



## NOTHING TO SNEEZE AT

### Flu outbreak raises legal questions

By **DOUGLAS S. MALAN**

**A**s of late last week, there were 14 confirmed cases in the state of the H1N1 virus, otherwise known as swine flu. Forty-two other states had a combined 1,625 confirmed cases with two deaths.

With everyone talking about the flu, lawyers' telephones must be ringing off the hook with questions from employers and employees, right? Well, not exactly.

Lori Rittman Clark, a Hartford employment law attorney with Hinckley, Allen & Snyder, is one of several lawyers who said clients are through with the flu, at least the hype of it. "I've called a few of my employers to ask if they're thinking about this and one employer told me they view it as a tempest in a teapot," said Clark.

But that attitude might not be a healthy one. Attorneys in Connecticut and across the country said a widespread flu outbreak – and reaction to it by businesses, educators and government – could raise a host of legal issues.

"I find it interesting that so many employers have not created contingency plans [to deal with widespread illness], at least a skeletal plan," Clark said. "I think that's a mistake."

"I think [swine flu] is overhyped," said Victoria de Toledo, a Stamford employee-side attorney with Casper & de Toledo. "But does it provide an opportunity to assess how employers should deal with illnesses? Yes."

Around the world, 24 countries have reported about 2,400 cases of swine flu. Mexico and the U.S. had the most cases and deaths related to this new flu strain. Still, many scientists have said the outbreak is extremely mild and will be less fatal than previous pandemics. About 36,000 Americans die each year from



Hartford attorney Lori Rittman Clark said she's surprised that so few companies have created even a skeletal plan to deal with the possibility that large numbers of employees could be out due to sickness at some point.

Gary Lewis

normal seasonal flu, according to the Center for Disease Control and Prevention (CDC).

The impact of a serious flu pandemic on employment could be significant. The World Health Organization has estimated that 40 percent of the work force could be out sick and another 10 percent out for care-giving purposes.

Clark said that's reason for companies to figure out now "what are the critical functions to keeping the company running and how will they get done?"

#### Legal Protections

Clark recently attended the annual labor and employment seminar of the Defense Research Institute—an international organization of civil-side defense attorneys—and said conversation quickly turned to flu pandemics and what laws come into play.

The Family and Medical Leave Act is

designed to protect employees' jobs if they miss work due to illness or the illness of a family member. The state statute provides 16 weeks of unpaid leave in a 24-month period, applicable to employers with 75 or more employees. Federal law provides 12 weeks of leave in a 12-month period, applicable to businesses with 50 or more employees.

"It's very likely that anybody who contracted the flu would be covered by state and federal FMLA," Clark said.

Pepe & Hazard employment attorney Bernard Jacques agreed, noting that both the federal and state FMLA broadly define "serious health condition" in a manner that likely would include swine flu.

Jacques noted that beyond the FMLA, the job security of employees who miss extended time might be protected by public policy exceptions within laws that define

relationships between employees and employers, known as the employment at-will doctrine.

He noted a 1997 Connecticut case, *Parsons v. United Technologies Corp.*, in which the court sided with a UTC employee who was fired when he refused to service a helicopter in Bahrain because the State Department advised Americans to avoid travel there.

"Just as the court took judicial notice of the impending conflict in Bahrain, a court could be persuaded to take judicial notice of the extent and seriousness of swine flu," Jacques said. "Employees terminated for refusing to come to work and exposing themselves to contagion or employees who refuse to come to work for fear of spreading the swine flu to others are likely to have a claim for wrongful termination."

### No Privacy

But there's a flip side to the employee protections. Employers have the right to take extraordinary steps to maintain workplace safety.

According to a legal primer circulated by national labor employment firm Littler Mendelson, the Americans with Disabilities Act allows employers to require employees with swine flu symptoms to be tested. The employer can also require the employee to disclose the test results. However, employers cannot require disclosure of the results if an employee voluntarily gets tested for the flu.

Once the results are known, employers cannot reveal the identity of the employee. But "an employer can tell co-workers who were exposed to the infected employee... that these employees may have been exposed to swine flu and should monitor themselves for symptoms of swine flu," Littler Mendelson attorney Philip Gordon stated.

At her conference, Clark said the question of employers' liability came up with regard to employees getting sick at work. "If an employee contracted the disease at work, if the working environment allowed for a higher risk of infection, that would likely be a workers' comp matter," she said.

Clark added that employers should take a common-sense approach to employees dealing with illness. If the family leave act doesn't apply, or a worker has exhausted his or her sick time, the employer should provide some leave time, she said.

"The employer needs to be as supportive and flexible as possible," said Clark, noting that companies also must be consistent with their policies to avoid discrimination claims. "If it's feasible to telecommute, allow them to do that. The whole idea is to decrease the risk of infecting one another."

### Schoolhouse Issues

Although many U.S. schools have closed for a time because of the swine flu outbreak, Thomas Mooney, an education law attorney at Shipman & Goodwin, has dispensed no legal advice on the outbreak to his school district clients.

That's because, under the law, schools must meet a reasonable duty of care threshold in their operations. When it comes to outbreaks of disease, that standard means it's best for educators to let the health experts make key decisions.

"Reasonable action will be defined by public health officials," Mooney said. "Two of my districts (Granby and Wethersfield) closed schools and I didn't get a call, which is fine. That shows it's more of a health issue than a legal issue."

After initially calling for schools hit by the flu to close, the federal Centers for Disease Control adjusted its message to leave the decision up to local authorities. The CDC says the primary method to reduce the spread of flu is to identify sick children and staff early and have them stay home.

Asked about a scenario in which he could become involved with legal issues surrounding the flu, Mooney pointed out that someone could claim that a school district acted unreasonably in some manner, which led to their child becoming sick.

But none of his clients have expressed any concern over that hypothetical.

### Government's Role

If a flu outbreak becomes serious enough, there's also a question of quarantines and how they might violate civil rights.

In Connecticut, the public health commissioner has the authority to quarantine those with the flu as well as those who are asymptomatic but have been exposed to the virus and pose a risk of passing it on. For that quarantine authority to take effect, the governor must first declare a state of emergency.

Ten states have issued various public health and emergency declarations since

late April, according to the Centers for Law and the Public's Health at Johns Hopkins and Georgetown universities. If the swine flu outbreak gets worse, "we will face every type of legal issue known to infectious disease control," said James G. Hodge Jr., executive director of the centers. "We've prepared very well as a nation since the 9/11 attacks, but nothing substitutes for actually doing it in real time."

That could bring civil rights into focus because of a federal law drafted by Hodge's group in 2001. The model emergency health preparedness law triggered intense controversy over whether it gave too much power to government officials and too little respect to civil rights and liberties.

The law was designed to give officials the

**The World Health Organization has estimated that, during a serious flu pandemic, 40 percent of the work force could be out sick.**

power to act decisively in the event of an attack or disease outbreak. Officials could treat, vaccinate and quarantine individuals on a compulsory basis when there was a threat to the public health. States would have broad emergency powers to confiscate property and facilities, from subways to drug companies.

But the American Civil Liberties Union has reissued a 2008 position paper urging government officials to not use police to address a public health issue. Since 2001, the ACLU said the government has embraced "a health policy through the prism of national security and law enforcement" that trades liberty for security.

While the legal issues of swine flu certainly were popular at her recent conference, said Clark, the Hartford attorney, they may not yet play out in real-world scenarios.

"The upshot of all this is it turned out to be an interesting legal discussion," Clark said, "But after that conversation, it seems the issue has waned." ■

*This story includes reports from the South Florida Daily Business Review and the National Law Journal, sister publications of the Connecticut Law Tribune.*