

Legal Preparedness for Pandemic Flu
April 26, 2006
Public Health Law in Practice: A Case Study on Pandemic Flu

Scenario Day 1

Shortly after a business trip to Vietnam in early January, a regional sales manager at “Manufacturer Inc.” – a transnational corporation with key operations in California – goes to the on-site occupational health clinic in the Manufacturer Inc. building complaining of a respiratory infection.

He tells the doctor that he did not visit the country-side nor purchase any raw poultry products while in Vietnam. However, he reports that as he was returning to the U.S., his flight was delayed for several hours and during the delay he sat in a crowded waiting room at the Ho Chi Minh City airport where a number of travelers were stranded waiting for domestic and international flights. Several people were coughing and sneezing. He believes he may have contracted a respiratory infection at this time.

The patient is sent to the community hospital for more tests and observation.

ANALYSIS

Epidemiology: WHO Phase 3. The main challenge at this point is that a patient can be infectious without being symptomatic. Respiratory hygiene and safe coughing practice should be taught to the general public.

Health Department: The local health department has no reason for concern at this time. The Centers for Disease Control (CDC) monitors outbreaks and high risk scenarios worldwide and communicates with state and local health departments on a continuous basis.

Health Law: Health & Safety Code §120175 requires health departments to take necessary action if the health officer *knows or has reason to believe* that any case of reportable diseases or any other contagious, infectious, or communicable diseases exist under his/her jurisdiction.

For a list of reportable diseases: see 17 CCR §2500.

From a legal perspective, no action is needed at this time, except as potentially required with regard to workers’ compensation submission – see below.

Employment Law: It is not clear if the regional sales manager himself is following good respiratory hygiene and safe coughing practices, but it should be taught to all employees. The company should have a policy with regard to travel restrictions, but presumably it has not been violated here. Although it is not clear whether the regional sales manager has indeed contracted an illness through work, he should be provided with workers’ compensation forms and it should be viewed as a potential occupational illness.

Scenario Day 3

The patient is in critical condition and is not responding to treatment.

The WHO issues a press statement reporting a number of respiratory failure cases, including several casualties, in Vietnam. Initial reports confirm that some patients have contracted the H5N1 virus. The reports suggest that transmission may have occurred via casual person-to-person contact. Investigations continue to confirm the mode of transmission.

CDC reports that the seasonal flu is widespread this year and is reaching an expected peak as children return to school after the holidays.

The local health officer is contacted by a newspaper reporter. She is asked to comment on the WHO reports and to discuss the impact of the report on local health conditions.

ANALYSIS

Epidemiology: WHO Phase 4 potential. Concern that person-to-person transmission may be occurring. Ironically, the lower the human death rate, the more difficult it is to conduct surveillance as death promotes reporting. There is an outstanding question on the reliability of testing results and how long it will take to get results if limited laboratory systems are stressed.

Health Department: There could be a large demand for testing by people with flu-like symptoms and the worried-well. Health department contacts infectious disease coordinators at health centers and hospitals regarding WHO press statement. Protocols recommended for respiratory hygiene in ER and outpatient clinics. Separate all patients exhibiting respiratory symptoms. Hospitals need internal communication systems to inform all employees.

Health Law: Health & Safety Code § 120175 requires health departments to take necessary action if the health officers *knows or has reason to believe* that any case of reportable diseases or any other contagious, infectious, or communicable disease exist under his/her jurisdiction.

For a list of reportable diseases: see 17 CCR §2500. From a legal perspective, no action is needed at this time, except on the part of the employer as suggested above.

Employment Law: The employer is obligated to report to Cal/OSHA because there has been an in-patient hospitalization of more than 24 hours for reasons other than observation. 8 CCR § 342. The illness also triggers record-keeping requirements on the employer's 300 log.

Other employees will almost certainly have heard of his condition and they should be provided with accurate information. Other employees exhibiting respiratory symptoms

should be directed for evaluation to the on-site occupational health clinic. “When in doubt” protocols should be implemented, and the employees quarantined at home while a report is made to the local health department and advice sought from the local health department. Whether there is a duty to pay such employees on quarantined leave is subject to several laws, and may also vary by company policy or union contract. The employer should consider triggering FMLA/CFRA leave. ADA/FEHA concerns are also triggered by the “when in doubt” protocols.

Scenario Day 5

Eight other employees who work in the same Manufacturer Inc. department as the ill regional sales manager have developed respiratory illnesses.

All of these employees also initially seek medical care at Manufacturer Inc.’s on-site occupational health clinic. Most appear to be relatively stable. Preliminary tests for the patients are mixed: three of the employees test positive for influenza, but the others do not.

The clinic’s medical director is concerned about the sudden spike in employees from this department seeking medical attention for respiratory illnesses since the first employee to get sick had visited Vietnam. He contacts the local health department to report the spike in illnesses.

ANALYSIS

Epidemiology: WHO Phase 4 or 5. Potential concern that a disease cluster has formed. Investigation and surveillance is warranted to ascertain whether a serious infectious disease is present.

Health Department: Health Officer asks that test samples be sent to the national reference laboratory at the California Department of Health Services in Richmond for further analysis.

A public health nurse is assigned to work with Manufacturer Inc. occupational health clinic to begin contact tracing. All employees in the affected Manufacturer Inc. department and all their contacts receive health order mandating testing. All target employees receive work exclusion orders and orders requiring home quarantine until cleared by a physician to return to work.

All health centers and hospitals in county are told to give priority care to patients presenting with respiratory infections. All respiratory illnesses must be reported to the health department. Protocols now mandated for respiratory hygiene in ER and outpatient clinics.

CDC identifies and traces the passengers on the Ho Chi Minh City flight so that health departments can medically monitor exposed persons.

Health Law: Health & Safety Code § 120175: Health officer *shall take measures as may be deemed necessary* to prevent the spread of the diseases or occurrence of additional cases.

Health & Safety Code § 100182 and Penal Code § 409.5(c) require individuals to comply with health orders or risk civil or criminal sanctions. Health & Safety Code § 120220 specifically requires compliance with orders for quarantine and isolation.

It is anticipated that target employees will voluntarily agree to comply with the health orders. Nonetheless, the orders affect their 14th Amendment rights to substantive due process (personal liberty and property interests) and to equal protection, and 4th Amendment rights to be free of search and seizure.

Health & Safety Code § 120275: Failure to abide by a health order is a misdemeanor. Health & Safety Code § 120290: anyone inflicted with a contagious disease who willfully exposes him/herself to others is guilty of a misdemeanor. Health & Safety Code § 120295: misdemeanors are punishable by a fine or imprisonment up to 90 days or both. If compliance with quarantine or work exclusion orders are not complied with voluntarily, health officers can obtain court orders to enforce the health orders and local police or sheriffs can be assigned enforcement duties.

Employment Law: Manufacturer Inc.'s obligation to take steps to protect health and safety of employees under the Cal/OSHA IIPP standard, etc., have now clearly been triggered. It should continue to work with the health department. ADA/FEHA concerns substantially reduced by health department orders and guidance. Manufacturer Inc. will likely be facing a substantial worry-well problem. Manufacturer Inc. is likely considering or already recruiting contingent workers and issues of appropriate notification need to be addressed.

Scenario Day 5-6

Four of the sick employees become progressively unstable and are admitted to the community hospital ICU with respiratory failure. Two of the employees die while hospitalized. One is known to have had asthma, the other had no known chronic disease. A 55-year old Spanish speaking woman with a history of emphysema, no health insurance, and who works for a janitorial company that serves Manufacturer Inc. is admitted to the county hospital. She dies later that day.

The national reference laboratory confirms 4 cases of H5N1 influenza. The state health officer contacts CDC which sends an epidemiological investigations team to the site.

The media relations staff at the hospitals, Manufacturer Inc., and the state and local health departments begin receiving press contacts from throughout the United States. The local health officer holds a press conference to answer questions from reporters.

Meanwhile, a still-healthy Manufacturer Inc. employee announces the illnesses and deaths on a blog site. He identifies Manufacturer Inc. and several of the employees he thinks are ill.

ANALYSIS

Epidemiology: WHO Phase 4 or 5. A disease cluster is confirmed with a contained mode of transmission. Immediate and aggressive action is necessary to limit or stop spread of disease.

Health Department: Epidemiological investigations expanded. Contact tracing assistance provided by neighboring health departments and CDC. At-risk individuals need testing and quarantine until test results confirm presence/absence of disease. If available, prophylactic Tamiflu administered to patients, work and personal contacts and hospital staff. The goal is to contain the disease immediately using all means available. Triage the administration of medical assets (drugs, ventilators, infection wards, etc.)

Health department provides information to the media that is necessary for the public to take protective action. Information does not include personal identifiers of patients. Nor is Manufacturer Inc. named in press reports.

CDC meets all flights arriving from Ho Chi Minh City to check for ill passengers and to distribute health notices informing passengers to be alert for symptoms.

Health Law: Health & Safety Code § 120175: Broad authority given to health officer to control disease. Actions can include the full panoply of prevention tools available. They can be enforced via civil and criminal courts. The greater the invasiveness and controlling of individual liberty or action by the government, the more legal rights individuals, corporations and institutions have to object to the actions being demanded and taken. In accordance with substantive due process rights guaranteed by the 14th Amendment, health departments must ensure the least restrictive alternatives are employed when limiting individual liberties. Communications must be linguistically sensitive to avoid discrimination. 45 U.S.C. § 2000d.

HIPPA Privacy Rule and California Civil Code § 56.10 compliance forbid hospitals, clinics, and health department from divulging personal identifiers of patients. However, data can be aggregated and de-identified to inform the community about health risks. Tension arises with regard to Manufacturer Inc. employees right to exposure information. Providers and health plans covered by the HIPAA Privacy Rule can share information as necessary to provide treatment, notify family members, prevent or lessen a serious and imminent health and safety threat, and tell callers whether the individual sought is at the facility. 45 C.F.R. Part 164.

It is possible that a declaration of emergency will be called by the local health officer, the state, the Secretary of Health and Human Services, 42 U.S.C. § 247d, or the President, 42 U.S.C. § 5191. Government Code §§ 8558(a) and (b) include the term “epidemic” in the definitions of “state of emergency” and “local emergency”. Government Code § 8659 provides liability protection for health professionals responding at the request of a responsible state or local official or agency during a state of emergency. Business & Professions Code § 900 provides immunity from liability to health care providers licensed in another state who respond to a declared state of emergency upon the request of the Emergency Medical Services Authority.

The 10th Amendment to the Constitution gives states police power authority in their jurisdiction and the state will need to invite the federal government into the state to provide assistance. Under the Constitution’s Commerce Clause, the federal government has authority to act at the borders, among the states, and with Indian tribes, and can take action to protect the movement of goods, services and persons under this authority. Inter-jurisdictional coordination will be key to successful disease containment strategies.

Manufacturer Inc. can likely cut-off blogging employee’s access to company computers if he is blogging from work, depending on company policy. However, it is of limited usefulness as a practical matter because the blog can be continued with the use of non-company equipment. Legal action can be started to potentially restrain unlawful disclosures (i.e., identification of employees who are or may be ill) but is a difficult and time-consuming practice.

Employment Law: Manufacturer Inc. may already have closed this location or a significant portion of this location. Many employment issues to address as a result.

Scenario Day 10

The respiratory illness appears to be spreading rapidly. The occupational health center, the community hospital, and local physicians have a growing number of patients with severe respiratory distress and their staff calling in sick, apparently with influenza-like symptoms.

One more death has occurred to a three-year-old child whose parent works at Manufacturer Inc. The child attends a pre-school located in the basement of a church.

The hospitals refuse to identify any of their patients who have died and the health officer refuses to identify the corporation where the illnesses seem to have originated or the preschool which the child attended.

A well-known national broadcaster with a penchant for drama broadcasts a live television report on the national evening news from in front of the preschool that the blogger identified. His lead: “Government officials are silent while children die. Are your children at risk?”

ANALYSIS

Epidemiology: WHO Phase 5.

Health Department: Social distancing strategies are required which may include: cancellation of gatherings (sports events, convention centers, theatres), school closings, business closings, etc.

Limited quarantine sites (for example, hotels, dormitories, etc.) established. Partial quarantine set for health care workers caring for patients with respiratory illnesses. Isolation or quarantine for all workplace and personal contacts.

Health Law: Social distancing strategies should be focused and targeted as possible (i.e. impose the least restrictive means necessary to achieve disease containment goals).

HIPPA Privacy Rule and California Civil Code § 56.10 compliance maintained as above. HHS enforces the HIPAA Privacy Rule and may not impose a civil money penalty where the failure to comply is based on reasonable cause, is not due to willful neglect, and the failure to comply is cured within a 30-day period. 42 U.S.C. § 1320d-5.

Health officers are empowered to commandeer facilities (hospitals, isolation and quarantine sites, etc.) once a declaration of emergency has been called. See, Health & Safety Code §§ 120175 and 101040; Government Code §§ 8550 and 8630; and 17 CCR § 2501.

Health care facilities may request that HHS waive the provisions of EMTALA (Emergency Medical Treatment and Active Labor Act) requiring stabilization of emergency patients prior to transfer. HHS can also waive certain requirements of the Medicare, Medicaid, and State Children's Health Insurance (SCHIP) programs. 42 U.S.C. § 1320b-5.

The Governor may request that HHS deploy federal medical resources or the Strategic National Stockpile to California. 42 U.S.C. § 247d-6b.

The California Emergency Services Act, Government Code § 8610, allows health officers to command the aid of citizens during a declared state of emergency such as during an epidemic. While involuntary servitude is prohibited by the 13th Amendment to the Constitution, statutorily authorized conscription for limited periods of time for the purposes of protecting public health and safety is arguably not considered involuntary servitude. That said, from a practical perspective, it is nearly impossible to force people to work against their will.

Scenario Day 14

The local health department is overwhelmed with case investigations. Initial findings suggest person-to-person spread of infection in some instances, but no clear infection pattern is identified by local data.

WHO announces that H5N1 may be spreading in some parts of the world through casual person-to-person contact.

The state and local health officials refer all press inquiries to the Centers for Disease Control personnel.

ANALYSIS

Epidemiology: WHO Phase 5.

Health Department: All non-essential first responder personnel told to stay home; all social distancing strategies become mandatory.

Health Law: HIPPA Privacy Rule and California Civil Code § 56.10 compliance maintained as above.

Health officers are empowered to commandeer facilities (hospitals, isolation and quarantine sites, etc.) once a declaration of emergency has been called. See, Health & Safety Code §§ 120175 and 101040; Government Code §§ 8550 and 8630; and 17 CCR § 2501.

The California Emergency Services Act, Government Code § 8610, allows health officers to command the aid of citizens during a declared state of emergency such as during an epidemic. While involuntary servitude is prohibited by the 13th Amendment to the Constitution, statutorily authorized conscription for limited periods of time for the purposes of protecting public health and safety is arguably not considered involuntary servitude. That said, from a practical perspective, it is nearly impossible to force people to work against their will.