

## Employers Confront Growing Ebola Concerns

The Ebola hemorrhagic virus that is ravaging West Africa has now reached the US. While the CDC reiterates that the risk of a widespread outbreak in the US is extremely low, public concern over the potential for person-to-person transfers within our borders remains high. As government and public health leaders take steps to contain the spread of the virus, employers should focus on addressing workplace concerns and updating infectious disease preparedness plans to minimize the potential impact of a future outbreak on their employees and business operations.

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### Background

On August 8, 2014, the [World Health Organization](#) (WHO) declared the Ebola outbreak in West Africa to be a public health emergency of international concern. While largely contained to Liberia, Guinea, and Sierra Leone, the WHO has estimated that further international spread is possible unless the outbreak is reversed in the at-risk countries. On September 30, 2014, a Liberian citizen became the first person diagnosed with Ebola in the US, and two nurses who treated him were subsequently diagnosed with the virus. On October 23, a New York City doctor who treated patients in Guinea became the city's first confirmed case of Ebola, creating challenges for health officials to find others who may have been exposed.

Infectious disease outbreaks pose significant challenges not only for health officials but also for employers and their employees. Prompted by the 2009 swine flu pandemic, the Equal Employment Opportunity Commission (EEOC) issued technical guidance on steps employers could take to protect the workplace against widespread public health threats. The EEOC's [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#) (pandemic guidance) addresses key employer concerns, including the permissible scope of employer health-related inquiries and requests for medical examinations during infectious disease outbreaks. (See our [October 30, 2009 For Your Information](#).) Although the EEOC has not yet published Ebola-specific guidance for employers, its pandemic guidance provides some insight into issues employers may



face in dealing with the current Ebola outbreak, including the treatment of employees returning from one of the West African hot spots for which the Centers for Disease Control and Prevention (CDC) has issued non-essential [travel advisories](#).

## Infectious Disease Preparedness Planning

Employer planning and preparedness should include a roadmap on how to continue operations in response to a severe disease outbreak. Measures to prevent exposure to Ebola will depend on the type of work, potential for viral contamination of the workplace, and other potential exposure hazards. In some workplaces, infection control strategies that are already in place may have to be modified to include additional personal protective equipment, administrative controls, and/or safe work practices.

### Contingency Planning

While it is not possible to predict how far-reaching or severe the Ebola outbreak might be on a global basis, employers should develop or update their preparedness plans to address issues that may arise within a very short time if the outbreak spreads.

There is no one-size-fits-all approach, but common, proactive steps employers can take include:

- Establish a planning team with members from critical departments such as human resources, operations, finance, and legal to do a risk assessment and develop alternative scenarios to deal with Ebola
- Develop plans to implement and/or expand telecommuting, flexible work schedules, and similar techniques, as needed, to keep healthy employees working
- Modify sick pay/sick leave schedules as necessary to help ill employees avoid financial difficulty
- Review medical plans, and mental health and employee assistance program benefits to ensure access to care
- Educate employees about Ebola and what to do if an employee shows symptoms or becomes ill
- Educate managers and supervisors regarding the employer's response planning, chain of command, and other operational issues likely to arise in an emergency
- Review general business practices to determine potential risks to inventories, contracts, travel policies, call centers, and other client-facing operations

### Employee Communications

It is especially important for employers to educate employees about the risks of Ebola and the employer's business continuity plans in a direct manner. An important step for all employers is to share information disseminated by the CDC and other public health agencies. Accurate, up-to-date information can alleviate employee concerns and minimize the potential for Ebola-related work disruptions.

## Workplace Considerations

Employers must be aware of the potential impact of various employment laws as they formulate strategies to manage business operations in the event that an employee or an employee's family member is exposed to — or contracts — the virus.

## ADA

The Americans with Disabilities Act (ADA) prohibits employment discrimination on the basis of an employee's or job applicant's actual or perceived disability. The ADA generally restricts employers from making employee disability-related inquiries and requiring medical examinations unless they are job-related and consistent with business necessity. It also prohibits employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" to themselves or coworkers, and requires reasonable accommodations for individuals with disabilities absent undue hardship.

**Inquiries about Travel and Potential Exposure.** Because questions about whether an employee travelled to any of the at-risk locations identified by the CDC and any potential exposure during travel (even personal travel) are not considered disability-related, they would not be prohibited by the ADA.

**Medical Examinations, Medical Clearances, and Monitoring.** Employers have less flexibility in requiring an employee to undergo a medical examination or to be cleared by a doctor before returning to work after traveling to an outbreak area. Under the ADA, an employer may request medical information or require a medical examination only if they're job-related and consistent with business necessity, or the employer has a reasonable belief that an employee will pose a direct threat because of a medical condition. According to the EEOC's pandemic guidance, an employer should look to the CDC or state/local public health authorities in assessing whether an illness is a direct threat.

**Comment.** Risk assessments by public health authorities will support medical inquiries and examinations, and minimize potential employer liability, in individual cases. For example, taking an employee's temperature — usually considered to be a medical examination by the EEOC — may be permitted if the employee poses a direct threat to the safety and health or himself and others.

According to the CDC, there is no need to require medical clearance of employees who have returned from travel to an at-risk location unless they have Ebola-like symptoms and were exposed to infected individuals. For individuals who were in an outbreak area but had no exposure, CDC [guidelines](#) recommend they self-monitor for a 21-day period following their return to the US. The CDC neither recommends —nor requires— their quarantine. Although the CDC [says](#) that an individual can continue his or her normal activities during this period, including work, some states disagree.

### Ebola Symptoms

Symptoms include fever, severe headache, muscle pain, vomiting, diarrhea, stomach pain, and unexplained bleeding or bruising.

Because Ebola symptoms are similar to those of the common flu, employers may face challenges in evaluating the nature of an employee's illness if the virus becomes more widespread.

**Comment.** While the CDC has set minimum recommended guidelines, several states have already imposed greater restrictions. On October 24, 2014, New York, New Jersey, and Illinois announced mandatory 21-day quarantines for all individuals coming into the US from an Ebola outbreak area who had contact with infected persons. The state rules, which exceed CDC guidelines, require active monitoring by public health officials of all individuals with travel history to these areas, regardless of whether they had direct contact with infected persons. Other states — including Florida, Connecticut, and California — have established their own quarantine programs. Employers should continue to monitor CDC and state websites

for any changes in recommended workplace restrictions for recent travelers, and ensure that they are in compliance with all applicable requirements.

If telecommuting is an option, an employer may want to consider offering the alternative to work at home for the incubation period to alleviate concerns of other employees. If telecommuting is not a viable option, an employer may consider placing an employee on a leave of absence. Even if the leave is paid, making the employee stay home for that period is not without some risk of violating the ADA. To minimize potential liability, the employer should make certain that it takes no adverse employment actions against an employee who is removed from the workplace — including no negative attendance issues and no loss of pay.

**Sending Employees Home.** The CDC advises individuals returning from an outbreak area who are symptomatic to seek medical help and stay apart from others. Employers may, as a safety precaution, consider requiring employees who have traveled to at-risk locations and who report exposure to an infected individual and/or Ebola-like symptoms to stay home pending medical clearance. Similarly, if an employee develops symptoms at work, the employer may send him or her home until medically cleared for return.

**Comment.** Employers must carefully balance the employee's medical privacy protections under both the ADA and HIPAA against their duty to maintain a safe workplace for all employees. Sharing health-related information about an employee's medical condition should be cleared with HR and/or legal counsel.

### Family and Medical Leave

The federal Family and Medical Leave Act (FMLA) and state and local sick leave laws may also be implicated in the event that employers require employees to take the virus' 21-day incubation period off. Ebola would qualify as a serious health condition under the FMLA and similar state laws, and taking leave to treat Ebola symptoms would likely be FMLA-covered even if it later turns out not to be the disease. Because it is less clear whether leave to monitor in the absence of any Ebola symptoms would be covered, employers should carefully consider whether to count such leave against the employee's FMLA entitlement.

**Comment.** Pending further guidance, employers should consult with counsel on the extent to which an employee absence due to a state-mandated quarantine may be FMLA-covered.

With certain limited exceptions, the FMLA does not provide for time off to care for healthy children. However, state and local leave laws may require employers to provide employees with time off to care for children who have been dismissed from school or child care due to public health emergencies.

### Vacation or Paid Time Off

Ebola-related school closures — which have already occurred in the US — can have a significant impact on businesses as employees struggle to find child care. Given a potential for recurrence, employers may wish to consider whether more flexible vacation or paid time off (PTO) alternatives may be beneficial in the event of an outbreak. If so, existing policies may be modified, for example, to allow PTO advances, donating time to other employees, or shortening notice periods to request time off.

### Bargaining Obligations

Unionized employers should be mindful of any bargaining obligations they may have with respect to issues such as sick leave, healthcare benefits, and other terms and conditions of employment.

## Safety and Health

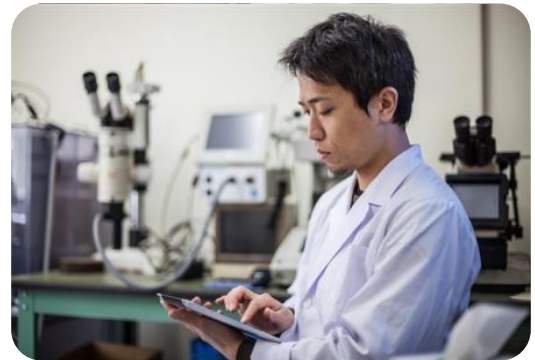
In workplaces where the potential exists for employees to come into contact with infected persons or materials, employers must comply with applicable workplace health and safety laws. Effective protocols must be in place, appropriate protective equipment and clothing must be available, and employees must be properly trained.

### Healthcare Workers

In addition to monitoring CDC guidance, employers need to closely monitor protocols issued by state and local public health authorities as they evolve.

The Occupational Safety and Health Administration (OSHA) has established an Ebola [web page](#) that provides [interim general guidance](#) to help employers prevent worker exposure to the virus and infected individuals. OSHA's general guidelines are not intended to cover workers who have direct contact with individuals with Ebola. Rather, as OSHA makes clear, the CDC is the authoritative source for information and guidance for healthcare workers who care for, treat, and otherwise interact with patients who are known to or are suspected of having Ebola.

Because there is no specific federal standard for Ebola, employers whose workers may be exposed to the virus would likely need to comply with a combination of several [OSHA standards](#) to implement a comprehensive worker protection program. Among them are: OSHA's blood-borne pathogen standard (which generally covers workers with occupational exposure to blood or other potentially infectious materials, such as healthcare workers and first responders); the respiratory protection standard; the personal protective equipment standard; and the hazard communication standard. Under OSHA's General Duty Clause, employers must comply with OSHA regulations and furnish a workplace free from recognized hazards to employee safety and health. To satisfy that duty, employers may have to remove employees with symptoms from the workplace. Finally, employers should be mindful that OSHA provides whistleblowing protections and prohibits retaliation against workers for voicing safety or health concerns to their employer or government agencies.



**Comment.** In the first reported work stoppage attributed to Ebola-related concerns, on October 9, 2014, roughly 200 airline cabin cleaners at LaGuardia Airport in New York engaged in a one-day strike over the lack of personal protective equipment. In appropriate circumstances, refusing to work because of safety concerns may be protected by the National Labor Relations Act as well as the OSHAct.

## Travel-Related Concerns

Employers — particularly those with a global or international footprint — will likely face questions about travel to and from Africa. Can an employer require or ban travel to West Africa? If employees want to go, can the employer stop them?

While suspending business travel to at-risk countries is consistent with CDC advisories on non-essential travel, employers would have difficulty defending a prohibition on their employees' personal travel to West Africa — particularly if it was FMLA-protected leave to care for an infected family member. While

### Discrimination Concerns

Unless required by state or local authorities, employers should ensure that employees and applicants are not treated differently because they recently visited West Africa.



returning travelers potentially pose a concern, employers must take ADA and other nondiscrimination obligations into account when deciding how to deal with them.

## What Should Employers Be Doing Now?

Even as the government and public health experts assure us that the risk of Ebola spreading in the US is extremely low, anxiety is high. As employers continue to monitor Ebola-related developments and announcements from public health officials, they should consider taking the following actions:

- Develop and/or update existing pandemic plans or infection control plans
- Educate employees on Ebola transmission and hygiene practices
- Revisit the company's business travel policies (and provide CDC and state health authority recommendations for personal travel)
- Be prepared to address employee questions about workplace safety
- Review employee benefit and insurance coverages
- Monitor CDC and state and local health authorities' guidance
- Ensure compliance with applicable federal and state employment, health, and safety laws

## In Closing

Employers should be making a concerted effort to address Ebola-related issues proactively and to put in place an appropriate communications strategy to respond to employee questions and workplace safety concerns as public health assessments evolve. As employers develop action plans to manage possible health risks, unexpected absences, and other work contingencies should the virus spread, they should integrate up-to-date information from the CDC and other public health authorities with their obligations under federal, state, and local law.

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