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SWINE FLU (H1N1 INFLUENZA) LIABILITY

On April 29, 2009, Governor Rick Perry declared that a state of disaster exists in Texas based on the public health emergency involving the Swine Influenza. As of May 4, 2009, there are 40 confirmed cases of the H1N1 Influenza in Texas and one death. In the United States, there are 286 confirmed cases. The World Health Organization has officially reported 1,085 cases worldwide.

Whether we call it the H1N1 influenza or the more common “Swine Flu,” the recent spread of the virus requires that businesses evaluate their Emergency Response Plans to control the spread of the disease, and avoid communicable disease liability to employees and customers. Many businesses, unfortunately, have no emergency plan to respond to a potential communicable pandemic disease.

EMERGENCY RESPONSE PLAN

A pandemic disease, like a terrorist attack or natural disaster, is an event which businesses should prepare for through the creation of an Emergency Response Plan. Preparation of an Emergency Response Plan to address the potential liability for the spread of the “Swine Flu” should involve consultation both with legal counsel and health authorities. The plan should be designed to prevent the disease from spreading, as well as to protect the health of employees and customers.

The creation of an Emergency Response Plan must be carefully drafted to avoid potential violations of the Health Insurance Portability and Accountability Act (HIPPA) due to disclosing confidential health information about an employee to other employees and customers. Moreover, the impact of the Americans with Disabilities Act must be considered since a flu-infected worker may contend that an employer’s actions to limit the spread of disease are discriminatory.

THEORIES OF LIABILITIES AGAINST EMPLOYERS

The ultimate workforce impact of “Swine Flu” remains unknown. However, employers who fail to prepare and implement an Emergency Response Plan may face Workers’ Compensation and/or Non-Subscriber claims arising from the failure to implement policies which prevent employee exposure to the “Swine Flu” and prevent the spread of the disease.

Employers should carefully consider the liability aspects of requiring employees to work in an environment or location known to be a significant risk area for contraction of the “Swine Flu.” Likewise, employers, like municipal school districts, need to carefully consider how they will respond in the event an employee is confirmed to have contracted “Swine Flu” to protect the health of other employees as well as that of their students.

Legal theories likely to be asserted against employers related to transmission will include: negligence, breach of warranty, breach of contract, and failure to provide a safe workplace. In recent years, a crop of litigation has arisen out of the spread of communicable diseases. A majority of these cases arise from diseases caught onboard a cruise liner.

In 2005, vacationers onboard a Carnival Cruiseline ship became ill after being infected with the Norovirus. In one case, a man died from the disease. The widow filed a wrongful death suit against Carnival Corporation. Although this case was dismissed, the threat of liability to Carnival Corporation was substantial.

THIRD PARTY LIABILITY THEORIES

It is inevitable that the current “Swine Flu” outbreak will give rise to litigation. Businesses should carefully review their insurance policies to determine whether they have insurance coverage for the spread of a communicable disease.

A business whose employees come in contact with the public, such as a restaurant or retail business, owes a duty to avoid the negligent spread of communicable diseases. Businesses need to develop and aggressively implement a plan of action to avoid the spread of “Swine Flu” from employees to customers.

The last major outbreak of an epidemic flu in the United States occurred during the 1918 Spanish Flu epidemic. The current “Swine Flu” outbreak appears to be the most significant communicable disease epidemic faced by American businesses in the last ninety years. Through proper emergency planning, and an aggressive response to an employee who tests positive for “Swine Flu,” a business’ liability to both employees and its customers can be greatly reduced and possibly limited altogether.

For more information on the “Swine Flu,” or standard precautions to reduce the risk of spreading the “Swine Flu,” please visit:

www.dshs.state.tx.us/swineflu

www.cdc.gov/swineflu

www.who.int/csr/disease/swineflu/en

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