

EBOLA - THE EMPLOYMENT ISSUES FOR HEALTH CARE PROVIDERS

With concerns over the spread of Ebola, hospitals and health care providers face a unique situation as employers and care providers. Just as a few years ago employers geared up to deal with Pandemic Flu and a few decades ago employers were dealing with AIDS/HIV in the workplace, many of the same precautions and guidance applies now in the current crisis. Here are the key employment issues that need to be considered in any comprehensive approach to Ebola as it might occur in the workplace.

CDC GUIDANCE - HEALTH CARE WORKERS AND PERSONAL PROTECTIVE EQUIPMENT

On October 21, 2014, the CDC issued updated and tightened infection control guidance for health care workers. This enhanced guidance focuses on:

- Rigorous and repeated training;
- No skin exposure when personal protective equipment is worn; and
- Having a trained monitor on the use of personal protective equipment.

The use of personal protective equipment is only one aspect of infection control. The CDC identifies five pillars of safety that all health care employers should adopt:

- Facility leadership has the responsibility;
- Designate an on-site Ebola site manager;
- Adopt clear and standardized procedures;
- Train health care workers; and
- Practice, practice, practice.

The CDC has issued a [fact sheet](#) that summarizes the enhanced infection control guidance; this extremely detailed document can be found [here](#). As we have seen, official guidance is subject to rapid change and the [CDC's Ebola Website](#) should be accessed frequently to ensure procedures are up to date.

OSHA - EXISTING STANDARDS, PERSONAL PROTECTIVE EQUIPMENT AND REFUSAL TO WORK

Workers have a right to a safe workplace. The law requires employers to provide their employees with working conditions that are free of known dangers. The OSHA law prohibits employers from retaliating against employees for exercising their rights under the law (including the right to raise a health and safety concern or report an injury). The law and regulations also prohibit discrimination, which would include taking adverse action against an employee for walking off the job over safety concerns in some circumstances. The circumstances where employees would be protected are:

- When an employee is confronted with a choice between not performing assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace;
- There is no reasonable alternative than to refuse in good faith to expose himself to the dangerous condition;
- The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury;
- There is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular OSHA enforcement channels; and
- The employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous

condition.

The OSHA safety standards applicable to Ebola are:

- Employers must ensure that they comply with OSHA's Bloodborne Pathogens standard, [29 CFR 1910.1030](#), to protect workers who may be exposed to blood or other potentially infectious materials;
- OSHA's Personal Protective Equipment standard, [29 CFR 1910.132](#), provides additional information about how to select and use appropriate personal protective equipment, training and other requirements; and
- OSHA's Respiratory Protection standard, [29 CFR 1910.134](#), covers the selection and use of appropriate respirators, including powered air purifying respirators.

Additional information can be found at the OSHA [Ebola Website](#) and on the OSHA [Fact Sheet](#) that deals with cleaning and decontaminating surfaces in non-health care settings.

HIPAA - PATIENT AND EMPLOYEE PRIVACY

Unfortunately, health care workers may have a new-found curiosity in patient health information, including the health status of their co-workers. To avoid violations and problems:

- Remind employees of their obligations under HIPAA;
- Ensure that access to protected health information is secure; and
- Impose appropriate discipline in the event of a privacy breach.

ADA - DISABILITY? REGARDED AS? REASONABLE ACCOMMODATION? DIRECT THREAT?

It is likely that an actual Ebola infection would qualify as a disability under the ADA. But even if there is no actual infection or impairment, employees who might be "*regarded as*" being infected (or having a "*record of*" infection) would be protected under the ADA. Employers need to consider:

- Employee confidentiality;
- The appropriateness of an employee medical exam if exposure to Ebola may have occurred;
- Inquiry as to an employee's recent travel;
- What can or should be said to others in the facility about an employee's condition;
- Whether to engage in the good faith interactive process to identify a reasonable accommodation;
- The Job Accommodation Network at this writing does not have accommodations specific to Ebola but reference to the [suggestions](#) that were offered for pandemic flu can be helpful;
- Telework from home as a reasonable accommodation;
- Only when an employer can demonstrate that a person with a disability will pose a "direct threat" can it lawfully exclude the individual from employment or other employment-related activities;
- Whether the employee who is sent home be paid; and
- Referring to the EEOC's [guidance](#) on employment issues involving pandemic flu, which contains an excellent list of questions and answers that employers face in dealing with infectious disease issues in the workplace.

FMLA - SERIOUS HEALTH CONDITION? UNPAID LEAVE OR NOT?

The FMLA protects employees who have a "*serious health condition*" or are "*needed to care for*" a family member who has a serious health condition. An employee who has no symptoms of disease likely would not have a serious health condition that would entitle the employee to FMLA leave.

NLRA - EMPLOYEE PROTECTED RIGHTS AND CONCERTED ACTIVITY

The National Labor Relations Act provides protections for private non-supervisory employees to engage in concerted activity for their mutual aid and protection. Indeed, there is a specific **provision** in the law that allows employees individually or as a group to cease work "*in good faith because of abnormally dangerous conditions ... at the place of employment.*" This means that private employees who in good faith believe that their working conditions are abnormally dangerous would be protected if they walked out because of that belief. Private employers should therefore consider:

- The employee's expressed reasons for refusing to work;
- The employee's right to cease work even if there is a collective bargaining agreement that contains a no strike clause;
- The steps taken to ensure that the workplace is safe;
- Urging employees to return if conditions are not abnormally dangerous;
- Getting all the surrounding facts before disciplining or discharging employees;
- Suspending an employee pending investigation; and
- Obtaining willing replacements for workers who refuse to work.

Besides the protected right to cease work, private employees have the right to privately or publicly complain about wages, hours and working conditions (e.g., Ebola preparedness). Employers should consider:

- That non-defamatory statements on social media or other media about safety issues or management's lack of preparedness would likely be protected;
- That public demonstrations that do not disrupt work or block ingress or egress to the facility (whether or not a union is involved) would likely be protected;
- Caution before taking any adverse action against an employee for expressing safety related views and opinions;
- Whether to suspend an employee pending investigation of all the surrounding circumstances; and
- That unions and labor organizations may use the current Ebola crisis to urge changes and improvements to protect employees and patients.

GOVERNMENT HOSPITALS AND FREE SPEECH

Although government hospitals are not covered by the NLRA, all of their employees, including managers and supervisors, enjoy free speech protections under the First Amendment of the U.S. Constitution. But of course those rights have limits:

- The speech must be about matters of public concern;
- The speech must be in a public forum; and
- The speech (or other activity) must not disrupt patient care or normal operations of the facility.

THE BOTTOM LINE FOR HEALTH CARE EMPLOYERS

Although the current crisis may be easing the public awareness of the risks inherent in treating any patient presenting with symptoms of an infectious disease is a wake-up call to educate and train workers in the recommended protocols. Keep current on all of the official guidance that is being issued by public agencies. Obtain the recommended protective equipment. Update existing infection control policies and practices. Identify the infection control leader of your facility. Train employees. Train employees. Train employees.

If you have any questions on issues discussed in or related to this post, please contact Steve Lyman at slyman@hallrender.com or (317) 977-1422, or Jon Bumgarner at (317) 977-1474 or jbumgarner@hallrender.com or your regular Hall Render attorney.