THE RESOURCE

A Legal Newsletter for Employers & Human Resource Professionals
By: L. Diane Tindall, Mary M. Williams and J. Kellam Warren
Attorneys-at-Law

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Better Safe than Sorry: What Employers Should do to Prepare for a Pandemic

Pandemic….No, that's not the title of this summer's blockbuster hit disaster movie, but it could be just as scary. The World Health Organization ("WHO"), the Centers for Disease Control and Prevention ("CDC") and the US Department of Health and Human Services ("HHS") are all warning of the serious threat of a flu pandemic that could affect humans worldwide.

Historically, pandemics have occurred several times each century, with the most deadly pandemic occurring in 1918, resulting in 500,000 U.S. deaths. Two less severe pandemics happened more recently, one in 1957, resulting in 70,000 U.S deaths, and one in 1968, resulting in 34,000 U.S. deaths. According to HHS, we are overdue and under-prepared for the next pandemic.

The current most plausible threat appears to be the H5N1 strain of influenza, or "bird flu," which has spread from Southeast Asia to Asia, into Africa and Europe. Although this strain has been transmitted from bird to human in only a handful of cases, the possibility of human-to-human transmission leading to a worldwide outbreak is out there.

Although no one knows what a serious pandemic would bring, many experts have predicted a moderate outbreak could cause as many as 200,000 deaths in the U.S., and a serious outbreak as many as two million U.S. deaths. See www.pandemicflu.gov. The effects on U.S. Businesses could be profound. Imagine if a third of your workforce were too ill to report to work for weeks, or even months. According to HHS, employers could expect an absenteeism rate of up to 40% due to illness or death, caring for family members, grieving for the loss of loved ones, or even just fear of leaving the house. Government services are likely to be interrupted and basic necessities scarce due to disruptions in the supply chain. Medical supplies and services are likely to be in short supply as well.

While President Bush and the Homeland Security Counsel have published a "National Strategy for Pandemic Influenza," it provides little hope for widespread government assistance to businesses in the face of a serious outbreak, and places much of the burden on the private sector. In the "National Strategy," President Bush urges private

businesses to respond to any pandemic "in a manner that allows them to maintain the essential elements of their operations for prolonged period of time, in order to prevent severe disruption of life in our communities." *"National Strategy for Pandemic Influenza," Homeland Security Council, November 2005*.

Given the potential for widespread disruption of society caused by such a scenario, employers should act now to establish policies that they could implement when and if such a health disaster should occur. Below is an outline some of the issues employers should address and what should be done to put in place a plan of action in case a pandemic should strike.

1. Policies and Prevention. It is not too early for employers to implement policies that will help their workplaces stay healthy. If you do not do so already, you may wish to provide free onsite flu shots for all employees. It is also wise to encourage aggressive sanitation protocols by, for example, providing sanitizing cleansers and soaps in all break and common areas. Another good idea is to provide separately packaged plastic cutlery, napkins and paper plates for employee use to avoid the spread of potential flu germs. In general, you should encourage employees to adopt healthy habits, such as good nutrition, regular exercise, regular medical care and the avoidance of smoking and excessive alcohol use.

Employers may also wish to publish useful guidelines about the transmission of flu germs through hand-mouth and hand-eye contact and unprotected coughing and sneezing. Employers should also ensure that their custodial staffs observe good cleaning protocols, using the proper sanitizing and cleaning solutions. It would also be good practice to stockpile certain supplies, such as hand-sanitizers, bleach, latex gloves, face masks and other necessities that could be in short supply if there is a serious flu outbreak.

2. Travel Restrictions. The first impacted function for most employers would be travel. Travel to locations where outbreaks of flu are occurring should be restricted or avoided altogether if possible. Employees returning from affected areas should not return to work and should limit their exposure to others until they receive clearance from a healthcare provider. In a severe outbreak, the government may close off travel to some areas, quarantine certain communities or even close the country's borders to international travel. If your workforce depends on regular travel, you will want to have a contingency plan, relying on teleconferencing, telecommunications and communications through local contacts and resources. The CDC website, www.cdc.gov, will post travel advisories if and as they become necessary.

3. Staffing and Absenteeism. If a serious outbreak occurs, absenteeism could be significant. Therefore, it is important that you minimize the effects of short-staffing and adapt your absenteeism policies to the situation. During an outbreak, employers should encourage employees to telecommute if possible to avoid exposure to those who are ill. If that is not possible, employers may consider placing employees on shifts so there is less contact among the entire workplace population. Employers may consider outsourcing certain functions. Cross-training your workforce so that you are not dependant on a small number of employees to perform any particular job would also be a smart precautionary measure.

Employers should also educate their employees about signs and symptoms of the flu virus and encourage those who are ill or likely to spread the disease, as from an infected family member, to stay at home. If you need to adapt your absenteeism policy to permit workers to remain at home for longer periods of time than allowed by your normal policies, the cost could be well worth a widespread infection among your entire workforce. Employers should also be sure that their FMLA policies are up-to-date and to promptly designate all qualified leave under the Family and Medical Leave Act. Employers should also be sure that their FMLA policies require a fitness for duty certification before employees will be permitted to return to the workplace to avoid unnecessary exposures.

We all hope that a major pandemic will never occur and that the experts and authorities have overstated the potential for a worldwide outbreak. However, the potential losses to businesses and communities are too great to gamble with. Putting in place now policies and protocols to deal with the worst case scenario is by far the better practice. A little foresight now could make a big difference for your company.

Dress and Grooming Policies - How Far Can Employers Go?

With summer approaching, employers may find themselves reminding employees that sundresses and flip flops are fine for the beach, but not the office. When employees begin looking more "casual" than "business casual," implementing and enforcing a dress code will help your business to maintain a more professional image. When drafting or revising a company dress code, employers must consider the effects of the dress code on employee morale and recruiting, company image and employee productivity levels. However, many employers forget to consider the legal implications of employee dress or grooming requirements.

Generally speaking, employers can regulate employee dress and grooming so long as the employer does not discriminate against individuals on the basis of their race, color, religion, sex, or national origin in violation of Title VII of the Civil Rights Act of 1964. When challenged by employees, employer dress codes have frequently been upheld by courts where such policies are reasonably related to business needs and are consistent with common social norms. Because standards of dress and grooming often vary for men and women, courts have allowed employers to implement different dress and grooming rules for men and women in the workplace, so long as the rules do not place an undue burden on one sex.

Recently, a federal appellate court upheld a casino grooming policy that required women—but not men—employed in certain positions to wear makeup while on duty. In *Jespersen v. Harrah's Operating Co.*, the Ninth Circuit Court of Appeals rejected an employee's claim that the casino discriminated against her on the basis of sex by requiring her to wear makeup at work. In that case, the casino required its male and female beverage servers to wear the same uniform, but required female beverage servers to wear styled hair and makeup, including face powder, blush, and mascara. Male beverage servers were prohibited from wearing makeup but were required to have short hair and fingernails. In response to the employee's claim, the Ninth Circuit found that the employee had presented no evidence that the casino's hair and makeup requirements imposed an "unequal burden" on female employees. In addition, the court rejected the employee's argument that the casino's makeup requirement was unlawful "sex stereotyping" because (1) the casino's grooming policies applied to male and female employees; (2) the makeup requirement was not adopted to make the casino's female beverage servers conform to stereotypical images of women; and (3) the makeup requirement was not intended to cause the women to be provocative or to subject them to sexual harassment.

Unlike the policy at issue in the above case, not all employer dress and grooming policies pass legal muster. Examples of dress and/or grooming policies that have been invalidated by the courts as discriminatory include the following:

- A policy requiring women to wear uniforms but allowing men to wear "customary business attire";
- Policies that prohibit female employees from wearing pants to work;
- Policies requiring female employees to wear revealing or provocative clothing;
- Policies prohibiting beards (because African-American males are disproportionately more likely to suffer a skin condition that can only be treated by not shaving), *unless* the employer can show non-discriminatory business reasons for the policy; and
- Policies that, in the absence of a safety reason or other undue hardship, do not accommodate employee religious beliefs such as head coverings, facial hair, and/or dress or hem lengths.

These days, most dress and grooming policies are established to cultivate a professional image and to promote productivity and safety, rather than to discriminate against certain groups. However, to avoid inadvertently discriminating against employees, employers should abide by the following rules.

First, dress and grooming policies should be business related. Your business reasons might include your professional image, productivity and/or health and safety standards. Second, employees should be required to have a site-appropriate, well-groomed appearance, and the policy should specify the clothing or grooming habits that are not appropriate for your workplace. Third, the policies should be communicated to all employees in a handbook, written memorandum, bulletin board and/or workplace intranet. Fourth, dress and grooming policies should be uniformly applied unless otherwise required by law. For example, if an employee requests that an exception be made based on a disability or religious reasons, the employer should consult with counsel to determine whether the exception must be made. Lastly, as with most workplace policies, employers should consistently discipline those found to be in violation of workplace dress and grooming policies.

Employer's Response to Employee's Request for No Sabbath Work Violates Title VII

An employer's offer of a work schedule excluding Sunday mornings did not constitute a reasonable accommodation of an employee whose religious beliefs forbid working on Sundays, a federal appeals court rules. *Baker v. Home Depot*, (2nd Cir. April 19, 2006).

A sales employee at Home Depot began attending church with his fiancé and, as a result, became aware of the importance of the Sabbath and the biblical requirement that all work cease on that day. When he moved and transferred to a new store, the employee informed his manager that, because of his new religious convictions which prohibited working on Sundays, he would no longer be able to work his old schedule. Although the company at first accommodated the employee's wishes, the company later informed the employee that he would not be scheduled to work on Sunday mornings so he could attend church services, but he would have to work Sunday afternoon and evening shifts. When the employee objected and refused to report for any Sunday shifts, he was fired.

The employee filed suit under Title VII claiming religious discrimination. Although the trial court granted summary judgment for the employer and dismissed the suit, finding that the employer's offer of Sunday morning's off was a reasonable accommodation, the employer's success was short lived. The Court of Appeals reversed the trial court's dismissal because the employer's response accommodated only one of the employee's concerns (i.e., missing church on Sundays); the offer completely ignored the employee's second religious conviction (i.e., no work on Sundays). The court ruled that the offered accommodation could not be considered reasonable since it did not eliminate the conflict between the employment requirement and the religious practice.

This is the latest case in a trend of increased religious discrimination lawsuits, especially those involving requests for no work on the Sabbath. Attention to this case is warranted because it offers opportunity for comment on a number of important issues to consider when responding to a request for religious accommodation.

1. A Response Is Not Reasonable If It Does Not Eliminate The Conflict. The first and most obvious lesson learned from this case is that, although an employer need not eliminate the conflict between an employee's religious beliefs and the employment requirement where it can show there is no other reasonable accommodation, if the employer offers an accommodation, it must show that the selected accommodation eliminates the conflict completely or that no reasonable accommodation was available that would have fully eliminated the conflict.

2. All requests for accommodation of religious beliefs should be made in writing and should identify the religious belief held. Employers are advised to obtain in writing an employee's explanation of his or her religious belief. As illustrated in the *Home Depot* case, courts measure the legitimacy of the employer's response based in part upon the what religious belief is held by the employee. In this case, the employer's response probably would have been held sufficient had the employee merely reported that his religion required him to attend church on Sundays. Having a written statement from the employee to that effect would go a long way towards making the employer's case if the employee sued because s/he was permitted to take off Sunday mornings but not the entire day. Regardless, requiring the employee to reduce to writing his request for accommodation and religious conviction will help ensure that an employer clearly understands what religious belief is to be accommodated.

3. No single response will lawfully answer all religious accommodation requests. Title VII requires an employer to either accommodate the employee's religious belief **or** show that the conflict could not be eliminated through reasonable accommodation. This analysis is fact specific and will not lead to the same answer, even where the same request for accommodation is made by another employee to the same employer. For example, a request for no work on the Sabbath by one employee may result in no more than a *de minimus* cost and be reasonable, but it may fall from the realm of reasonable once several more or all employees on a shift subsequently make the same request.

4. Title VII's Accommodation Requirement Has Limits. It goes without saying that not all requests are reasonable. When considering what is reasonable, it is certainly worth noting that an employer's duty to accommodate a religious belief under Title VII is not as great as

an employer's obligation to accommodate a disability under the Americans with Disabilities Act ("ADA"). In most cases, the ADA requires reasonable accommodation of a disability absent proof of undue hardship, whereas Title VII requires accommodation of a religious belief unless it would result in more than a *de minimus* cost. While there is no bright line test for what constitutes more than a *de minimus* cost, the fact that an employer will have to pay overtime to another employee to cover for the accommodated employee is not enough. Of course, if more than one employee requests the Sabbath off, payment of overtime to cover for multiple employees not working on the Sabbath could – depending on the facts – rise above the level of a *de minimus* cost.

5. An Offer To Help Facilitate A Shift Swap May Suffice. While accommodation cases are inherently fact specific, and no particular accommodation will work for all requests, an offer to facilitate a shift swap, even if the swap is not successful, will in many cases be sufficient accommodation of a religious conviction prohibiting work on the Sabbath. In such cases, the employer could either seek volunteers for the shift swap or permit the employee requesting accommodation to seek volunteers. In the latter case, the employer would need to provide a list of employees qualified to swap shifts and a means to communicate the request (*e.g.*, provide contact information or permit the employee to post the request in a common space frequented by the employees). The employer would also be well advised to counsel the employee seeking accommodation that s/he cannot force others to swap shifts. In the event no one volunteers, the simple act of having facilitated the employee's attempt to swap shifts *may* in and of itself be held to be a reasonable accommodation.

6. Do Not Let Your Disbelief of An Employee's "Religious Beliefs" Dominate Your Decision. Employers do not win religious discrimination cases on the argument that the employee's claimed belief is not really a religious belief. While an employer in California successfully defended a case of religious discrimination on the grounds that vegetarianism is not a religion, a religious discrimination suit was not avoided where the employee's claimed religious belief arose from her membership in the Church of Body Modification, an interfaith church whose members practice an assortment of ancient body modification rites (e.g., tattoos and body piercing), which members believe are essential to spiritual salvation. Similarly, as illustrated by the *Home Depot* case, courts are not quick to disbelieve an employee's claimed belief, no matter how long they were previously employed without holding such beliefs.

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Wyrick Robbins Yates & Ponton LLP

4101 Lake Boone Trail, Suite 300,

Raleigh, NC 27607-7506

(919) 781-4000

www.wyrick.com