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OSHA IMPLICATIONS TO POTENTIAL FLU PANDEMIC- EMPLOYERS SHOULD BEGIN PREPARING NOW

On issues such as the potential for an avian flu pandemic, it is often difficult for employers to cut through the media hysteria to determine whether the risk is real. While Reinhart's OSHA team cannot predict whether the feared flu pandemic will actually occur, we can help employers understand the possible OSHA implications in the event a flu pandemic strikes.

On May 10, 2006, Edwin G. Foulke Jr., Assistant Secretary of Labor, gave a presentation (subsequently published on OSHA's website) to a business group in which he addressed several "big OSHA issues" including OSHA's initiative to assist employers in preparing for a possible flu pandemic. Mr. Foulke told the business group that OSHA, in consultation with several other federal government agencies, is updating its guidance document for employers to use to help protect workers against the avian flu and also developing guidance to assist employers in responding to a potential flu pandemic.

Given OSHA's extensive efforts to communicate how employers can protect their employees from avian flu, it is possible that OSHA will attempt to exercise its authority under the General Duty Clause to issue OSHA citations to employers who fail to adequately protect their employees from a flu pandemic, should one arise. OSHA's General Duty Clause states, "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" 29 U.S.C. § 654(a)(1).

Alternatively, should it appear that a flu pandemic is likely, OSHA may exercise its statutory authority to issue an emergency temporary standard. 29 U.S.C. § 655(c). Such a standard takes effect immediately upon publication in the Federal Register without following the typical comment and rulemaking protocol. In December 2005, five labor unions, including the AFL-CIO, petitioned the OSHA to issue an emergency temporary standard to protect workers. OSHA may be temporarily withholding that action for the reason that emergency temporary standards are effective for only six months.

Under either possible scenario, employers may have a legal duty under OSHA regulations to prevent the transmission of avian flu at work. This would obviously be a large undertaking. Therefore, Reinhart's OSHA team encourages all employers to

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begin business planning to meet their possible legal obligations in the event of a flu pandemic. Such planning should include:

1. Develop a written exposure control plan to identify which employees are at greatest risk and identify steps the employer can take to prevent exposure.
2. Identify housekeeping and environmental hygiene solutions to reduce potential sources of infection.
3. Train and communicate with employees.
4. Offer to vaccinate employees if a safe and effective vaccine becomes available.
5. Employers in certain industries (food, agribusiness, health care, pharmaceutical, financial, insurance, state and local governments) should evaluate the utility and cost-effectiveness of personal protective equipment and engineering controls designed to reduce employee exposure.

For more information about how your organization can plan for the potential flu pandemic, please contact Jeffrey Clark or another member of our OSHA team.

The *Reinhart OSHA E-Newsletter* is an electronic publication of the law firm of Reinhart Boerner Van Deuren s.c. and is prepared by attorneys on the firm's OSHA team. This publication is intended to afford timely notice to our clients and friends of current events in the OSHA arena and to provide general information about OSHA issues. It is not intended, nor should it be used, as a substitute for specific legal advice regarding particular factual situations.



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