



## **Ebola in the Workplace Update**

Insights

10.17.14

I've been dealing with the employment aspects of infectious disease scares since 1984 when AIDS first reared its evil head. Every permutation of the flu, be it avian or swine, has had the same effect on the public, the government, and business. We get to a stage where we realize that there is a lot that we don't know and it scares us. This is the legally dangerous stage where organizations make knee-jerk decisions that are not based on objective individualized analysis and the current public health guidance. We realize that the guidance from the CDC, EEOC and OSHA is not yet specific or practical enough.

This is the point at which labor lawyers are called upon to review whatever legal precedent seems to apply to the situation, as well as public health guidance, and advise employers about how to handle the resulting employment challenges. We're not health professionals. Our job is to help employers take prudent actions in compliance with the labor laws and the public health guidance, and most importantly assist them in protecting their employees and the public. We assist employers in objectively weighing their legal risks versus real world concerns. One problem is that our legal schemes, for better or worse, do not necessarily encourage an employer to take the "better safe than sorry" approach. An employer may have to weigh employment law risks against what they believe is prudent to protect their employees, customers, the public or students. The public health guidelines are the guardrails of the decision making.

It's not an exact science.

### **There are Two Kind-of Conflicting Areas of "Analysis" to Balance**

Let's consider the two ends of "analysis," for lack of a better word. Courts and government agencies, such as the EEOC and OSHA, have made it clear that the more that an employer's decisions track CDC guidance, the less likely the employer's actions will not violate the ADA and other employment laws. Many of these legal schemes are designed to prevent an employer from making adverse employment decisions which may affect those with an ADA-type "disability condition" or who are wrongly perceived to have a disability condition. Medical inquiries are limited in most situations to those which are job-related and consistent with business necessity. And of course the ADA and common law privacy and other protections limit the extent to which an employer should or could share employee medical information. These schemes are not very friendly toward employer concerns about the safety of its employees or the public. In this analysis, CDC and other public health guidance are the gold standard. For this analysis to work, one must trust the public health

guidance.

The other end of the “analysis” is the highly practical *“better safe than sorry”* approach. In other words, why should we not prohibit travelers from affected countries to come into the U.S.? Or, why should I not err on the side of caution and exclude an employee from the workplace for at least 21 days after return from affected areas? Or in the school setting, why would I not ask a student returning from these areas to stay home for 21 days? In defense of these positions, one has to admit that there is much that we don’t yet know about Ebola. I believe that we know more from the last 30 years than people recognize. Read the Hot Zone or check this graph of the history of Ebola outbreaks. However, a doctor who also has his vet degree and subject matter experience reamed me today for encouraging employers to follow CDC guidance. This guy was not a nut or conspiracy theorist. He raised reasonable questions about what we don’t yet know, such as some question about whether the incubation period can be more than 21 days. His position was *“why would we want to take a chance that the CDC appraisal is not adequately conservative.”* Another person commented, *“Do you want to take a chance and return a student from West Africa to a class even if he did answer questions suggesting no exposure and then had a normal temperature?”* I view these concerns far more sympathetically than I do the 46% of Americans polled who believe that the government is *“withholding information about Ebola.”* I’m not pleased with the Administration’s actions and inactions, but I don’t buy the conspiracy theory.

In an effort to be objective and to better explain our legal analysis, here are factors or considerations for employers.

1. Most of us are not infectious disease specialists. We have to rely at some point on medical guidance. When employers make these pandemic-type decisions based solely on their own experience, they get sued. When we allow ourselves to panic, we make unfounded decisions. And while the harm is less than contracting Ebola, there are adverse consequences to our “better safe than sorry” decisions. A kid may miss 21 days of school when it was unlikely that he had been exposed. An unpaid leave of 21 days is brutal. This leads to my next point ...
2. Employers must weigh risks, evaluate ways to lessen that risk, and then make a decision. Sometimes we must choose the *“least bad”* option.
3. In this model, you may decide that the risk to a particular group, such as students, patients or coworkers outweighs the concern about harm to the individual employee or student. You may decide that the legal exposure of harm to a student, a customer, the public, or a coworker outweighs the cost of possibly losing an ADA claim.
4. Consider risks, but do not yield to the opinions of coworkers, the public, parents or other groups. If the right decision is to allow someone to return to work or to class, determine a way to explain the actions to the larger audience and to defuse the situation. Don’t rail about unfounded fears. This stuff is scary. Simply determine how to address concerns.
5. The ADA is probably the main legal scheme impacted by employment decisions involving Ebola. Ebola almost certainly will be found to be a disability condition under the ADA. The ADA also

prohibits taking adverse action against an individual wrongly perceived as having a disability condition under the ADA, which probably applies to the person you fear would get Ebola, but does not do so.

6. Similarly, the ADA restricts medical tests and inquiries of current employees to those that are job related and consistent with business necessity. The CDC guidance will be the main determinant of what is job related and consistent with business necessity (see the EEOC pandemic guidance). Taking the employee's temperature and asking certain questions are probably regulated medical inquiries. So one shouldn't start asking questions and requiring tests and procedures without first considering if the activities meet the ADA test. This is NOT legal advice, and in fact, this blog should never be interpreted as legal advice, but we are inclined to seek temperatures and ask the questions propounded by the CDC if there is a reasonable reason for the employer to be concerned.

### **Why Did I Prepare This Blog?**

I've been interviewed by a dozen news outlets in the last few days and quoted in the USA Today, on MSNBC and elsewhere. I'm considered a good interview subject because I will try to apply these amorphous standards to practical situations and come up with some sort of guidance.

For you to obtain any value from my Firm's advice or from any law firm, you need to be an educated consumer and understand how we, labor lawyers, analyze the facts. You need to understand and engage in rational risk analysis. It's your business or your school or not-for-profit organization. And I, or "we" want you to make educated and objective decisions. You must NOT make knee jerk decisions. Lawyers aren't health care professionals. We strive to follow the recognized public health guidance, but at some point, you, the employer must also evaluate the public guidance.

I truly believe that the Ebola threat is of lesser magnitude than an airborne flu-like pandemic. The 1917 Influenza Pandemic and its millions of deaths haunt me. The bottom line is that Ebola is more difficult to transfer than a flu. I believe that the U.S. will develop effective strategies for handling Ebola. Dallas was a wakeup call. I have faith in the Emory Medical Centers of the Country. Also, as responsible professionals, lawyers have a duty to discourage panic and the resulting ill thought out decisions. But I also believe that you should scrutinize the CDC pronouncements and demand efficiency and effectiveness. Once again ... be an educated consumer.

We'll return to more content based analysis in our next post. In the interim, we'll share some resources:

My [USA Today](#) and [MSNBC interviews](#) and FP attorneys' Kevin Troutman and Matt Korn's [Forbes post](#).

The CDC Ebola page. <http://www.cdc.gov/vhf/ebola/>

Excellent article analyzing how Ebola is spread and the concern about spread on airlines.

<http://www.vox.com/2014/10/10/6953601/plane-ebola-virus-outbreak-flight-airport-symptoms>

CNN graph showing the last 30 years history of Ebola.

<http://money.cnn.com/interactive/news/history-ebola-outbreaks/>

Encouraging discussion of Nigeria's success in responding to Ebola.

<http://www.cdc.gov/media/releases/2014/p0930-nigeria-ebola.html> and

<http://www.voanews.com/content/us-studying-success-of-nigeria-response-to-ebola/2475523.html>

The EEOC Pandemic/ADA page. [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html)

OSHA's Ebola page. <https://www.osha.gov/SLTC/ebola/index.html#.VD7xpciibDM.twitter>

A fascinating blog by an Atlanta nurse. <http://dtolar.wordpress.com/2014/10/01/ebola-a-nurses-perspective/>