A Balanced Analysis of Workplace Ebola Concerns
ASSUMING NO SERIOUS U.S. OUTBREAKS, WHAT ARE OTHER POTENTIAL PROBLEM AREAS?

• Overreaction…leading to unlawful action.
• Travel to and from Africa.
• Response to Healthcare Workers who are infected – are current protocols adequate?
• Outbreaks in Europe or Asia – China is heavily invested in Africa, as is Europe, and over 350 million people a year travel into the U.S.
HOW SHOULD WE REACT?

• It’s ok to be scared. This is scary stuff!
• But knee jerk reactions get one sued and create other legal issues.
• Approach Ebola issues as a Risk Management analysis.
• Ebola raises questions, but WHO and the CDC have over 30 years of experience and the past containment of many Ebola outbreaks.
• CDC reactions and their approach raise questions, but information proffered about Ebola seems accurate.
  – Especially in early stages, transmission likelihood is limited.
  – Not airborne.
  – Most dangerous to Healthcare Workers, First Responders
HOW SHOULD WE REACT?

• Other regulators follow the CDC’s lead.
• But, especially in early stages, public health guidance does not clearly apply to specific employer scenarios.
• One must extrapolate to apply disease-driven guidance to heavily regulated employment scenarios.
• Neither the CDC Guidance or the EEOC take a “better safe than sorry approach.”
• “Direct threat” under the ADA is difficult to prove.
• Employee, public and customer concerns mean almost nothing to these regulators.
SO, WE’RE BACK TO RISK MANAGEMENT.

- Objectively weigh ALL risks, and the dollar and human costs.
  - Monitor the evolution of public health guidance because, generally, as we learn more, public health guidance tends to find less threat presented by a disease and its sufferers.
  - Determine your disease exposure for each situation;
  - And the applicable legal concerns:
    - ADA confidentially and common law privacy and defamation.
    - ADA and state protections of employees with a disability condition or those wrongly perceived to have a disability condition.
    - Race and national origin discrimination;
    - Contract.
CHALLENGES IN IDENTIFYING EBOLA

• Symptoms of Ebola include
  • Fever
  • Severe headache
  • Muscle pain
  • Weakness
  • Diarrhea
  • Vomiting
  • Abdominal (stomach) pain
  • Unexplained hemorrhage (bleeding or bruising)
  • Symptoms may appear anywhere from 2 to 21 days after exposure to Ebola, but the average is 8 to 10 days.
RISK CLASSIFICATIONS

A high risk exposure includes any of the following:

• Percutaneous (e.g., needle stick) or mucous membrane exposure to blood or body fluids of EVD patient
• Exposure to blood or body fluids of, an EVD patient without appropriate personal protective equipment (PPE)
• Processing blood or body fluids of a confirmed EVD patient without appropriate PPE or standard biosafety precautions
• Direct contact with a dead body without appropriate PPE in a country where an EVD outbreak is occurring
• Having lived in immediate household and provided direct care to a person with Ebola while the person was symptomatic

Some risk includes:

• In countries with widespread Ebola virus transmission (www.cdc.gov) while using appropriate PPE with a person was symptomatic
• Close contact in households, healthcare facilities, or community settings with a person with Ebola while the person was symptomatic
A low risk includes any of the following:

- Having been in a country with widespread Ebola virus transmission within the past 21 days and having no known exposures
- Having brief contact (e.g., shaking hands), while not wearing appropriate PPE with a person with Ebola while the person was in the early stage of disease
- Brief proximity, such as being in the same room for a brief period of time, with a person with Ebola while the person was symptomatic
- In countries without widespread Ebola virus transmission: direct contact while using appropriate PPE with a person with Ebola while the person was symptomatic
- Traveled on an aircraft with a person with Ebola while the person was symptomatic
Public Health Actions Related to **High Risk** and **Some Risk**

- **If** *symptomatic*: Implement rapid isolation, immediate contact with health authorities, medical evaluation
- **If** *asymptomatic*:
  - Direct active monitoring, travel restrictions, etc.
  - Public health authority, through orders may impose restrictions that *include exclusion from workplaces* for the duration of the public health order
FROM CDC: SHOULD COLLEGES AND UNIVERSITIES ISOLATE OR QUARANTINE STUDENTS AND FACULTY WHO HAVE RECENTLY RETURNED TO THE US FROM COUNTRIES WHERE THE EBOLA OUTBREAKS ARE OCCURRING?

• CDC is not recommending colleges and universities isolate or quarantine students, faculty, or staff based on travel history alone.

• Colleges and universities should identify students, faculty, and staff who have been in countries where Ebola outbreaks are occurring within the past 21 days and should conduct a risk assessment with each identified person to determine his or her level of risk exposure (high- or low-risk exposures, or no known exposure).

• All students, faculty, and staff who have been in these countries within the past 21 days should be given instructions for health monitoring (see below).

• If the students have had NO symptoms of Ebola for 21 days since leaving a West African country with Ebola outbreaks, they do NOT have Ebola. No further assessment is needed.

• If a student, faculty, or staff member has had a high- or low-risk exposure, state or local public health authorities should be notified, and school officials should consult with public health authorities for guidance about how that person should be monitored. Anyone with a potential exposure should receive thorough education about immediately reporting symptoms and staying away from other people if symptoms develop.

• In the event that a person who has had a high- or low-risk exposure develops symptoms consistent with Ebola, the person should be medically evaluated while following recommended infection control precautions.
HOW DO WE APPLY THE CDC GUIDANCE TO THE ADA ANALYSIS

• The traveler returning from an affected country?
• The traveler from Nigeria?
• The traveler from East Africa?
• The passenger on a plane with an infected person?
• A person at a conference with an infected person?
• The coworker asking about a colleague who traveled to Liberia?
• Customers refusing to work with a salesperson who was in Nigeria?
• Medical inquiries and taking temperature?
• A desire to brief coworkers?
IS EBOLA A DISABILITY CONDITION UNDER THE ADA?

• From a Fox Medical Commentator:

  • Any patient who survives a severe viral infection could have damage to their kidneys, liver and heart, as well as long-term fertility issues. **So if an Ebola patient survives, you can only imagine some of the long-term consequences he or she may face.** As more patients survive and recover from this disease, we might begin to get a better idea on some of these issues.

  • One area where we have gained knowledge as to the long-term effects of recovering from Ebola is the immune system.

  • Any time a patient survives a significant viral infection, the autoimmune responses that the patient undergoes could have secondary consequences on the rest of the body—particularly in areas that are quite sensitive to immunological reactions and inflammation, like the joints and eyes.

  • The general complaint by many of these patients is chronic body pain and severe joint pain—called arthralgia.
ADDITIONAL ADA CONCERNS

• Ebola almost certainly is a Serious Health Condition under FMLA.

• Regardless, an individual can be perceived as having a disability condition under the ADA even if they do not have a disability.

• Medical Exams and Inquiries must be job-related and consistent with business necessity,
APPLYING THE CDC GUIDANCE

- Step 1 – Find the most applicable ADA Guidance.
- Step 2 – What are the facts?
- Step 3 – What is the Adverse Action?
- Step 4 – What are my options?
- Step 5 – What are my legal risks?
- Step 6 – What are my other risks? (direct threat?)
EEOC PANDEMIC PLANNING MEETS ADA

1. INTRODUCTORY INFORMATION

A. PURPOSE

This technical assistance document provides information about Titles I and V of the Americans with Disabilities Act (ADA) and pandemic planning in the workplace. It identifies established ethical principles that are relevant to questions frequently asked about workplace pandemic planning such as:

- What must an employer do if an employee calls in sick, in order to protect the rest of its workforce when an influenza pandemic appears imminent?
- When may an ADA-covered employer take the body temperatures of employees during a pandemic?
- Does the ADA allow employers to require employees to stay home if they have symptoms of the influenza pandemic virus?
- When employees return to work, does the ADA allow employers to require doctors’ notes verifying their fitness for duty?

In the event that providing a complete answer, this document provides information about religious accommodation and Title VII of the Civil Rights Act of 1964.

B. BACKGROUND INFORMATION ABOUT PANDEMIC INFLUENZA

A pandemic is a global epidemic. The world has seen four influenza pandemics in the last century. The deadly “Spanish Flu” of 1918 was followed by the mild “Asian” and “Hong Kong” flu of the 1950s and 1960s. While the SARS outbreak in 2003 was considered a pandemic, it was the H1N1 flu in 2009 that is considered as the latest pandemic.

The U.S. Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC), and the World Health Organization (WHO) are the definitive sources of information about influenza pandemics. The WHO classifies pandemic influenza into six phases (0-6) which describe how rapidly influenza is spreading around the world. As the severity of the influenza virus increases, a WHO announcement that the world is in Pandemic Phase 6 (the highest phase) would indicate that there is sustained human-to-human transmission worldwide, and that the virus is no longer contained in a few geographic areas. It would not, however, automatically mean that the influenza symptoms are severe.

Pandemic planning and pandemic preparedness includes everything from global and national public health strategies to an individual employer’s plan about how to continue operations. Comprehensive federal government guidance advises employers about best practices for pandemic preparedness and response with respect to influenza, specifically the 2009 H1N1 virus. This EEOC technical assistance document focuses on implementing those strategies in a manner that is consistent with the ADA.

C. RELEVANT ADA REQUIREMENTS AND STANDARDS

The ADA, which protects applicants and employees from disability discrimination, is relevant to pandemic preparation in at least two major ways. First, the ADA regulates employers’ disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities. Second, the ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a “direct threat” (i.e., a significant risk of substantial harm even with reasonable accommodation). Third, the ADA requires reasonable accommodations for individuals with disabilities (absent undue hardship) during a pandemic.

This section summarizes these ADA provisions. The subsequent sections answer frequently asked questions about how they apply during an influenza pandemic. The answers are based on existing EEOC guidance regarding disability-related inquiries and medical examinations, direct threats, and reasonable accommodation.

A. DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS

The ADA prohibits an employer from making disability-related inquiries and requiring medical examinations of employees, except under limited circumstances, as set forth below.

1. Definitions: Disability-Related Inquiries and Medical Examinations

- An inquiry into “disability-related inquiries” is one that is likely to elicit information about a disability. For example, asking an individual if his immune system is compromised is a disability-related inquiry because a weak or compromised immune system poses a direct threat to the individual’s health. For a question to be disability-related it must relate to the individual’s health and to the SSA’s definition of disability.
WHAT THE EEOC GUIDANCE COVERS.

• Information about Titles I and V of the Americans with Disabilities Act (ADA) and pandemic planning in the workplace. It identifies established ADA principles that are relevant to questions frequently asked about workplace pandemic planning such as:
  
  • How much information may an employer request from an employee who calls in sick, in order to protect the rest of its workforce when an influenza pandemic appears imminent?
  
  • When may an ADA-covered employer take the body temperature of employees during a pandemic?
  
  • Does the ADA allow employers to require employees to stay home if they have symptoms of the pandemic influenza virus?
  
  • When employees return to work, does the ADA allow employers to require doctors’ notes certifying their fitness for duty?
THE EEOC ON DIRECT THREAT IN A PANDEMIC

• Direct threat is an important ADA concept during an influenza pandemic.

• Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.

• During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.
DURING A PANDEMIC, HOW MUCH INFORMATION MAY AN ADA-COVERED EMPLOYER REQUEST FROM EMPLOYEES WHO REPORT FEELING ILL AT WORK OR WHO CALL IN SICK?

- ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms, such as fever or chills and a cough or sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

- If pandemic influenza is like seasonal influenza or spring/summer 2009 H1N1, these inquiries are not disability-related. If pandemic influenza becomes severe, the inquiries, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat.
When an employee returns from travel during a pandemic, must an employer wait until the employee develops influenza symptoms to ask questions about exposure to pandemic influenza during the trip?

No. These would not be disability-related inquiries. If the CDC or state or local public health officials recommend that people who visit specified locations remain at home for several days until it is clear they do not have pandemic influenza symptoms, an employer may ask whether employees are returning from these locations, even if the travel was personal.
TRAVELING TO AFFECTED AREAS

- Risk Analysis
- Workers Comp and other legal exposure
- Enhanced Travel monitoring
COMPLAINTS AND REFUSAL TO WORK.

• OSHA 11C prohibits adverse action against an employee for complaining about safety even if the complaint is unfounded.
• However, if an employee refuses to work based on safety concerns must be objectively reasonable.
• Employee complaints or refusal to work may be protected as concerted protective activity under the National Labor Relations Act.
RELIGIOUS ACCOMMODATION

Dear [Recipient],

Your letter dated February 7, 2013, addressed to the Chair of the U.S. Equal Employment Opportunity Commission (EEOC), has been directed to me for reply. You have inquired about the application of Title VII of the Civil Rights Act of 1964, as amended, to matters where an employee requests accommodation for religious beliefs. Although there is no mandatory binding precedent in this context, the Commission exercises its discretion to issue a formal interpretation or opinion pursuant to 29 C.F.R. § 1601.91, I am responding by informal discussion letter in light of the information available in existing Commission publications addressing the relevant legal standards.

Infection Control Practices, Vaccination Requirements, and Reasonable Accommodation Generally

As a preliminary matter, we note that the EEOC has addressed matters related to pandemic influenza and vaccinations in its technical assistance document entitled Pandemic Preparations in the Workplace and the Americans with Disabilities Act (2009), https://www.eeoc.gov/facts/pandemic_fl_h1n1.html, which includes the following questions and answers on mandatory infection control practices, vaccination requirements, and reasonable accommodation for disability under the ADA or religious beliefs under Title VII:

11. During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquettes, and proper tissue usage and disposal, does not implicate the ADA.

12. During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

13. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII (“more than de minimis cost” to the operation of the employer’s business, which is a lower standard than under the ADA).

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.

The Title VII principles referenced in these questions and answers would govern the general questions you have raised regarding whether Title VII requires hospitals to accommodate their employees’ religious objections to receiving influenza and other vaccines, and under what circumstances such accommodation would not be required. Factors relevant to undue hardship in this context would presumably include, among other things, the assessment of the public has posed at a particular time, the public’s assessment of the threat to public health, and potentially the number of employees who actually request accommodation.

Scales of Covered Religious Beliefs and Employer Inquiries

In your letter, you inquired about what religious beliefs potentially are entitled to accommodation under Title VII, provided that a reasonable accommodation could be provided without undue hardship. The Commission has addressed these matters extensively in its guidance on discrimination because of religion, 29 C.F.R. Part 1605, http://www.eeoc.gov/policy/docs/religion.pdf, the Compliance Manual, Section 12: Religious Discrimination (2008), http://www.eeoc.gov/policy/docs/religion.pdf, and the Compliance Manual, Section 1Z: Religious Discrimination (1974), http://www.eeoc.gov/policy/docs/religion.pdf. The Commission and courts have consistently found that Title VII defines religion very broadly to include not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism, but also beliefs that are new, unorthodox, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. An employer’s belief or practice can be “religious” under Title VII if it is rooted in a religious belief or practice that is sincerely held, and if the group espouses such beliefs or if the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.


In addition, the Commission has consistently found that Title VII’s protection extends to religious beliefs in nature although the church to which he belonged did not teach those beliefs; accord African v. Commonwealth of Pa., 462 F.2d 1522, 1522-35 (3d Cir. 1971); Guahs v. Local Union 2200, United Auto., Aerospace & Agric. Implement Workers of Am., 164 F. Supp. 2d 1066, 1076 n.15 (N.D. Ind. 2001) (“Title VII’s intention is to provide protection and accommodation for a broad spectrum of religious practices and beliefs and not merely those beliefs based upon organized or recognized teachings of a particular sect”).

The EEOC Office of Legal Counsel staff members wrote the following informal discussion letter in response to an inquiry from a member of the public. This letter is intended to provide an informal discussion of the noted issue and does not constitute an official Commission position.

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