will be able to continue performing their jobs in a somewhat normal manner.
 - ii) Educate Employees
 - (1) Host informational meetings for employees to attend.
 - (2) Circulate newsletters informing employees of the resources available to them.
 - (a) The U.S. Government launched a web site, www.pandemicflu.gov, to provide Americans with more information about pandemics.
 - (b) For information on how Pennsylvania is preparing for a pandemic flu outbreak visit www.pandemicflu.state.pa.us.
 - (c) For general information and updates on the status of the avian influenza visit the Department of Health and Human Services Centers for Disease Control and Prevention at www.cdc.gov/flu/avian.
 - (d) For additional information you can visit the World Health Organization online at www.int/csr/disease/avian_influenza.

³⁷ Claire Lee Reiss, *Risk Management for Small Business*, PUBLIC ENTITY RISK INSTITUTE (2004) at 4.

- iii) Prepare for Absenteeism
 - (1) Cross-train employees. Guarantee that the positions that are essential to the functioning of your business can be filled in the event of an outbreak.
 - (2) Keep a list of the current contact information for retired employees.
 - (3) Identify employees who can work at home and determine in advance the point at which certain employees may rely upon remote access in order to complete work.
- iv) Keep Employees Healthy
 - (1) Emphasize hygiene. Instruct employees to avoid close contact, wash their hands, cover their mouths when they cough or sneeze, stay at home if they are sick, and avoid touching their eyes, nose, or mouth.
 - (2) Schedule employees in shifts, so everyone is not at work at the same time.
 - (3) Stockpile certain supplies (i.e., gloves, masks, and hand sanitizers).
- c) International Travel
 - i) Advice for Travelers
 - (1) Currently, CDC does not recommend that people avoid travel to the countries affected by the avian influenza. However, the CDC does set forth the following precautionary recommendations:
 - (a) Educate yourself and others who may be traveling with you about avian influenza.
 - (b) Assemble a health kit which contains basic first aid and medical supplies.
 - (c) See your health-care provider at least 4-6 weeks prior to traveling in order to update your immunizations.
 - (d) Identify in-country healthcare resources in advance of your trip.
 - ii) Recommended Precautionary Measures Upon Return
 - (1) Monitor your health for 10 days.
 - (a) Employers may want to consider “quarantining” employees who have traveled to areas of the world which have reported cases of avian influenza. Employers may request that employees work from

home or work in a separate, isolated office so as to not infect the entire workplace.

- (2) If you become ill with fever or respiratory symptoms during this 10-day period consult your healthcare provider. Make sure you inform your provider prior to your visit of your symptoms and recent travel in an area reporting avian influenza.