
Legal Concerns in a Swine Flu Emergency

by Kenneth W. Taber, Frederick A. Brodie, and Andrew C. Smith

In a press release on April 26, 2009, Governor David A. Paterson announced that he had activated New York State's health emergency preparedness plan and put the state on high alert to quickly identify and respond to any cases of swine flu. The Centers for Disease Control and Prevention (CDC) confirmed eight cases of a new strain of influenza (swine flu H1N1) in New York City, and declared a public health emergency that same day.

Over the past two years, a team of 27 Pillsbury lawyers has been examining disaster scenarios—including the possibility of a pandemic—for the City of New York. We have been advising the City on legal issues pertaining to its disaster planning efforts. The scope of this engagement ranges from analyzing the City's disaster planning for scenarios as varied as a dirty bomb, a chemical attack, a Hurricane Katrina-type storm scenario, and a potential pandemic, such as the current swine flu outbreak.

In responding to the current swine flu outbreak, businesses need to consider issues that may affect their work force. Among the questions that should be considered are:

Business and Human Resources Questions

- Can my company lawfully require that all employees provide proof that they have been vaccinated or have taken preventive medications?
- Can my company bar people from coming to work if they've been exposed to swine flu? Does this create a problem under the Americans with Disabilities Act or the Rehabilitation Act?
- Can my company legally require employees to disclose health information, such as whether they have been exposed to swine flu, been vaccinated, or taken antiviral medication?
- What if people are afraid to come to the workplace? Can they be compelled to do so?
- Can my company be liable if we distribute medication and someone has an adverse reaction to it?
- What happens if there's a quarantine order that affects our workforce? What if the quarantine is voluntary?
- What if my company cannot perform a contract due to the swine flu emergency?
- What if my company's suppliers cannot perform their obligations due to the swine flu emergency?

Immunization

- Can the company provide immunization or antiviral medication to some or all of its work force?
- What legal constraints apply in this jurisdiction to the administration of vaccinations or preventive medication?
- What warnings must be given to recipients of vaccinations or preventive medication? Can enforceable waivers be secured? What “informed consent” standards will apply in this context?
- What potential liability could the entity face for injuries or damages resulting from vaccinations or preventive medication?
- What patient-specific records must be maintained? Is HIPAA compliance required, and if so, what steps will such compliance require or prohibit?

Isolation/Detention/Quarantine

- Can a company lawfully exclude individuals with certain diseases, traits, characteristics, and/or exposures from coming to work?
- What liability risks could arise under anti-discrimination laws, the Americans with Disabilities Act and the Rehabilitation Act?
- May a business compel employees to disclose the health information necessary to make work force exclusion determinations?
- What information may lawfully be shared with public health officials without potentially triggering liability under HIPAA?

Pillsbury's Disaster Planning and Liability Management Team is available to answer any questions you may have. Please contact the following individuals for more information.

Kenneth W. Taber
New York
+1.212.858.1813
kenneth.taber@pillsburylaw.com

Frederick A. Brodie
New York
+1.212.858.1628
frederick.brodie@pillsburylaw.com

David A. Crichlow
New York
+1.212.858.1640
david.crichlow@pillsburylaw.com

Andrew C. Smith
New York
+1.212.858.1743
andrew.smith@pillsburylaw.com

Jay D. Dealy
New York
+1.212.858.1270
jay.dealy@pillsburylaw.com

Kent P. Woods
New York
+1.212.858.1836
kent.woods@pillsburylaw.com

This publication is issued periodically to keep Pillsbury Winthrop Shaw Pittman LLP clients and other interested parties informed of current legal developments that may affect or otherwise be of interest to them. The comments contained herein do not constitute legal opinion and should not be regarded as a substitute for legal advice.

© 2009 Pillsbury Winthrop Shaw Pittman LLP. All Rights Reserved.