

# The Microbiological Threat to Financial Institutions and the Global Economy



## Advanced Pandemic Planning for Executives

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# Preface

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On August 10, 2007, executives from 11 of the country's leading financial services institutions came together in New York City to participate in the *Executive Roundtable Series: Advanced Pandemic Planning for Financial Leaders*. They came to share what is working in their companies, to pool their thinking about pandemic dilemmas, and to tackle issues not yet reconciled. They participated in experiential exercises, confronting issues likely to arise in a real-world pandemic. Pandemic simulations looked at (1) avian flu confined to Asia and its impact on the U.S.; and (2) a global contagion including widespread cases in North America.

This exceptional group of experienced and thoughtful leaders represented the following companies:

- Charles Schwab
- ChicagoFIRST
- Citigroup
- Fidelity
- Goldman Sachs
- Lehman Brothers
- NASDAQ
- Northern Trust
- Morgan Stanley
- UBS
- Visa

This paper extracts key points and observations from the roundtable and integrates them with the authors' experiences and observations to create a guide with the most current thinking on pandemic planning for use by opinion leaders and decision makers.

The authors, Regina Phelps, Joseph McMnamin, and Dave Kieffer, experts in three different dimensions of pandemic preparedness, designed the roundtable format, led the exercises, and served as facilitators.

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# Executive Summary

Pandemics, by their very nature, are unpredictable. Global infectious disease specialists may not be able to pinpoint when the next pandemic will strike or its severity, but the consensus among public health officials is that it is a matter of when, not if.

Nonetheless, uncertainty makes planning difficult. Most companies – even critical infrastructure organizations such as financial institutions – find it challenging to direct executives' time, the necessary resources, and an appropriate budget for pandemic preparation.

## Strategic Implications

- There will be “winners” and “losers” among financial organizations in a pandemic. Performance during an emergency creates a lasting impression with customers and regulators – either really good or really bad. It has a huge impact on their “brand” for a long time to come.
- The investments you make in pandemic planning will reap clear returns; many will have short-term, positive effects on your enterprise's overall performance.
- Your preparation is under way – whether you intend it or not. Patterns of leadership, values, and communications have a trajectory of their own. In a crisis, behaviors will follow current paths, for better or worse. The question is: Do these factors in your organization need fine tuning now?
- People, human capital, are the obvious issue, but ironically, many companies – even among financial enterprises – overlook some key workforce matters.

## Business Continuity Planning

Pandemic planning is part of enhancing enterprise resiliency. It supplements the business continuity planning (BCP) work you have already done. Thus, substantive pandemic preparation will make your organization more resilient for *any* event it is likely to face.

- Determining who is mission critical on your staff and where they need to work will help drive your strategies and determine the type of supplies and equipment you will need to procure.
- A key aspect of every company's pandemic plan is reliance on the Internet and the dreaded “last mile.” This may be an Achilles tendon and will require careful planning and outreach to providers and likely the government.

- The only pharmacologic option currently available for potentially preventing, shortening, or reducing the severity of influenza is an antiviral drug. Therefore, every financial sector company will have to make a decision about the use of antivirals in its plan.
- A well thought out virtual emergency operations center (VEOC) will be essential to your success.

## Legal

A pandemic will give rise to legal issues as well. Although the most obvious and numerous are the labor and employment questions, other matters may be equally or even more important to financial institutions.

- Your contracts impose obligations difficult or impossible to meet, or to enforce.
- Well-intentioned but erroneous communications may trigger claims.
- Coverage disputes between insured companies and their carriers are probable.
- Perhaps most disconcerting, disgruntled shareholders may seek their remedies at law against corporate boards for losses that, they will claim, could have been avoided or diminished had planning been better.

While it may not be possible to avoid all these problems, identifying them in advance and taking steps to minimize their impact may decrease the magnitude of the threat they pose to the success and viability of the enterprise.

## Workforce

Wise planners spend as much or more time figuring out where the organization stands with its people as they do on public health, security, and work-at-home strategies. They understand the drivers of job commitment will weigh heavily on managers' and employees' decisions to show up and work...or not.

Other people issues:

- Managing employee relations and expectations is going to become more challenging as people become aware of what other companies are doing to protect their employees' health and safety.
- Contingent and replacement talent strategies must be worked out for critical units and functions in advance.

- Training and cross-training people to step into certain roles will reap short-term returns by identifying high-potential talent and bolstering the critical thinking and decision-making skills of leaders up and down the chain of command.
- Various workforce, employment, pay, and benefits policies – often the biggest sticking points for many financial organizations – are not governed so much by legal issues as they are by leadership values, the enterprise’s history and culture, financial constraints, and employee relations considerations. No task force can resolve such policies without the input and support of leadership.

# A New Kind of Disaster

By Dave Kieffer, Dave Kieffer Partners

## A Different Game

Business continuity planners in U.S. financial institutions typically have been thinking about and planning for the possibility of a pandemic more than just about any other business sector. Those in attendance at the Financial Executives' Roundtable are among the industry thought leaders – certainly exceptionally knowledgeable about pandemics – so this short section, *A Different Game*, is not for them but for those who might appreciate a quick review of the evolving facts before delving into the specific observations and recommendations that follow from the meeting and the authors' experiences.

The first step in pandemic planning is understanding what it is not – and it is not a typical business crisis. The difference between most business crises and a pandemic is: property vs. people. It's the difference between having a call center flooded and not having people to run the center. Most corporations have elaborate backup plans for damage to, or failure of, physical assets. Their plans for keeping their people healthy and for contingent staffing tend to be less robust. And that lack of people-planning could result in serious issues – from operating ineffectiveness to brand damage.

## What It Might Look Like

Meanwhile, many governmental agencies and global entities have weighed in with disconcerting warnings. In 1918-19, an influenza epidemic swept the world, killing an estimated 50 million people. If we experience a similar pandemic: Of course, such scenarios are dismissed in some quarters for a variety of reasons. Some point to the minor pandemics in 1957 and 1968, because, while the disease was widespread, it was generally nonlethal. Others say that agencies such as the World Health Organization (WHO) and the U.S. Centers for Disease Control and Prevention (CDC) are motivated to talk up the potential of pandemics to get larger budgets for their bureaucracies. And in most corporations – including financial institutions – many top executives are immersed in pressing day-to-day issues with little time to dedicate to the possibility of what seems to them a long-shot event.

All of that nay-saying and deflecting begs the preponderance of evidence that the world should prepare more earnestly for the potential of a severe pandemic.

- The avian flu will spread around the world quickly – perhaps in as little as three weeks and probably not more than six. In a worst-case scenario, a foreign government might cover up its regional spread so that, when it finally becomes known, the surge is well beyond what anyone realized, cutting more deeply into reaction time.

- Countries may close their borders quickly, but such actions will not contain the spread. Tens of thousands of people fly from continent to continent daily, and it takes only a relatively few asymptomatic, infected people to infect virtually all of North America (or any other nation or continent). It may seem implausible, but computer modeling has demonstrated the geometric procession of this phenomenon repeatedly. (In the 1918 pandemic, people in remote rural villages and as far north as Eskimos along the Arctic Circle were affected.)
- Economic shockwaves, however, will likely hit the U.S. before public health difficulties. At the earliest sign of something serious developing (probably in Asia), many investors will begin shifting from stocks and bonds to cash or gold. If that happens, the global economy would falter. In the worst case, there could be “runs” on banks (and/or ATM machines), settlement capabilities could be taxed, and, despite all post-9/11 intentions and ongoing Treasury Department-directed exercises, some markets could close, further exacerbating the discontinuity of commerce worldwide. (*Specific implications for financial institutions are examined throughout the remainder of this paper.*)
- The 24/7 cable and satellite news channels will fuel fear with snippets of facts or hearsay that exaggerate or misrepresent what’s really happening. Bloggers will likely do the same.
- As the disease progresses, more and more leaders, managers, and employees will be missing from work – they may be sick, caring for others with the disease, or merely afraid to be out in public.
- Supply chains will be disrupted; the availability of many goods and services will become unpredictable – including prosaic things without which financial institutions might struggle: paper and toner, check printing companies, armored truck services, and all kinds of contractors, from outsourced providers to emergency plumbers.
- Some businesses won’t be able to meet customer demands; and some companies will see demand collapse. Such disparities will be apparent in the financial sector and even within given financial enterprises where there may be crushing demands in some units while other functions may scale back dramatically.
- Health care will not be available to all who require it. There won’t be enough doctors, nurses, hospital beds, ventilators, medications, or even gloves and masks.
- In some places, civil order may deteriorate.

## Current Situation

The early warning signs are available now. The transmission from wild and domestic birds to humans is well-established from Southeast Asia westward to Turkey. So is human-to-human transmission (H2H) although some officials – most notably in Indonesia – deny it. Early on, the H2H transmission was associated only with people who were very close to one another for prolonged periods, e.g., a mother caring for a sick child. Recent reports of transmissions, not just of person-A giving it to person-B, but of person-B then transmitting it to person-C, are new cause of heightened concern. *If* those chains of H2H transmissions become more “efficient” – that is if the virus changes in a way that allows it to spread easier – the flu will accelerate, and the world will face the likelihood of a global pandemic. (Ironically, pigs may be pivotal to whether the avian flu explodes or not. Pigs are not as close to humans genetically as chimps and orangutans, but, as co-author Joe McMenamin says, “They’re close enough.” Thus, some of pigs’ human-like genetics combined with their proximity to both chickens and people in Southeast Asia could make them readily available “breeding factories” for a mutated virus that could spread more rapidly between people than the current strain.)

## Strategic Competitive Opportunities

One of the roundtable attendees suggested that virtually all of the financial institutions were in the same boat – in effect, none could gain a competitive advantage because the markets would either be open and all financial institutions would be relatively stable or they won’t. He may be right, but it seems more complex. Even if the markets remain open, most financial institutions – depending on the nature of their particular business – could be challenged to execute settlements, replenish ATMs, and keep retail electronic payments moving.

## Winners and Losers

Those kinds of operational matters could roll up into a much larger strategic issue: A severe pandemic will result in distinct winners and losers in all business segments including financial institutions.

Those that have invested in preparation will reap the dual rewards of a faster recovery and a lasting competitive advantage measurable on many dimensions: market share, profitability, market capitalization, brand equity, public relations, and – not least – commitment from managers and employees that could carry over for years.

Conversely, organizations that don’t properly prepare will lose customers, shareholders, key managers, and high-potential talent.

## First-movers Get ROI Now

These are not abstract theories. The winner-enterprises are already beginning to produce competitive advantages through their advanced solutions. They have elaborate plans, training, and processes for protecting their employees which, of course, are at the center of assuring the continuity of their businesses. These actions are not lost on employees. Indeed, such preparation strengthens the bonds between organizations and their people – bonds that will serve them well in a crisis.

Specifically, leading-edge corporations are identifying contingent leaders and high-potential talent to step into key roles. Through training and periodic simulations, they are building and diversifying decision-making skills in their organizations. In picking and training such people, companies send powerful messages: “You’re a player here; we are going to invest in you.” Similarly, winner-enterprises’ communications and involvement with key customers, suppliers, government leaders, and their communities send inescapable signals of leadership, good will, and reliability.

## Engaging Executives

All of the roundtable attendees were impeccably discreet, but a couple hinted at struggles to get the necessary air time with top executives and the appropriate budgets to do their work at the level they believe is necessary to protect the strategic interests of their organizations. This is hardly a news bulletin nor unique to the financial sector.

## Executive Mindshare

CEOs in particular are more likely to focus on urgent issues, e.g., the liquidity crisis, than what may seem like a potential future risk of unknown scope. That mindset is not only the result of short-term priorities but also reflects how difficult it is for most executives to conceive of how high rates of absenteeism will affect their businesses. While they have seen many hurricanes, tornadoes, fires, and floods in the news, they’ve never experienced anything like a severe pandemic.

## Involving the Executive Team

The single best way to sensitize the executive team is to put it in the middle of a pandemic. Take your executives through an *exceptionally well-planned* and facilitated simulation of a pandemic. To effectively alter

### Did You Know?

We mortals tend to carry around a number of what are called “cognitive biases.” Being aware of them can significantly improve deliberations and decision-making. Some include:

- Relying too heavily on past data, e.g., discounting the potential of things we’ve never experienced (called “anchoring”).
- Believing we, as individuals or our business, can deal with whatever happens (“overconfidence effect”).
- Avoiding decisions/actions for which not all data are available – making the probability seem unknown (“ambiguity effect”).

Understanding one’s cognitive biases and those of executive decision makers is the first step to more effective critical thinking and problem solving.

perspectives, the simulation needs to be a compelling experience that genuinely focuses on alternative perspectives and possibilities. Once executives are forced to confront an unprecedented set of tough decisions, they are likely to recalibrate their thinking about the issue. Indeed, one attendee said, “We did three-hour sessions globally. It required lots of investment, but the result is the light bulbs go off.” Another said, “It’s invaluable.”

## Gauging Strategic Risk

Another way to engage your leadership team in this challenge is to remind them of the concept of how your enterprise might get “far from equilibrium.” It’s the notion that organizations – under circumstances both positive (say, aggressive growth) and negative (an erosion of financial reserves, for instance) – can fall backwards in a dramatic manner. Recovery, if it comes at all, can take years.

The “far from equilibrium” theme could be part of the workshop or simulation to raise sensitivity to what happens to an organization pushed to the brink. The end-game would be to define strategic boundaries to keep the corporation away from such thresholds. Defining such borders is not some insignificant exercise. Many of the ultimate pandemic action-planning decisions can be made responsibly only with a clear sense of the financial consequences of various pandemic strategies. These could range from extraordinary operational tactics to making significant exceptions to current pay and benefits policies that could become very costly.

## Strategic Thought-leadership

As you can see, there is an exceptional opportunity for business unit leaders, CFOs, CHROs, risk managers, business continuity planning chiefs, medical directors, and pandemic action-planning leaders to affect the strategy and performance of their companies around this issue. Making the business case for both short-term and long-term results can impact the competitive standing of your company for years to come.

## A Legacy of 9/11

This chapter is titled “A New Kind of Disaster.” Some, however, might say they have experienced similar or even worse circumstances than a pandemic could ever pose.

On September 11, 2001, Cantor Fitzgerald, one of many financial enterprises in the World Trade Center, had 658 people perish without warning in the first building struck by the terrorists. That was the greatest loss for any one company. The second highest casualties were with my former employer, Marsh & McLennan, which lost 295. A commentary, however, on the power of exceptional planning and on-the-ground leadership is the evacuation of about 2,800 Morgan Stanley people from Tower-2 before the second plane hit the floors they occupied. Rick Rescorla, Morgan’s security chief for the World Trade Center, and his team defied Port Authority orders to stay in

place and led his company's people – as well as many others – down the steps and away from the building. Rescorla, a veteran of both the British and American armies, famously sang anthems through his bullhorn throughout the evacuation. Last seen back in the building checking for stragglers before it collapsed, Rescorla was one of “only” 13 Morgan Stanley people killed that day thanks to his extensive preparation and courageous leadership. (It is interesting to note that some of his colleagues apparently thought his planning, his warnings about risks, and his quarterly evacuation drills were obsessive and/or unnecessary. That sounds a little like what some BCP leaders today hear about their pandemic preparations.)

The terrorist attack on the twin towers is an indelible moment for most New York City-based financial institutions. Understandably, some financial leaders feel they have seen the worst the world can throw at them. And they tend to index the future against that ghastly day. With the utmost respect, a severe global pandemic would challenge corporations in a wholly different and probably far deeper strategic manner. Simply stated, the operational discontinuities – and deaths – would be worldwide.

## Summary

- It is possible that there will be a pandemic, potentially severe, in the foreseeable future.
- Despite all, the prospect of a pandemic is not consistently cast as a true strategic matter in the financial sector.
- There will be winners and losers in the sector – based on whether or not companies prepare now and execute well in the crisis.
- Companies will profit from preparation – even if there is no pandemic for years.
- Executives, like everyone else, have certain cognitive biases. Those inclinations can be changed by engaging the executives in robust pandemic simulations.
- Another useful part of such a simulation might center on the risks of getting “far from equilibrium.”
- Line and staff executives can become valued strategic thought leaders through their work on enterprise resiliency in general and pandemic planning in particular.

# Experienced Planners Face a New Challenge

By Regina Phelps, Emergency Management & Safety Solutions

## Planning Leaders

The financial industry has long been a leader in the area of business continuity and disaster recovery planning. In January 2006, the Financial Services Sector Coordinating Council for Critical Infrastructure Protection and Homeland Security (FSSCC) approved a “Statement on Preparations for ‘Avian Flu’ ” and issued “Issues for Consideration Regarding Preparations for ‘Avian Flu,’ ” for distribution to members of the financial services sector in the United States.<sup>1</sup> The goal of the two papers was to provide guidance for financial institutions considering how to prepare for the potential of a serious influenza epidemic.

The Council was very careful in its guidance, stating “...preparations around this issue must proceed in a careful and measured way...” and expressed concern that the alarmist tone of much of the press coverage was an overall concern. To that end, and to avoid contributing to undue alarm, the official FSSCC statement and paper generally avoided terms such as “pandemic.”

While public health experts cannot now predict whether a serious outbreak of influenza involving an easily communicable strain of avian flu will develop in the near future, the potential for such an outbreak raises significant issues in terms of business continuity and overall resilience within the financial services sector.

Many of the attendees at the pandemic planning roundtable were from the New York area and had direct and personal experience in dealing with the aftermath of September 11, 2001. Even among such experienced planners, all agreed that preparing for a pandemic was a significant and challenging undertaking and required the full engagement of the organization.

## Pandemic Task Force

Most of the members of the roundtable had been significantly engaged in pandemic planning for at least 24 months, and all had some type of enterprise-wide Pandemic Task Force (PTF) in place. A pandemic touches virtually every aspect of a business. Because of the depth of the impact of a pandemic and its duration, the Task Force needs to include all of the great thinkers across the enterprise. The PTF’s role is to develop and test the

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<sup>1</sup> Financial Services Sector Coordinating Council for Critical Infrastructure Protection and Homeland Security, “Statement on Preparations for ‘Avian Flu,’” January 23, 2006.

pandemic plan, serve as pandemic ambassadors across the company, share specific expertise, and participate in meetings and exercises.

Companies participating in the roundtable had Pandemic Task Force memberships from the following corporate departments:

- Business continuity planning
- Corporate communications
- Executives/administration
- Human resources
- Key lines of business, such as investment, commercial, retail, and personal banking
- Legal
- Purchasing/procurement
- Risk management
- Safety
- Security
- Technology
- Telecommunications
- Travel

## Management Response

Participants attending the roundtable were asked to characterize their executive committee's orientation to a pandemic. Approximately half described it as a high strategic priority while the remainder judged it as an important – but not urgent – consideration. The lack of pressing and threatening daily news has shifted the perception in some companies that this is a time-sensitive risk.

## Executive Management

When dealing with a highly contagious, possibly deadly, disease, you will need to think carefully about a work and travel strategy for your executives. Would you have all executives come to work on a daily basis? When might you suspend executive travel? As unpleasant as it may be to address the topic, a key aspect of planning is to develop your leadership continuity strategy and succession planning for all key positions in the company. In addition, when situations arise during the pandemic, you will need to determine who is authorized to permit and/or direct departures from the plan and under what circumstances. Most attendees stated that it was the plan to have executives continue to work on site during the pandemic, although they may be dispersed to different locations. The presence of senior management would send an important message to all employees.

## Virtual Emergency Operations Center

Most companies have “brick and mortar” emergency operations centers (EOCs) to provide a command and control structure for a major event. The existing protocol for managing your EOC can provide a solid basis for developing a virtual emergency operations center (VEOC). The last thing you want during a pandemic is for all of your key decision makers to be in the same room, breathing on each other. A virtual EOC would likely be a combination of telephone conference bridges, Internet meeting collaboration tools, and EOC software to track events and status. Develop the protocols to operate virtually and test your virtual EOC in advance.

## Pandemic Exercises

During the roundtable, we conducted two simulations demonstrating the different types of impacts and incidents that may be experienced in the pandemic continuum.

- Raising the World Health Organization (WHO) threat phase to “4” globally
- Six weeks into a WHO 6.

In the first narrative – going to WHO 4 – there were border closures in the countries with documented human cases, and these border and port closures impacted the movement of goods around the world. There was widespread news coverage, which raised the anxiety level of people at work and in the community and also raised significant questions from employees, investors, regulators, and the government about the level of company preparedness. Without having even a single flu case in the United States, the plan was immediately tested. “To get ahead of the rumors, we will need to communicate early and often to keep ahead of the game and the Fox-news effect,” noted one participant.

Our second exercise highlighted what life would be like in a WHO phase 6 situation, where there were flu cases in the U.S. In this exercise, there was illness and death in the community and the company. There were high absenteeism rates, supply chain slow downs, economic impacts, and plant and distribution disruptions. One key aspect of the exercise was to tell participants that they could not change a decision that was made in the first exercise that would impact them in the second. For example, if they didn’t purchase masks or antivirals in the first exercise, they couldn’t change their minds and purchase them now. At the height of the disaster when the vision is clearer, some participants regretted their earlier choices. This may well be a reflection of how things are likely to play out in the real world.

A goal of any exercise is for the team to identify plan shortcomings. After the exercise, team participants will need to develop strategies to address those shortcomings. It may be a simple documentation update, or it may require a change to team roles and responsibilities or a shift in processes. In order to enable your plan to remain viable, always identify specific findings, identify who is accountable for addressing those findings and amending the plan, and determine the timetable for completing the changes. It’s also a

good idea to take these exercises “on the road” and conduct them at mission-critical locations and departments throughout the company, such as at data and call centers, trading rooms, network operations centers (NOCs), and settlement groups. All mission-critical departments should experience several different iterations of the pandemic exercise.

## Economic Modeling

Executives need to understand the potential cost and the losses the company is likely to experience during a pandemic, which is going to be vastly different from business as usual. The purchase of needed equipment and supplies and the development of appropriate human resources policies require some understanding of how the pandemic will impact the company’s bottom line.

- Develop economic models to assess the impact to the company.
  - What will be the impact of the first pandemic wave?
    - Project the “burn rate” for performance of mission-critical work.
    - Project revenue loss.
    - Project added costs for use of antivirals, PPE, additional cleaning, and supplies.
- Project cash reserves required to continue operation during the first wave.
- Project cash reserves required to continue operations during the second and third waves.
  - Confer with lenders about cash advances and relaxing repayment dates.
- Assuming that a second or third pandemic wave occurs, determine whether and how much to budget for vaccination of your personnel, and perhaps of their families, as well.

## Public-Private Partnerships

One public agency that most financial institutions don’t have a working relationship with is the Department of Public Health. The local DPH is tasked with local management of a health emergency and pandemic. It has tremendous power and authority. By invoking public health law, it can essentially control the destiny of your institution. This situation will be particularly challenging for a bank with many locations, as each state, county, and local municipality health officer could easily have different rules, guidance, and requirements during the pandemic. Identify your company’s point of contact for your local city or county DPH, and meet with key DPH personnel to share your plans. They may well be able to make helpful suggestions or point out problems that can be addressed in advance. It will also be helpful for you to know their plans to learn not only what you can expect from them, but what they may be expecting from you.

## Summary

Pandemic preparation will engage every aspect of your organization and touch every one of your stakeholders. It is the ultimate team event. Preparation includes:

- A well-rounded Pandemic Task Force (PTF) supported by your senior management.
- Plans and processes to move your emergency operations center (EOC) to a “virtual” world.
- Analysis of the economic impact on your company.
- Pandemic exercises that challenge the management team at different times within the pandemic cycle.
- Reviewing the Financial Services Sector Coordinating Council (FSSCC) pandemic guidance in preparing your plans.
- And last, since no financial institution is an island, an effective plan requires you to have deeper relationships with local government entities such as county and state Departments of Public Health.

# Staying in Business – Enterprise Resiliency

By Regina Phelps, Emergency Management & Safety Solutions

A pandemic precludes adherence to the two most basic rules of continuity planning:

1. You get back to “business as usual” in 30 days or less.
2. You go from the affected site to the unaffected site and resume work.

Historically, pandemics have lasted around 18 months, not 30 days, and there is no place to go. There is no “unaffected site” – the entire population, the world, is affected. Although most continuity plans are now written as “all hazards” plans, this new threat requires us to prepare differently.

## Critical Business Functions and Services

The Banking and Finance sector is a service-based industry providing a wide variety of financial services both domestically and internationally. These financial institutions are organized and regulated based on the services they provide. Roundtable members were asked what business functions and services were absolutely critical to maintain. Although there were several different entities present (commercial and retail banking, brokerages, a credit card company, and exchanges), there were several common critical functions:

1. Clearing/settlement.
2. Retail electronic payments.
3. ATM replenishment.

Client servicing and new business, although critical on a day-to-day basis, would likely be deferred or suspended during peak times in the pandemic.

Given these critical functions and services that must be maintained in a pandemic, what is required to ensure continuous delivery? The group consensus was:

- Telecommunications.
- Equipment and supplies.
- Facilities.
- Staff.

## Telecommunications

A key aspect of every company’s pandemic plan is reliance on the Internet and the dreaded “last mile.” There was extensive discussion on this failure point for each of the

institutions and each expressed frustration at not knowing whether this critical service will be available for employees to perform these essential functions. Comments such as the following were typical: “For funding, we’ll need the Internet for us to [be able to] work remotely and pass the book of business to other offices as necessary.” “We will need to match the trade, conduct trade reporting, and make data available. Market makers will need to access us – this is all done online.” One participant summed up the feeling of the entire group: “The failure of the Internet will bring us to our knees!”

## Equipment and Supplies

During a pandemic, will you have what you need? Will you be able to get supplies from your regular vendors? Will the supply chain be disrupted? Is your supplies model based on “just in time” ordering? Of all of the business continuity issues, this is one of the most challenging.

In the financial sector, a “service/supply chain” concern is offshore locations. These locations could be a source of failure or disruption during a pandemic. All offshore call centers, R&D facilities, IT development, and other critical support functions overseas must be assessed carefully. Everyone at the roundtable had some offshore work. It is critical to:

- Inventory the extended enterprise and points of integration with overseas entities.
  - Identify where critical services and products originate.
  - Identify single points of failure in the service/supply chain.
  - Identify where single- and sole-source suppliers are located.
  - Determine whether the contingency plans cover disruption in the service/supply chain.
  - Determine how critical products are sourced and shipped from overseas locations.

In a global economy, materials, supplies, and equipment come from all over the world. An assessment of your mission-critical supply chain is essential – and a somewhat monumental and humbling task. It is likely that you receive critical inventory today from countries that have already experienced an avian flu outbreak. The following checklist provides some guidance to get started on a supply-chain assessment.

When assessing products:

- Identify minimum inventories required for critical supplies and products. You will need to take into account peak periods.
- Collaborate with suppliers and exchange information on plans and strategies for addressing supply chain disruption and people risks during a pandemic.
- Determine whether critical vendors pose any exposure risk to staff and visitors.
  - Identify and evaluate your vendors’ pandemic plans.
    - If some vendors lack plans, or lack reasonably adequate plans, consider developing relationships with competing firms.

Roundtable participants also considered ways to help, guide, or assist key vendors to ensure their pandemic readiness. There was also discussion on providing incentives to ensure availability of services or products, as well, although current plans among participants did not include such incentives for vendors. Some companies were including pandemic planning requirements in new contracts going forward.

## Facilities

Maintaining a clean, safe workplace is essential for employees to feel protected enough to continue to come to work. This key area deals with cleaning, security, maintenance, facility restrictions, and emergency procedures.

### Cleaning

It is important to work with your janitorial staff to assess current cleaning practices and cleaning agents. You must then determine if changes to existing protocols are necessary to provide a sanitary and safe work environment.

- Develop/refine procedures for facility cleaning to minimize disease spread during a pandemic.
  - Identify procedures and work practices that may need to be changed for:
    - Janitorial contractors.
    - Employees and staff.
- Identify which cleaning agents will be used – ideally, products should have both antibacterial and antiviral properties.

To help ease concerns about cleanliness, attendees discussed providing employees with the equipment to clean their own areas. This would enable individuals to control frequency and degree of cleaning, especially important if the company has to operate with reduced janitorial staff.

### Security

When communities have “battened down the hatches,” the question of how to keep the staff safe and secure was a point of discussion. “We’ll immediately limit points of entry as well as involve local police departments,” was one member’s strategy. Another spoke of elevating it to the level of the National Guard if things became a real problem. Others spoke of having armed guards at some facilities if the situation dictated.

Review your existing security post orders for management of infectious diseases. It is quite likely there will be no mention of this issue. Banks, high-profile financial centers, and customer service locations could be targets for looting and thefts – security will be a prime concern for employees and customers.

- Develop security protocols for a pandemic scenario and develop infectious disease/pandemic response plans.
- Train security staff at major locations to back each other up in case one facility is shut down or has a severe shortage of security staff.
- Identify how the facility can be secured despite reduced availability of security staff.
- Discuss with local police how the facility can be protected should there be an increased response time from local law enforcement.
  - Make sure the police know how to enter and leave your facility.
- Identify how the facility can be protected in the event of civil disturbance and unrest.
- Consider contracting with private security firms for preferential treatment in case of need.

## Facility Restrictions

All roundtable participants plan to significantly restrict visitors during WHO 6 and, in some cases, WHO 5. “We will be implementing entrance screenings, and have medical triage at the front doors. We’ll also limit the building to a single entrance, have monitors in the elevators, and staging areas outside elevator lobbies to observe all who enter and leave looking for any signs of illness,” noted one member. Everyone plans to conduct some type of screening, and some have thought about taking temperatures. Since people become contagious before they become symptomatic, however, it is questionable whether that step will provide value sufficient to justify the burden.

As cases develop in your area, it is probable that you would restrict access to your facility as well as shut down all internal gathering places. Many attendees planned to close gyms, cafeterias, daycare centers, and break areas. Eventually, it will likely be required that you do so by your local county health officer.

Accordingly, consider the following as part of your assessment process:

- Identify restrictions on visitor access that may be needed and when those would begin.
- Identify any changes to building access procedures that may be needed.
  - Determine if special lobby security procedures would be required.
  - Determine when they would be implemented.
  - Decide whether special training or equipment would be required for those in the lobby who greet employees and visitors.
  - Consider special screening for visitors, vendors, and possibly employees. (See *Screening Questionnaire*, page 68.)
- Identify which internal services and gathering places will be closed.
  - Include cafeterias, daycare centers, gyms, and break rooms.
  - Determine when they will be closed and what criteria are to be applied.

## Emergency Procedures

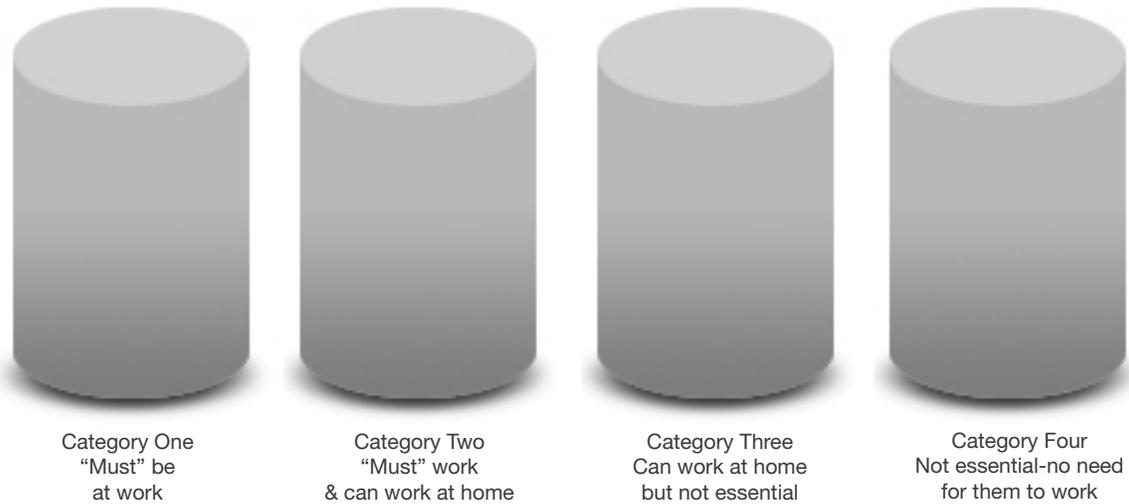
How will you handle medical emergencies at work? If you have a medical department, how will it cope with a patient load greatly exceeding what it was designed for? What happens if you dial 911 but are told there will be no response because of staffing constraints? How do you care for someone on site until help arrives? Most companies never consider these situations, but they could arise during a pandemic. Identify which rooms will be used as temporary care and isolation rooms should someone become ill while at work and 911 is not able to respond. Ideally, these rooms have hard surfaces for easy cleaning (no carpet or fabric furniture), a portable HEPA filter, masks and gloves for the ill person and care providers, and easy access.

Train your company emergency responders on how to handle a respiratory emergency during a pandemic. Identify additional training required if an incident occurs at work. Training would include how to properly don and remove gloves and masks without contaminating oneself or others as well as protocols to move the ill person to the isolation room until help arrives. Determine whether you will alter first-responder protocols, especially with respect to traditional mouth-to-mouth respiration in event of respiratory arrest. Unfortunately, you should also consider how you would deal with a corpse (or corpses) in the event of work site deaths.

## Staff

Staff must be categorized into two basic “buckets” according to mission-critical or non-mission-critical functions. Most participants had categorized their staff and understood their mission-critical needs. This categorization is essential for future identification of necessary resources and training. Within each of those categories there are two sub-categories.

- Mission-critical functions and staff:
  - Category One – Who performs a mission-critical activity and **must be on site** to perform the work?
  - Category Two – Who performs a mission-critical activity and **may work remotely** (e.g., from home or from an alternate work location via remote access)?
- Non-mission-critical functions and staff:
  - Category Three – Who performs an activity that is not mission critical but **could be performed via remote access** if sufficient appropriate resources (such as bandwidth or equipment) are available? (These staff could also “backfill” the Category One and Two staff.)
  - Category Four – Who performs an activity that is **not mission critical** and **cannot be performed via remote access** (e.g., mail room clerk or shipping attendant)?



## Making It Safe for Category One Staff

If the company cannot make the Category One staff feel safe, these individuals will be reluctant to come to work. What options are available to promote their safety while on the job? Roundtable participants discussed five ways to create a working environment as safe as reasonably feasible:

1. Hygiene – hand and cough.
2. Social distancing.
3. Personal protective equipment.
4. Extensive facility cleaning.
5. Antivirals.

### Hygiene – Hand and Cough

Although hand hygiene is the simplest thing to do, it is also the most effective and the most recommended by all agencies and medical experts. Influenza is a highly contagious respiratory illness that is spread by droplet nuclei that are expelled during the acts of breathing, coughing, sneezing, and speaking. Proper hand hygiene is absolutely essential, though not sufficient, to limit the spread. Staff must be educated about thorough hand washing (20 seconds, warm water, and soap) and to avoid touching their faces.

It is also important to teach proper cough and sneeze etiquette. Always cough or sneeze into your elbow, ideally into fabric. (A very amusing and thoughtfully designed video tool is called "Why don't we do it in our sleeves?" and can be viewed and ordered at <http://www.coughsafe.com/media.html>.) All roundtable participants had seasonal flu shot programs and were providing health education alongside the flu shot administration.

## Social Distancing

Social distancing is a technique used to minimize close contact among persons in public places, such as work sites and public areas. It involves keeping people three to six feet apart. This can be a challenge in some work environments. Some options to social distance staff include:

- Split teams into different work locations. This can help avoid cross-infection and also build some backup and redundancy – in other words, don't keep all of your eggs in one basket!
- Stagger shift changes so staff can be more easily separated. This can also minimize contact and congestion in locker rooms, security areas, lobbies, stairs, and elevators.
- Prohibit face-to-face meetings. Whenever possible, use technology solutions to conduct business, including telephones, video conferencing, and the Internet.
  - If face-to-face meetings can't be avoided, minimize meeting time, choose large conference rooms, and have participants sit at least six feet from each other.
- Avoid all unnecessary travel. Cancel or postpone nonessential meetings, gatherings, workshops, and training sessions.
- Contrary to recommendations pertinent to nonpandemic situations, advise your employees to avoid public transportation and drive to work. Or, allow a version of “flex time” that will work for you, with employees work hours shifted earlier or later to avoid rush-hour crowds on public transport. Consider enlarging the parking lot, if necessary.
- Introduce staggered lunchtimes to minimize numbers of employees in lunchrooms.
  - Encourage employees to bring lunch and eat at their desks or away from others. Encourage them to avoid eating in the cafeteria, lunchrooms, and crowded restaurants.
- Advise employees not to congregate in break rooms or smoke-break areas where people normally socialize. If they do, advise them to keep three to six feet from their colleagues.
- Advise employees to avoid shaking hands or hugging.
- Close company gyms, childcare centers, and recreation areas.
- In areas where workstations may be shared, such as call centers and NOCs, provide each worker with his own keyboard and headset or phone. Remind employees not to share their equipment.

What triggers would call for social distancing at work? The first cases of pandemic influenza in your area would probably prompt formal social distancing procedures, but you may want to initiate some practices early on to allow people to grow accustomed to a different way of working. It is also likely that some training will be required so that staff may more fully understand how social distancing works. Be sure to include this information in your pandemic staff education.

Although social distancing makes sense, is strongly encouraged by CDC and WHO, and is apt to conform to the desire of employees anyway, it must be recognized that there is

little scientific evidence supporting the adequacy of a three foot or six foot separation – or, indeed, of any other specific distance.

## Personal Protective Equipment

There will likely be work that must be performed, but where staff cannot be separated a minimum of six feet. This could be in an NOC or a data center, or it might be a task that requires several people to work in close contact for a period of time. In these instances, personal protective equipment (PPE) will be required. The type of PPE will vary based on the workers and the work situation. Roundtable participants had a combination of N-95 and surgical masks on hand.

Health and Human Services (HHS) and the CDC issued interim guidance on the use of masks in May 2007, stating that facemasks and respirators could provide added value when used in combination with other preventive measures.<sup>2</sup> Dr. Michael Bell, associate director for infection control at CDC's Division of Healthcare Quality Promotion, noted that facemasks and respirators have different qualities and offer different types and levels of protection. "Facemasks are not designed to protect people from breathing in very small particles, such as viruses," said Bell. "Rather, facemasks help stop potentially infectious droplets from being spread by the person wearing them. They also keep splashes or sprays from coughs and sneezes from reaching the mouth and nose of the person wearing the facemask. Respirators are designed to protect people from breathing in very small particles, which might contain viruses. Thus, if you're caring for someone who is ill with pandemic flu, proper use of a well-fitted respirator may be a reasonable choice."

Bell stressed that neither a facemask nor a respirator will provide complete protection from a virus. This is particularly true for employees with beards or moustaches. To reduce the chances of becoming infected during a pandemic, people will need to practice a combination of simple actions, including washing hands often with soap and water, staying away from other people when they are ill, and avoiding crowds and gatherings as much as possible. As with social distancing, hard data demonstrating the efficacy of PPE do not exist.

Other key issues you will need to address include:

- How much PPE to stockpile.
- When the PPE will be distributed.
- Who will develop the training needed to support use of PPE.
- Who will deliver initial and refresher training.
- Who will develop a security plan so that the supplies of PPE are secure during the pandemic.

Attendees planned on having masks available for employees who wanted them, requiring

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<sup>2</sup> HHS Issues Interim Guidance for the Use of Facemasks and Respirators in Public Settings During an Influenza Pandemic, May 3, 2007, available at <http://www.hhs.gov/news/press/2007pres/05/pr20070503a.html>

them only in areas where close contact was likely. One member was planning on three masks per day for all staff. Most believed it was likely that staff would wear them only in situations where they could not socially distance themselves from others. If masks are used, staff will need to know how to put them on and remove them, and to discard them properly after use. Re-use should be discouraged.

### Extensive Facility Cleaning

Since respiratory illnesses are spread by droplet nuclei, and our hands carry bacteria and viruses to our faces where we can then breathe them into our lungs, extensive cleaning of all commonly touched areas is essential. However, janitorial staff is likely to be in short supply. The solution will be a combination of education and requiring employees to clean their own areas.

Employees will need to have supplies and basic training about the importance of cleaning all commonly touched surfaces in their areas. In the office, the most “germy” surfaces are the phone, desktop, keyboard, mouse, and doorknobs. Also, common sense guidelines would include:

- Use your own phone only.
- Open doors with paper towels or cloth.
- Push buttons in elevators and on phones with your own pen or pencil.
- Wash your hands frequently with soap and water. Use hand sanitizers if you can't wash immediately.

### Antivirals

Of all the topics discussed at the roundtable, two areas were the liveliest. The first was telecommunications and the availability of the Internet; the second was the use of antivirals. At present, the only pharmacologic option for potentially preventing, shortening, or reducing the severity of illness is an antiviral for influenza. Vaccines cannot be developed until the pandemic strain has evolved and is spreading from human to human. Once that occurs, it is expected to take six to eight months to develop and prepare a vaccine, and initially, supplies will be limited. Moreover, vaccines prevent illness from occurring; they offer no help to those already infected. Offering employees antivirals as part of a prevention or treatment strategy could be a cost-effective way of both reducing worker absenteeism and bolstering employees' confidence in your company.

The most effective antivirals currently available work by interfering with the release of the influenza virus from infected human cells into the rest of the body. These medications require a physician's prescription and can be given prophylactically or at the time of illness. Given the critical nature of the finance and banking sector and the fact that medications exist that can treat the illness, every financial institution needs to ask if antivirals should be part of the company's pandemic strategy. The questions that were discussed at the roundtable included:

- Will antivirals be used as a strategic response to a pandemic?
  - If so, for whom?
  - Will the company program cover the employee's family or just the employee?
- When would the medications be ordered?
- How would they be ordered?
  - Through an internal medical department?
  - Through an outside medical group?
  - Through a drug distributor?
- Where will antivirals be stored?
  - How will they be protected during storage?
  - What is their shelf life?
- When will they be distributed?
  - How will they be distributed?
- How will employees be educated about their use and storage?
  - How will you discourage employees from using them for ordinary colds and seasonal flu?

These questions and your answers to them are crucial. Although there is a sufficient supply of antivirals today, once the pandemic threat advances, the drugs are likely to become scarce. It is important that companies evaluate the threat and the options while options still exist. In the absence of a readily available, effective vaccine, which will take months to produce and will have limited availability, antiviral drugs appear to be the best pharmaceutical hope for mitigating disease and preventing death.

One of the most spirited aspects of the antiviral conversation involved the question of efficacy. "If you could guarantee me that it [antivirals] would be effective, we would buy them tomorrow!" stated one participant. Another said, "What if we spend the money now, find out it's not effective, or something else comes out?" And the comment that silenced the room and then filled it with laughter was, "You know...our industry always says 'Past performance is no guarantee of future results!'" Although there are no guarantees in investments or medications, the current antivirals Oseltamivir (Tamiflu®) and Zanamivir (Relenza™) report excellent efficacy and Tamiflu® is the medication recommended by the WHO for clinical management of human infection with avian influenza A (H5N1) virus.<sup>3</sup>

"We need the sense that enough businesses are doing it (purchasing antivirals) to make an actual difference. We can't be the only ones; that won't be enough to save the markets," noted one contributor. This one argument met with a great deal of pushback from fellow roundtable members who felt that all companies didn't need to use antivirals for it to make a difference. Those who do use them may have a competitive advantage over those that don't.

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<sup>3</sup> WHO "Clinical management of human infection with avian influenza A (H5N1) virus," available at [http://www.who.int/csr/disease/avian\\_influenza/guidelines/clinicalmanage07/en/index.html](http://www.who.int/csr/disease/avian_influenza/guidelines/clinicalmanage07/en/index.html)

All participants came to the realization that if they did not order antivirals while the world was at a WHO 3, when the level was raised to a WHO 4, antivirals might no longer be available. All banking and financial sector firms will need to use current information and

### **Two Types of Antiviral Programs**

Companies generally have two options when looking at antiviral programs. You can choose to distribute the medications to employees now or wait until a pandemic seems imminent. Antivirals have a five-year shelf life and, as of the writing of this paper, are widely available.

#### **Bulk Purchase**

In this option, a company would purchase a bulk supply of antivirals from a pharmaceutical distribution company. The purchasing company can then arrange for prescribing the drug at a time of its choosing by either using its own medical department or contracting with an outside medical group. The advantage to this option is that the company holds all medications securely until it decides they should be distributed. There are several disadvantages. Physicians may not be available to prescribe the medication when you need it, distribution may be difficult, there could be security challenges in protecting the supply, and there is always the possibility that the government could seize the medications in a public health emergency.

#### **Pre-distribution**

Another option is to distribute the medications at the time the program is established. This approach would require education and physician assessment. The medication can then be given to the employee at the time of the consultation or sent to the employee's home using a mail-order delivery service.

conduct a serious discussion to decide whether to include antivirals in their pandemic plans. It is important that companies evaluate the threat and the options while options still exist. In the absence of a readily available, effective vaccine, which will take months to produce and will have limited availability, antiviral drugs appear to be the best pharmaceutical hope for mitigating disease and preventing death. One participant ended the conversation with "Antivirals would help us protect employees so they can come back as healthy as possible when the markets are back up – and that would make it worth it."

## **Connecting the Category Two Staff**

Category Two staff is mission critical, but can work remotely. There are two parts to the work-from-home solution. One part you can control (equipment, company systems and network); one part you can't (telecommunications and "the-last-mile"). All participants had work-from-home as part of their pandemic strategy, and all were extremely concerned about the "last mile" and the real ability of staff to be able to work from home successfully.

Roundtable members were using the following strategies for Category Two staff:

- Identify equipment needed to support work via remote access.
  - Who needs additional equipment?
  - What type of equipment? Consider laptops, printers, faxes, and scanners.

- Will the company pay to provide additional equipment?
  - Will the company pay for high-speed connections at home?
- Identify amount of bandwidth the company needs to meet projected demands for remote access for all Category Two staff.
  - Increase as needed to meet projected demand.
- Identify alternative work options for call center environments. These may include agent-at-home, distributing work to numerous centers to spread the risk, and encouraging customers to use the Web site for service.
- Increase capacity and number of conference call bridges to meet anticipated meeting requirements.
- Provide training on how to use remote meeting technology, e.g., Web meetings, conference bridges, and teleconferences.
- Train staff to provide sufficient Help Desk support to those who will need to work via remote access during a pandemic.
- Once the strategy is developed, require Category Two staff to work from home one day a month to “work out the bugs.”

## What About Category Three and Four Staff?

Those employees identified as category three and four (not mission-critical and will not be working) bring up issues of employment policies, pay, and benefits. These issues will be covered in detail by co-author Dave Kieffer in the following chapter.

## Employee Preparedness

In May 2007, the American Public Health Association (APHA) reported that only 13 percent of Americans responding to a national opinion survey said they were fully prepared for a public health crisis or disaster. If a public health threat or other emergency crisis struck, most U.S. residents would not be prepared to handle the situation. About 90 percent of those surveyed said they had not taken enough steps to prepare for a health threat or other emergency. In fact, nearly one-third reported that they had taken no steps to prepare. About 40 percent of respondents said they took some steps to prepare for an emergency situation after terrorists attacked the United States in 2001. However, those respondents admitted that they had since let their preparedness plans lapse.<sup>4</sup>

This situation is disheartening for any employer and was a focus of conversation at the roundtable. Many companies held health fairs, seasonal flu programs, brown bag lectures, and wellness courses in an effort to promote employee preparedness and readiness with mixed results. One participant had a unique way to engage the employees : “Do any of you have *Take Your Child to Work Day?*” she asked. This company found the best way to employees was through their children. This innovative planner “took over” the day and turned all of the big group events into a family preparedness opportunity. “We brought in local firefighters and paramedics who taught

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<sup>4</sup> APHA poll: “Americans are not ready for public health crises,” <http://www.apha.org/publications/tnh/archives/2007/May07/APHANews/APHAPollNation.htm>

basic first aid and fire safety, and at lunch a 911 operator discussed how and when to call for emergency help. We even did a mock fire evacuation with all of the fire trucks and gear out at the evacuation site. We then gave the kids simple materials on home preparedness with a checklist of things to ask Mom and Dad, such as ‘Where are our extra water and flashlights?’ The kids loved it and the parents now have someone right in the home to push family readiness!”

## Travel

Most participant companies carry some form of health travel insurance that covers employees with medical emergencies outside the United States, as well as evacuation assistance (medical, nonmedical, and repatriation of remains). Many were sending employees to countries where avian flu was present. Some companies were already providing emergency medical travel kits that included masks, gloves, hand sanitizer, and, in some cases, antivirals. The group discussion focused on the company travel policy before and during a pandemic.

There are some key questions you will need to explore:

- What would trigger implementation of pandemic travel policy?
  - At what point will international travel be restricted?
    - What restrictions will apply?
    - To whom will they apply?
    - To what extent, if any, should you consider challenging legal obstacles to repatriation of U.S. nationals detailed abroad?
  - At what point will domestic travel be restricted?
    - What restrictions will apply?
    - To whom will they apply?
  - What information will be provided ahead of time to travelers?
    - What health and hygiene precautions will be recommended?
    - What pharmaceutical remedies and PPE will be provided?
    - If the situation is in flux, how will information be updated and disseminated?
  - What information will be required from travelers ahead of time?

### Sample Travel Guidelines

Develop simple guidelines that managers and staff can use to restrict company travel.

**At a Phase Four** – All travel is suspended to the country where the “Four” occurred.

**At a Phase Five** – All travel is suspended to the region where the “Five” occurred.

**At a Phase Six** – All international travel is suspended immediately (possible exception: expatriates and those traveling back to their home country). All US travel to be suspended in seven days.

Look into travel insurance for all staff traveling abroad. This insurance should cover medical care and physician referrals while traveling, medical evacuation, evacuation during civil unrest or other country emergencies, and an expatriation of remains if necessary.

- Will all travel need to be booked through a central agency/department?
    - Does this include all business travel?
    - Does this include all personal travel?
  - Will you provide any type of travel kit as noted above?
- Develop procedures for employees who become ill while traveling. This is likely to become an issue if health care services are restricted or overcrowded.

## “Man on the Moon”

At the conclusion of the day when we asked participants if there was anything we hadn't talked about yet that they felt needed to be discussed, one member issued a compelling call to action. “What needs to happen to resolve this issue is for government and pharmaceutical companies to work together to create a vaccine. The real panacea to a pandemic outbreak is the development of an effective vaccine. Who will marshal the global medical community during an outbreak to get them to work collaboratively in a quick and efficient manner without regard to licensing and patent issues?” This compelling discussion was much like the May 25, 1961, speech by President Kennedy calling for “landing a man on the moon and returning him safely to the Earth.”<sup>5</sup> Who is to say that it couldn't happen if the right amount of effort were applied?

## Summary

Preparing for a pandemic is all about creating a resilient organization – 85 percent to 90 percent of a pandemic plan is about enterprise resiliency – a small portion is solely about a pandemic.

### Telecommunications

- Continue to work with your telecommunications providers and government agencies to resolve the “last mile” issues.

### Facilities

- Facilities preparation includes site cleaning, security, facility and visitor restrictions, and emergency procedures to care for those may suddenly get ill.

### Staff Categorization

- Determine who is mission critical, who must be at work, and who can work remotely.

### Antivirals

- It is important that companies evaluate the threat and the antiviral option while options still exist. In the absence of a readily available, effective vaccine, which will take months to produce and will have limited availability, antiviral drugs appear to be the best pharmaceutical hope for mitigating disease and preventing death.

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<sup>5</sup> “Man on the moon: Kennedy speech ignited the dream,” <http://archives.cnn.com/2001/TECH/space/05/25/kennedy.moon/>

## Employee Preparedness

- Find innovative ways to get employees prepared for an emergency – whether it be an earthquake, hurricane, flood, or pandemic influenza. If their family is not ready, they won't be coming to work.

## Travel

- When would you restrict travel and how would you care for stranded travelers?

## Enterprise Resiliency

- Finally, when you look at your organization's current risk portfolio, the changing climate, and all associated risks, there is a great deal of value in using pandemic planning as a tool to create a disaster-resilient company – regardless of the threat.

# Pandemic Flu: The Legal Issues

By Joseph McMEnamin, McGuireWoods LLP

## The Legal Discussion Was Different

Time and the array of nonlegal issues at the roundtable prevented extended discussion and extensive interaction concerning legal questions. Instead, legal matters were raised in a more didactic fashion. While classic law school-style give-and-take has its advantages, it has some limits here, because the full array of legal issues may not yet be fully definable. Many public health laws, for example, date from the 19<sup>th</sup> Century, long before the “rights revolution” of the mid-to-late 20<sup>th</sup> Century. Tension between the sweeping powers given government by the former and restrictions on that power imposed by the latter have not been entirely resolved. In this chapter, we will attempt to identify some of the more prominent and perhaps somewhat less unsettled legal questions and consider how they might be answered.

There is at least one other reason why the legal discussion differs from the rest of this paper. The nature of legal advice is such that guidance must be individualized to a client’s specific situation, and that requires detailed knowledge of the characteristics of each company. What is offered here, then, is a general discussion intended to be useful, but it is not and cannot be legal advice such as that which you can seek from your inside or outside counsel.

## Why Pandemic Raises Legal Issues

A pandemic is a virtual certainty. History suggests that pandemics occur, on average, about every 25-35 years. Within the last several centuries, the longest pandemic-free interval has reportedly been about 39 years.<sup>6</sup> Recently, data from two of the largest reported family clusters were analyzed; investigators found statistical evidence of human-to-human transmission in Sumatra, although they could not determine whether sustained human-to-human transmission is presently possible.<sup>7</sup> The recurring nature of pandemics, and their potential for causing great harm, create sound business and legal grounds for financial services companies to examine their readiness to operate in a pandemic environment and to take reasonable steps to enhance that readiness.

The most predictable characteristic of a pandemic is its disruptive effect. As discussed in co-author Dave Kieffer’s chapters, the absenteeism that will follow may make it very difficult for many companies to continue to provide their goods and services. The problem will be compounded, of course, because the suppliers of those companies, and the suppliers’

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<sup>6</sup> See, e.g., PAHO Strategic and Operational Plan for Responding to Pandemic Influenza. (stating that the “longest recorded inter-pandemic interval is 39 years”). <http://www.paho.org/English/AD/DPC/CD/vir-flu-PAHO-Plan-9-05.pdf> (last visited August 6, 2007).

<sup>7</sup> Yang Yang, Halloran, M.E., Sugimoto, J.D., and Longini, I.M., “Detecting Human-to-Human Transmission of Avian Influenza A (H5N1),” 13 (9) *Emerging Infec. Dis.* 1348 (Sept., 2007).

suppliers throughout the supply chain, will be facing the same problems. Federal, state, and local governments may impose restrictions, possibly severe, on the movement of persons and goods. They may control the sale and distribution of commodities and declare certain buildings, highways, or sections of town off limits. They might request – or require – that certain persons be confined to their homes or to hospitals. The ability to carry on business as usual may be severely compromised or even impossible altogether.

## Negligence Claims Against Companies and Their Directors

A cause of action for negligence lies – that is, can be asserted – for harms arising from the failure to exercise ordinary care.<sup>8</sup> For financial services businesses, the standard of care is ordinarily the behavior of reasonable companies in the industry in similar circumstances. In theory, a company whose carefulness equals or surpasses that of “reasonably prudent” companies in the same industry has complied with the standard of care, and cannot be held liable even if the outcome is poor.<sup>9</sup>

The reasonableness of a course of action must be analyzed in light of the circumstances at the time it is taken.<sup>10</sup> These circumstances are difficult to anticipate, since no one knows how severe the problem will be. In judging what level of preparedness is needed, companies should consider the likely behaviors of other actors. This includes, but is not limited to, the conduct of other companies in the space. The ability of the government to respond to a pandemic and its consequences should also be factored in, especially since government will probably be limited in its response capacity. The federal government has repeatedly indicated that it lacks resources necessary to deal with an influenza outbreak in 5,000 communities simultaneously.<sup>11</sup> The anthrax attacks of 2001 illustrate the difficulties that public health authorities will face. Overlapping responsibilities, real or imagined gaps in authority, a lack of reliable data, political interference in public health decisions, and an inability to conduct calm and dispassionate scientific study of the problem all contributed to the generation of tardy, confusing, and often outright conflicting recommendations from public health authorities.<sup>12</sup> Companies may question whether governmental performance will be any better in event of a pandemic.

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<sup>8</sup> See, e.g., *Comer v. Smith*, 2007 U.S. Dist. LEXIS 4690, \*5 (W.D. Va. Jan. 23, 2007) (stating that, under Virginia law, negligence is the “failure to do what a reasonable and prudent person would ordinarily have done under the circumstances”); *Chesler v. Trinity Indus.*, 2002 U.S. Dist. LEXIS 14559, \*26 (N.D. Ill. Aug. 7, 2002) (defining negligence as the failure to exercise ordinary care). See also, Glossary.

<sup>9</sup> The business judgment rule “insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances, and rationally believes that the business judgment is in the best interests of the corporation.” See *Cuker v. Mikalauskas*, 692 A.2d 1042 (Pa. 1997) (citing 1 ALI, Principles of Corporate Governance: Analysis and Recommendations (1994) (“ALI Principles”) § 4.01(c)).

<sup>10</sup> See, Restatement (Second) of Torts § 285-d (standard of conduct is “that of a reasonable man under the circumstances which, at the time of his action, the actor knows or has reason to know”).

<sup>11</sup> See, e.g., Remarks as Delivered by the Honorable Mike Leavitt Secretary of Health and Human Services Commonwealth Club of California, March 14, 2006. (stating that “Any community that fails to prepare with the expectation that the federal government will be able to step in and save them at the last moment will be sadly disappointed. It is not because we lack will, and not because we lack wallet, but rather because we lack a way. There is no way that any government or agency will be able to reach out to every community at the same time. Local preparedness is the foundation of preparation for a pandemic”). <http://www.hhs.gov/news/speech/2006/060314.html> (last visited August 6, 2007).

<sup>12</sup> See, Gursky, E., Inglesby, T.V., O’Toole, T., “Anthrax 2001: Observations on the Medical and Public Health Response,” 1 (2) *Biosecurity and Bioterrorism: Biodefense Strategy, Practice, and Science* 97 (2003).

## What Is the Company's Duty?

Negligence lies for harms caused by breach of duty. But that proposition begs the question: In a pandemic, just what is the company's duty?

The members of the board of directors of a publicly held company owe a fiduciary duty to the shareholders.<sup>13</sup> As fiduciaries, the board members are under the highest duty known to the law.<sup>14</sup> Shareholders dissatisfied with the performance of their directors may, and often do, bring claims against them in court. Sometimes such claims succeed.<sup>15</sup> A company experiencing significant losses for failure to take adequate precautions against the consequences of a pandemic, or taking precautions that plaintiffs' lawyers and their experts are willing to characterize as inadequate, may face such suits.

Following natural disasters, litigation often ensues.<sup>16</sup> Whether it will after a pandemic is unknown. It would not be surprising, however, if shareholders experiencing substantial losses attempted to recover damages against corporate boards, especially if as a result of superior planning competitors lose less.

## Proving the Standard of Care

As noted, practice within an industry generally establishes the standard of care. If other companies in the financial sector are not stockpiling masks and other PPE, for example, then as a rule the standard does not require your company to do so either.<sup>17</sup> In some circumstances, however, courts may impose a duty of care higher than that prevailing in the industry or profession at the time.<sup>18</sup>

Negligence cases are decided by lay juries with limited understanding of the complexities of the financial services business and of what conduct is "reasonable" within the industry. At trial, the standard of care is ordinarily established by the testimony of experts, persons

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<sup>13</sup> See, e.g., *In re Doctors Hosp. of Hyde Park, Inc.*, 474 F.3d 421 (7th Cir. 2007) (directors owe fiduciary duties to shareholders); *Fagin v. Gilmartin*, 432 F.3d 276 (3rd Cir. 2005) (plaintiffs allege that officers and directors breached their fiduciary duties to shareholders).

<sup>14</sup> See, e.g., *La Scala v. Scufari*, 479 F.3d 213 (2nd Cir. 2007); *Welt v. Sasson (In re Dollar Time Group)*, 223 B.R. 237 (S.D. Fl. 1998); *Enzo Biochem v. Johnson & Johnson*, Fed. Sec. L. Rep. (CCH) P97,053 (S.D. NY 1992).

<sup>15</sup> See, e.g., *Syracuse Television, Inc. v. Channel 9, Syracuse, Inc.*, 273 N.Y.S.2d 16 (Sup. Ct. 1966) (successful suit by shareholder for losses incurred allegedly because of mismanagement); *Selheimer v. Manganese Corp. of America*, 224 A.2d 634 (Pa. 1966) (holding that the officers and directors were liable to reimburse the corporation, but remanded for a determination of which losses were caused by the negligent and wasteful conduct of the officers and directors).

<sup>16</sup> See, e.g., *Danos, et al. v. Bass Ent. Prod. Co.*, No. 05-4212 (E.D. La., Sept. 21, 2005) (commercial fishermen in Louisiana filed a class action suit against oil and gas companies, alleging that the negligence of the corporate defendants caused more than seven million gallons of crude oil to be discharged from storage tanks and pipelines after Katrina). Owners of a nursing home that was not evacuated as Katrina approached were prosecuted, albeit unsuccessfully, for negligent homicide. Foster, M., "Katrina nursing home trial leaves scars," Yahoo News, available at [http://news.yahoo.com/s/ap/20070908/ap\\_on\\_re\\_us/katrina\\_nursing\\_home\\_deaths](http://news.yahoo.com/s/ap/20070908/ap_on_re_us/katrina_nursing_home_deaths) (last visited September 8, 2007).

<sup>17</sup> But note that in February 2007, the Occupational Safety and Health Administration of the US Department of Labor published its *Guidance on Preparing Workplaces for an Influenza Outbreak*. OSHA's guidance recommends the use of face masks to protect employees in medium risk workplaces (to be considered a medium risk workplace, employees must have frequent contact with the general public.) See <http://www.osha.gov/Publications/OSHA3327pandemic.pdf> (last visited August 6, 2007).

<sup>18</sup> A handful of cases has imposed a duty of care higher than the prevailing practice in the industry or profession. See, e.g., *The T.J. Hooper*, 60 F.2d 737, 740 (2nd Cir. 1932); *Gleason v. Title Guarantee Co.*, 300 F.2d 813 (5th Cir. 1962); *Helling v. Carey*, 519 P.2d 981 (Wash. 1974) (what others in the industry or profession do may not necessarily define the standard of care). See also, *Alvarado v. J.C. Penney Co., Inc.*, 737 F.Supp. 371, 374 (D. Kan. 1990); *Gryc v. Dayton Hudson Corp.*, 197 N.W.2d 727 (Minn. 1980); *Dawson v. Chrysler Corp.*, 630 P.2d 950 (3rd Cir. 1980).

whose knowledge, training, and experience qualify them to testify about practices with the industry.<sup>19</sup> In most jurisdictions, however, such testimony is not the only potential source of evidence of the standard of care. Plaintiffs will doubtless seek to offer as many proof sources as they can to try to establish the standard of care and a breach thereof. These may include statutes,<sup>20</sup> regulations,<sup>21</sup> and professional codes.<sup>22</sup> Although it lacks the force of law, the Office of the Comptroller of the Currency (OCC) Bulletin 2001-47<sup>23</sup> discusses third-party relationships and risk management principles for financial institutions. Its persuasive power may well mean that litigants will invoke it. In pandemic-related litigation against the industry, another possible proof source could be the pronouncements of the FSSCC, which works in cooperation with the Treasury Department.<sup>24</sup> Companies should examine these authorities, both to assess current and probable future compliance and to identify rules and regulations that in a pandemic will be onerous or perhaps even impossible to obey. Federal officials have repeatedly invited businesses to confer with their regulators, to seek relaxation for the pandemic's duration of at least some of the less highly valued, more burdensome regulations. Companies should accept this invitation, both to make continued operations less difficult during the crisis and to reduce litigation exposure afterwards.

Absent tort reform legislation enacted to prevent it, plaintiffs may also attempt to use your own plans as evidence of the standard.<sup>25</sup> This possibility suggests that, in drafting its plans, a business should be realistic and not ask of itself more than it can reasonably be expected to accomplish. After all, you control what your plan says. To have any chance of advancing preparedness, of course, the plan should balance this reality with articulation of clear and meaningful requirements that personnel should be expected to meet. But a company should not let itself be hoisted on its own petard. Unless it has a realistic chance of successfully invoking a claim of privilege (see below), it should assume that its own words can and will be used by adversaries alleging inadequate preparedness. To the extent that it has a voice in the pronouncements of the industry as a whole,

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<sup>19</sup> Under Texas law, for example, an expert's qualifications can be established by showing knowledge, skill, training, experience, or education. Tex. R. Civ. Evid. 702.

<sup>20</sup> See, e.g., *Parker Bldg. Servs. Co. v. Lightsey*, 925 So. 2d 927 (Ala. 2005) ("the doctrine of negligence per se [see, Glossary] is applicable to a violation of an ordinance as well to violation of a statute"); *Cerretti v. Flint Hills Rural Electric Coop. Ass'n*, 837 P.2d 330 (Kan. 1992) ("Whether the company is negligent, even though it complied with the code, is usually a question to be determined by the jury under proper instructions by the court"); *Henry v. Britt*, 220 So.2d 917 (Fla. Ct. App. 1969) ("The effect of a violation of a statute or ordinance as constituting negligence cannot be avoided by the fact that the act complained of was done in accordance with the custom or practice of other persons engaged in the same type of work in the community"); *Va. Elec. & Power Co. v. Savoy Co.*, 294 S.E.2d 811, 817 (Va. 1982) (violation of building code is negligence per se). See also, Ark. Code Ann. § 20-21-402(b)(3) (2001).

<sup>21</sup> See, e.g., 29 C.F.R. 1910.38(a)(2) (requiring that an employer have an emergency action plan whenever required by OSHA; requirements for emergency action plans in a variety of situations); NASD Rule 3510 (requiring member firms to create and maintain a business continuity plan).

<sup>22</sup> National Fire Protection Association, NFPA 1600 Standard on Disaster/Emergency Management and Business Continuity Programs (2007 Ed.), <http://www.nfpa.org/assets/files/PDF/NFPA1600.pdf> (last visited August 6, 2007).

<sup>23</sup> Comptroller of the Currency, Bulletin 2001-47, November 1, 2001, available at [http://www.ffiec.gov/ffiecinfobase/resources/outsourcing/occ-bul\\_2001\\_47\\_third\\_party\\_relationships.pdf](http://www.ffiec.gov/ffiecinfobase/resources/outsourcing/occ-bul_2001_47_third_party_relationships.pdf). Last visited September 8, 2007. OCC has stated that the Board of Directors and management must insure that third-party activity is conducted in a safe and sound manner and in compliance with applicable laws. In OCC's view, the fact that a bank utilizes a third party does not diminish the responsibility of its Board and management to see that such services are provided.

<sup>24</sup> See, FSSCC home page, at <https://www.fsscc.org> (Last visited August 27, 2007).

<sup>25</sup> A preliminary step may be to argue that a failure to develop a plan at all violates the standard of care. Citing the Deloitte Center for Health Solutions, "Business Preparations for Pandemic Flu" (2006), for example, DHS has asserted that "Most large businesses have extensive contingency plans on hand for managing natural and man-made disasters." 4.1 The Business Continuity of Operations Plan-Essential (COP-E), *The Pandemic Influenza Preparedness, Response, and Recovery Guide for Critical Infrastructure and Key Resources* (September 19, 2006) at 20.

such as the recommendations of trade associations, companies should exercise similar circumspection. Groups purporting to speak for companies in an entire industry must provide useful guidance on effective preparations yet be cautious not to conflate mere aspirations with actual, appropriate, feasible recommendations.

Ironically, the government's effort to contain the harms of a pandemic may have increased the legal risks of companies regarded as part of the critical infrastructure. Particularly notable in this regard is the letter of December 6, 2005, from the Secretaries of HHS, DHS, and Commerce. It states in pertinent part: "Companies that provide critical infrastructure services, such as power and telecommunications, also have a special responsibility to plan for continued operation in a crisis and should plan accordingly. As with any catastrophe, having a contingency plan is essential."<sup>26</sup> No legal authority defines the metes and bounds of this alleged "special responsibility." Nor can cabinet secretaries, merely by signing letters, make law. Companies should anticipate, nevertheless, that in fashioning claims plaintiffs' lawyers will attempt to utilize pronouncements such as this. As they articulate their policies and position statements, federal agencies and officers should develop a heightened sensitivity to the potential for such mischief. Otherwise, such statements could do more harm than good. Industry representatives may wish to acquaint legislators and agency personnel with the unintended harmful consequences that could arise from statements such as these.

## Antivirals

Does the standard of care require the purchase of antivirals? This question undoubtedly shoots at a moving target. At this writing, a majority of financial services companies have probably not stockpiled these medicines, although some have. The standard of care is not established by a plebiscite; that which is "reasonable" may not necessarily be the same as what the majority of companies are doing. Nevertheless, a company that can show that most of its competitors are not taking a particular step it is criticized for omitting has gone at least some distance towards a successful defense. Over time, however, practices could change; companies should watch developments as they unfold across the industry. Roundtable participants indicated that when their companies must send personnel into areas where malaria, for example, is a common problem, the companies often provide antimalarial medications to their traveling employees. If financial service companies, especially those seen as industry leaders, begin to adopt a particular course of action to prepare for pandemic, whether it be stockpiling and distribution of antivirals or any other measure, it may be wise to re-evaluate your initial decisions on such questions to determine whether they remain sound and legally defensible.

As with many pandemic-related questions, both the benefits and risks of stockpiling should be considered. Stockpiling has the potential to save many lives, and, as a by-product, to enable a company that would otherwise be crippled to survive and perhaps

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<sup>26</sup> Pandemic Flu Business Letter, 12/6/05, from Michael O. Leavitt, Secretary, Department of Health and Human Services, Carlos M. Gutierrez, Secretary, Department of Commerce, and Michael Chertoff, Secretary, Department of Homeland Security, <http://www.pandemicflu.gov/plan/workplaceplanning/panbusletter.html> (last visited August 6, 2007).

even prosper. But purchasing antivirals is no panacea. To be effective, neuraminidase inhibitors should be taken within 48 hours of the onset of symptoms. In the event of a pandemic, distributing the drug rapidly enough to reach the sick in time for effective treatment could be problematic. Moreover, some companies may be concerned, as their roundtable representatives suggested, that government could seize stockpiled drugs to meet the needs of other citizens. That possibility is part of why some companies have decided not only to procure antivirals for their personnel (and sometimes for the families of employees as well), but to distribute these medicines in advance of need after extensively educating workers in their proper use. There may be some risk that the organism could develop resistance, and companies may want to consult with medical experts on whether that risk may be increased with advance distribution of medications. Then, too, all drugs have side effects. Some taking antivirals may claim to have developed side effects or adverse reactions.<sup>27</sup> If a company furnishes antivirals to some employees, but not all, those excluded might bring claims; even if no such claims arise, the effect upon morale of perceived discrimination could be harmful.

Some participants expressed concerns about pharmaceutical efficacy. Neuraminidase inhibitors are relatively new compounds, so humanity's experience with them, and our knowledge about them, is necessarily more limited than with older, better-known drugs. For understandable reasons, controlled clinical trials have not been conducted.<sup>28</sup> In animal models however, oseltamivir was effective in preventing death from H5NI infection and drug resistance did not develop.<sup>29</sup> Zanamavir protected mice against death from H5NI and chickens against H7N7.<sup>30</sup> Computer models have suggested that neuraminidase inhibitors may be able to contain a potential strain of influenza at its source.<sup>31</sup> No drug is 100 percent effective, and of course in pandemic there is no way to predict which pathogen will emerge as the villain, never mind which, if any, pharmaceutical will be effective against it. Based on mathematical modeling, however, combined interventions (hospital and community control measures, antivirals, and vaccines) are expected to be more effective than reliance upon any one modality alone.<sup>32</sup> Companies may wish to consult their own in-house physicians or outside consultants and public health departments for guidance here. There are also other potential sources of information. The FSSCC has created an

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<sup>27</sup> Workers' compensation law may be relevant here. See discussion below.

<sup>28</sup> WHO, "Clinical Management of Human Infection with Avian Influenza A (H5NI) Virus," Updated advice August, 15 2007 at 5, 6 available at <http://www.who.int/csr/resources/publications/en/index.html>, (Last visited August, 28 2007).

<sup>29</sup> These include ferrets, Govorkova, E.A., Ilyushina, N.A., Boltz, D.A., et al., "Efficacy of oseltamivir therapy in ferrets inoculated with different clades of H5NI influenza virus," 51(5) *Antimicrob. Agents Chemother.* 1414-24 (2007); and mice, Govorkova, E.A., Leneva, I.A., Goloubeva, G, et al., "Comparison of efficacies of RWJ-270201, zanamavir, and oseltamivir against H5N1, H9N2 and other avian influenza viruses," 45 *Antimicrob. Agents Chemother.* 2723-32 (2001); Leneva, I.A., Roberts, N. Govorkova, E.A., et al., "The neuraminidase inhibitor GS 4104 (oseltamivir phosphate) is efficacious against A/Hong Kong/156/97 (H5NI) and A/Hong Kong/1074/99 (H9N2) influenza viruses," 48 *Antivir. Res.* 101-15 (2000).

<sup>30</sup> Gubareva, L.V., Penn, C.R. and Webster, R.G., "Inhibitors of replication of avian influenza viruses by the neuraminidase inhibitor 4-guanidino-2, 4-dideoxy-2, 3-dehydro-N-acetylneuraminic acid," 212 *Virology* 323-330 (1995); Gubareva, L.V., McCullers, J.A., Bethell, R.C., and Webster, R.G., "Characterization of influenza A/HongKong/156/97 (H5NI) virus in a mouse model and protective effect of zanamivir on H5NI infection in mice," 178 *J. Infect. Dis.* 1592-96 (1998).

<sup>31</sup> Longini, I.M., Nizam, A., Xu, S., et al., "Containing pandemic influenza at the source," 309 *Science* 1083-7 (2005); Ferguson, N.M., Cummings, D.A.T., Cauchemez, S., et al., "Strategics for containing v. emerging influenza pandemic in Southeast Asia," 437 *Nature* 209-14 (2005).

<sup>32</sup> Nuno, M., Chowell, G., and Gunel, A.B., "Assessing the role of basic control measures, antivirals and vaccine in curtailing pandemic influenza: Scenarios for the US, UK and the Netherlands," 4 *J.R. Soc. Interface* 505-21 (2008), abstract available at <http://www.journals.royalsoc.ac.uk/content/1656/rq4712132256/>, (Last visited August 28, 2007).

Infectious Disease Forum; its Avian Flu Working Group may also be able to provide assistance.

In sum, the decision to stockpile antivirals, or the decision to distribute them in advance, should be made only after carefully weighing the medical and legal risks and benefits.

## Decision-making in a Pandemic

In anticipation of the probability that some corporate decisions during a pandemic may require board action and that achieving a quorum could be impossible, the board may want to amend its bylaws in advance of need to permit decision-making during a crisis, perhaps by authorizing an executive committee to act as the board's agent. If such a committee already exists, it may be wise to make provision for how the committee is to act in case even its much smaller quorum cannot be assembled.

## Privilege

In their internal communications, companies should factor in the possibility that, if a suit is filed, a plaintiff may seek to discover board resolutions and minutes, the plan itself, drafts of the plan, correspondence and e-mail pertinent to a pandemic or to the plan, the content of Web pages, announcements to personnel, vendors, and others, -- in short, virtually any communications pertinent to pandemic preparation that company employees have developed or participated in. Documents circulated publicly, of course, cannot be protected -- that cat is already out of its bag. In fact, even strictly internal documents may well be discoverable. It may be possible, however, at least in some jurisdictions, to shield some of these documents from discovery under the critical self-analysis doctrine, which is based on the need to promote candid self-evaluation. One of the primary purposes of this doctrine is to prevent a chilling effect on self-evaluation undertaken to protect the public.<sup>33</sup> The theory is that if a company is aware that by setting high standards for itself it significantly enhances its liability exposure, then in rational defense of its own self-interest it will avoid doing so, to the detriment, possibly, of its customers and perhaps even society as a whole.

In addition, to the extent that an articulable threat of litigation exists, it may be possible to shelter some portion of this trove from discovery under the work product doctrine.<sup>34</sup> If an investigation into a relevant question is undertaken in anticipation of litigation, especially at the request of counsel, a colorable claim of privilege may arise. It may be prudent to consider whether, and how, advantage of this approach might be taken. Companies should recognize, nevertheless, that sheltering such documents from discovery may be

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<sup>33</sup> See, e.g., *Granger v. National R. Passenger Corp.*, 116 F.R.D. 507 (E.D. Pa. 1987) (explaining that "one of the purposes of the [critical self-analysis] doctrine is to prevent a 'chilling' effect on self-analysis and self-evaluation prepared for the purpose of protecting the public by instituting practices assuring safer operations"); *Hogan v. City of Easton*, 2006 U.S. Dist. LEXIS 90235 (E.D. Pa. 2006) (denying admissibility of various police studies because, among others, they were conducted for the purpose of self-evaluation).

<sup>34</sup> The work product doctrine allows a party to discover material prepared in anticipation of litigation or for trial only upon a showing that the requesting party has a substantial need for the material and cannot obtain the material or its equivalent elsewhere without incurring a substantial hardship. See, Fed. R. Civ. P. 26(b)(3).

difficult or impossible in jurisdictions ruling adversely on the issue in other circumstances. The best approach is to take such precautions as seem appropriate to maximize the chances that privilege protection will be afforded, but to draft all pertinent documents as though it was clear that adversaries will, in fact, be able to obtain and use them at trial.

## Labor and Employment

As co-author Dave Kieffer explains in the following chapter, the applicable law may well set a floor for companies' decisions respecting employment issues in a pandemic setting, but it probably will not set a ceiling, and many non-legal considerations may shape a company's judgments in this area. It is necessary, nevertheless, to have a basic working knowledge of some of the more prominent employment laws as you wrestle with how best to handle employment-related problems that a pandemic will cause.

Notwithstanding the discussion of industry-based standards of care, employers will generally be required by applicable occupational health and safety laws to take reasonable steps to maintain a safe working environment. In the financial services arena, a problem raised by some of our participants was "presenteeism," the tendency of some workers to report for duty when they should not – as, for example, when contagious. Hence, the existence of a pandemic will introduce a two-edged sword into the workplace. Not only must employers be cognizant of their treatment of infected or potentially infected workers who need to be away from the workplace, but employers must take reasonable steps to maintain a safe environment for those who are not infected. Otherwise, healthy employees may refuse to work, thus compounding the staffing problems caused by the pandemic itself.

## The General Duty Clause

The Occupational Safety and Health (OSH) Act<sup>35</sup> is the primary federal law regulating safety and health conditions in the workplace, and it applies to virtually all private sector employers in the United States.<sup>36</sup> In addition to complying with all duly promulgated safety and health standards, employers must comply with the OSH Act's general duty clause, which provides that 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."<sup>37</sup> Violations do not give rise to a private right of action, however.

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<sup>35</sup> 29 U.S.C. §§ 651-678.

<sup>36</sup> See generally, Mark A. Rothstein, *Occupational Safety and Health Law* § 12, St. Paul: West Group (4th ed. 1998).

<sup>37</sup> 29 U.S.C. § 654(a)(1), § 5(a)(1) of the OSH Act. Employers can be cited for violating the General Duty Clause if there is a recognized hazard and they do not take reasonable steps to prevent or abate the hazard. U.S. Department of Labor, Occupational Safety & Health Administration, Guidance on Preparing Workplaces for an Influenza Pandemic, OSHA 3327-02N (undated, but issued in May, 2007), at [http://www.osha.gov/Publications/influenza\\_pandemic.html](http://www.osha.gov/Publications/influenza_pandemic.html). An employer can be found to be in violation of the general duty clause if it can be shown that: 1. A hazard existed. 2. The hazard was likely to cause death or serious physical harm. 3. It had knowledge of the hazard or should have had knowledge because the hazard had been recognized by the employer, its industry, or common sense. 4. The hazard was foreseeable. 5. Workers were exposed to the hazard. See, U.S. Chamber of Commerce Small Business Center's Website: [http://www.uschamber.com/sb/business/P04/P04\\_8421.asp](http://www.uschamber.com/sb/business/P04/P04_8421.asp) (Last visited August 6, 2007).

## Leave

At this stage, the actual attack rate of whatever organism eventually causes a pandemic cannot be predicted. Experts estimate, however, that over time as many as 40 percent of the workforce could be affected. Companies should scrutinize their leave policies in light of the extraordinary levels of sickness that may attend a true pandemic.

## Workers' Comp

Employees out of work as a result of the flu are unlikely to be able to claim workers' compensation because it will be difficult, if not impossible, to prove that the illness was contracted in the course of employment.<sup>38</sup> The result may differ, however, if a worker can show that he developed a medical problem because his employer, as a condition of employment, required him to take medication, submit to vaccination, or undergo some other form of treatment.

Consider the legal principles applicable in Virginia as an example of one state's approach. When an employee is injured at a place where his employment requires him to be while engaged in an activity reasonably connected with or incidental to his employment, the injury is compensable under Virginia's workers' compensation statute.<sup>39</sup> The Virginia Workers' Compensation Commission ("Commission") has held that in certain situations, injuries caused by vaccination or inoculation injections may fall within the realm of workers' compensation.<sup>40</sup> For a vaccination or inoculation to be a compensable injury, "the claimant must prove that the vaccination or inoculation arose out of and in the course of employment, and resulted in an 'obvious sudden mechanical or structural change in the body.'" <sup>41</sup> Where the employer has required the employee to undergo an injection or vaccination, the Commission has found that the claimant's adverse reaction to the injection or vaccine was a compensable injury.<sup>42</sup> There would seem to be no reason why a different conclusion would be reached if the compulsory treatment were the taking of a medication.

There does not seem to be a Commission decision or any case law discussing how the standard is applied when injection, vaccination, or other treatment is offered by an employer to its employees on a completely voluntary basis. It is possible, however, to draw an analogy looking at how the Commission and courts have addressed injuries sustained during recreational activities. Under certain circumstances, an injury sustained as a result of a voluntary recreational activity can be a compensable worker's compensation injury.<sup>43</sup> "The dispositive question is whether the social or recreational function is so closely associated with the employment to be considered an incident of it."<sup>44</sup> The factors to consider in making this determination include: (1) the degree to

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<sup>38</sup> To be compensable, the illness must have "arisen out of and in the course of employment." See, e.g., Va. Code Ann. § 65.2-101. If the workplace exposes the employee to additional risk of infection, it may be possible for him to make out a compensation claim.

<sup>39</sup> *Kim v. Sportswear*, 10 Va. App. 460, 464 (1990).

<sup>40</sup> *Lovinger v. Children's Hosp.*, 2002 WL 149373, VWC File No. 186-90-44 (Va. Workers' Comp. Comm'n Jan. 7, 2002).

<sup>41</sup> *Id.*

<sup>42</sup> See, *Dempsey v. Henrico (County of) Fire*, 2000 WL 33117008, VWC File No. 196-40-41 (Va. Workers' Comp. Comm'n Dec. 12, 2000), *aff'd*, 2001 WL 1496549, No. 0086-01-2 (Va. App. Nov. 21, 2001); *Overton v. Commonwealth of Va./Augusta Corr. Ctr.*, 1994 WL 1039861, VWC File Non. 161-10-26 (Va. Workers' Comp. Comm'n July 1, 1994).

<sup>43</sup> *Mullins v. Westmoreland Coal Co.*, 10 Va. App. 304, 307 (1990).

<sup>44</sup> *Kim*, 10 Va. App. at 466.

which the employer derives a benefit from the activity; (2) the degree of sponsorship and participation by the employer; (3) whether the activity occurs on the employer's premises; (4) when the activity occurs in relation to the work day; and (5) the frequency or period over which the activity has been conducted.<sup>45</sup> Each factor is relevant; however, no one factor is essential to a determination that the event was or was not within the course of employment.<sup>46</sup>

Several of these factors could weigh in favor of compensability in the context of influenza vaccinations or other prophylaxis or treatment. In other states, injuries suffered as a result of an adverse reaction to a voluntary inoculation or vaccination have been determined to be compensable workers' compensation injuries.<sup>47</sup>

Thus, depending on the state, it is possible that an adverse reaction to a flu vaccine or medication could be a compensable injury whether the vaccination is voluntary or involuntary, if the factors discussed above are met. This possibility does not mean, of course, that providing access to vaccines and/or to antivirals is unwise. It merely means that in weighing risks and benefits, companies should factor in the cost of the risk that, among that fraction of those treated who can show they were thereby harmed, some may become entitled to compensation.

## Quarantine

Individuals quarantined but who never develop disease probably have no compensable illness or injury.<sup>48</sup> Nor do they enjoy any special protection from adverse employment decisions. Financial services companies may wish to think carefully, however, about the effect in the court of public opinion of adverse job actions against such workers.

## The ADA

It is unlikely in a pandemic that the Americans with Disabilities Act will provide any protection for workers either.<sup>49</sup> The ADA may impose certain restrictions, however, on

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<sup>45</sup> *Id.* at 465-66.

<sup>46</sup> *Id.* at 468.

<sup>47</sup> See, e.g., *Hicks's Case*, 820 N.E.2d 826 (Mass. App. Ct. 2005) (finding the injury resulting from a voluntary flu shot offered by the claimant's employer compensable because the employer, a medical center, was necessarily benefited by preventing or limiting the potential its own employees might spread a contagious illness); *E.I. Dupont de Nemours & Co. v. Faupel*, 859 A.2d 1042 (Del. Super. 2004) (affirming the state Industrial Accident Board's determination that the claimant's injury was compensable where the claimant volunteered to get a flu vaccine offered by her employer and the Board found that the vaccination, as a preventative measure, benefited the employer by providing good employer-employee relations and decreasing absenteeism); *Monette v. Manatee Mem. Hosp.*, 579 So.2d 195 (Fla. Dist. Ct. App. 1991) (finding that a hospital worker's injury resulting from a voluntary flu vaccination offered by her employer to be compensable because "the claimant's effort to avoid illness that would impair her work performance is incidental to her employment" and the "employer derives a benefit from maintaining the health of employees"); *City of Austin v. Smith*, 579 S.W.2d 84 (Tex.Ct. App. 1979); *Lampkin v. Harzfeld's*, 407 S.W.2d 894 (Mo. 1966) (holding that the injury arose out of the employment because the employee was "administered the influenza inoculation by an agent of her employer on her employer's premises during regular work and normal work hours").

<sup>48</sup> Rothstein, M.A., Craver, C.B., Schroder, E.P., Shoben, E.W., *Employment Law*, 3d ed., St. Paul, Minn.: West (2004). Discharge while under quarantine, however, could possibly violate Title I of the ADA, §§ 12101-12213, or an analogous state disability law.

<sup>49</sup> ADA protection extends to individuals otherwise qualified to perform the essential duties of their jobs but who labor under a "disability" defined to mean (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; or (2) "a record of such an impairment; or (3) "being regarded as having such an impairment." 42 U.S.C. § 12102(2). Short term illnesses

an employer's ability to seek medical information from employees, and may require that employers take steps to protect that information. Title I of the ADA limits an employer's ability to "make disability related inquiries or require medical examinations."<sup>50</sup> In its enforcement guidance, the EEOC takes the position that these limitations apply to all employees, not just those with actual or perceived disabilities.<sup>51</sup> Thus, questions that are broad and might elicit information about a disability, or those that relate to a specific disability, must be job-related and consistent with business necessity. Employers must be careful, if seeking information regarding the health status of potentially infected employees, to avoid disability-related inquiries.

Likewise, there must be a demonstrable need for requiring employees to undergo medical examinations.

A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health. The guidance on Pre-employment Questions and Medical Examinations lists the following factors that should be considered to determine whether a test (or procedure) is a medical examination: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task; (6) whether the test normally is given in a medical setting; and, (7) whether medical equipment is used.<sup>52</sup>

Finally, information obtained pursuant to any medical inquiries must be kept in separate files and must be treated as confidential.<sup>53</sup>

## The FMLA

There is a strong likelihood that infected workers will qualify for protection under the Family and Medical Leave Act (FMLA),<sup>54</sup> which requires the provision of a certain amount of unpaid leave, the option to substitute unused sick leave or vacation, and job restoration to the same or a substantially equivalent position. Over half the states also have their own family and medical leave acts, some of which apply to public employees only. A few laws go beyond the federal law, such as by covering smaller employers.<sup>55</sup> While most companies generally comply with the FMLA, the increased hardship associated with a

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such as flu do not generally qualify as disabilities under the Act.

<sup>50</sup> 42 U.S.C. §§ 12101-12117, 12201-12213 (1994)(codified as amended).

<sup>51</sup> EEOC Enforcement Guidance, available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>, last visited September 5, 2007.

<sup>52</sup> *Id.*

<sup>53</sup> 29 CFR §1630.14.

<sup>54</sup> See, 29 U.S.C. §§ 2601-2654 (applies to employers of 50 or more employees). To be eligible for the protections of FMLA, an employee must 1) work for a covered employer; 2) work in a location with 50 or more employees within 75 mile radius; 3) work at least 12 months (does not have to be consecutive); and 4) work at least 1,250 hours during 12 month period preceding leave request. For information on Federal labor laws, see, [www.dol.gov](http://www.dol.gov).

<sup>55</sup> For instance, California employees are entitled to up to six weeks of paid leave. Cal. Unemp. Ins. Code §§ 3300-3305.

pandemic's high absenteeism will require a greater level of planning by employers in order to maintain compliance levels.

## Health Insurance

Whether employees insured under the company's policies will have adequate health care coverage will, of course, vary with the company. If influenza behaves as it has historically, however, the great majority of patients will probably either die or recover quickly – within a week or two. In dollar terms, then, healthcare costs may be relatively modest.

## Organized Labor

For unionized employers,<sup>56</sup> changes to leave or benefit policies, as well as cross training to permit a greater level of continuity during periods of high absenteeism rates, may all require bargaining with union representatives before implementation.<sup>57</sup>

## Contracts

Every financial services company is both a buyer and a seller. Most commercial contracts contain *force majeure* clauses.<sup>58</sup> As a buyer, a company should consider whether, in a pandemic environment, its suppliers would be excused for nonperformance under the *force majeure* clauses of its existing contracts. As a seller, the company should determine whether its nonperformance will be so excused. *Force majeure* clauses vary, but they tend to be narrowly construed and seldom mention pandemic expressly. Omission of this specific “force” from the list may preclude effective application of the clause.<sup>59</sup> Sometimes *force majeure* law in a given jurisdiction will excuse nonperformance for natural phenomena beyond the control of the parties. In other jurisdictions, however, nonperformance is excused only if the natural phenomena were not only beyond human control, but unforeseeable.<sup>60</sup> It would be difficult to characterize a pandemic as unforeseeable.

Even where a viable *force majeure* defense exists, it may fail in some jurisdictions if some other factor, not a *force majeure* or “act of God,” played a role in the outcome.<sup>61</sup> In some

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<sup>56</sup> Although unions are not prevalent in the financial services industry, some unions have successfully petitioned to represent employees in certain aspects of the business, such as call centers.

<sup>57</sup> See, generally, the National Labor Relations Act, 29 U.S.C. §§ 151-169.

<sup>58</sup> *Force majeure* (French: a “superior force”) means an event or effect that cannot be anticipated or controlled; it includes both acts of nature (i.e. floods or hurricanes) and acts of people (i.e. riots, strikes, or wars). BLACK’S LAW DICTIONARY 263 (Pocket Edition 1996). See, Glossary.

<sup>59</sup> See, *Seitz v. Mark-O-Lite Contractors, Inc.*, 210 N.J. Super. 646, 510 A.2d 319 (1986) (if a law refers to autos, trucks, tractors, motorcycles, and other motor-powered vehicles, “vehicles” would not include airplanes).

<sup>60</sup> See, e.g., *URI Cogeneration Partners, Inc. v. Board of Governors for Higher Education*, 915 F. Supp. 1267, 1287 (D.R.I. 1996) (holding that the court will extend a *force majeure* provision to only those situations that were unforeseeable at the time of the contract); *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099 (holding that the shutdown of the plant was foreseeable and therefore defendants would not rely on the *force majeure* clause). See also, *Lane v. G&M Statuary, Inc.*, 156 S.W.3d 498 (Mo. Ct. App. 2005); *Bradford v. Stanley*, 355 So.2d 328, 330 (Ala. 1978) (flood). For cases of possible historical interest, see *Charing Cross Co. v. London Hydraulic Co.*, 3 K.B. 442, 449 (1913); *Pandorf v. Hamilton*, 17 Q.B.D. 670, 675 (1886).

<sup>61</sup> *Cooper v. Horn*, 248 Va. 417 (1994) (defendants allowed trees to grow in earthen dam, so even though dam failed during a three-day storm, clearly a *force majeure*, human agency contributed to the flood damage and the defense failed). See also, *Central Ga. Elec. Membership Corp. v. Heath*, 4 S.E.2d 700 (Ga. Ct. App. 1939) (lightening strike was an act of God, but failure to ground line was not “free of human agency,” so liability lay).

jurisdictions, where harm is caused concurrently by a *force majeure* and human acts, the defendant is liable for only that portion of the damages caused by the latter.<sup>62</sup>

The party invoking *force majeure* has the burden of proof.<sup>63</sup> Whether a *force majeure* arose is a question of fact for the jury.<sup>64</sup>

Financial services companies should examine their contracts to see what provisions help and hurt them. They may wish to renegotiate those agreements in pursuit of better terms, although renegotiation might well require payment of additional consideration.<sup>65</sup>

In addition, companies in the financial services sector should be making inquiries of their suppliers, particularly those that supply critical items, to determine what those companies are doing to prepare for a potential pandemic and to determine what those companies are doing to determine the adequacy of preparations farther down the supply chain.<sup>66</sup> You must also ask them to allow you to see and evaluate the plans they have developed. Poor oversight of the financial institution's third-party relationships could significantly increase the risk profile of a bank, for example, so the bank should exercise effective oversight and controls on its third-party relationships to promote preparedness and to mitigate the bank's risk of inferior performance by the third party. The bank will also have risk with respect to its primary regulator, since the OCC has the authority to examine and regulate the functions or operations performed or provided by third-party service providers to the same extent as if such functions were performed by the bank itself on its own premises.

To minimize additional risks such as these, a financial institution must develop a contingency plan against the possibility that the third party becomes unable to perform as expected, and the financial institution must also review the third party's business resumption contingency planning and testing to assure that it has a plan on how it can continue to provide and/or restore services within acceptable time limits. And as discussed elsewhere, financial services companies may wish to assess their own policies regarding stockpiling critical supplies in light of a pandemic's expected duration.

## Insurance

Insured companies may seek to recover some of their losses from their carriers. The position of the insurance industry, however, is that the risks of a pandemic are essentially uninsurable.

### Business Interruption Insurance

Business interruption coverage is insurance coverage designed to protect business

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<sup>62</sup> *Webb v. Platte Valley Pub. Power & Irrigation Dist.*, 18 N.W. Ind. 563 (Neb. 1945) (burst dam); *Anderson v. Highland Lake Co.*, 258 S.W. 218 (Tex. Civ. App. 1924) (same).

<sup>63</sup> *Naxera v. Watham*, 159 N.W.2d 513, 517 (Iowa 1968).

<sup>64</sup> *Lee v. Mobil Oil Corp.*, 452 P.2d 857, 861 (Kan. 1969).

<sup>65</sup> See, e.g., *Demasse v. ITT Corp.*, 984 P.2d 1138 (Ariz. 1999) (holding that any modification to layoff policy was ineffective absent additional consideration).

<sup>66</sup> See, OCC Bulletin 2001-47, *supra*, n. 23.

owners from the loss of income caused by interruptions of normal business activities. Traditionally, business interruption insurance has applied only when the interruption is caused by direct physical loss or damage to the insured property. For all its formidable powers of destruction, the virus attacks humans only, not bricks and mortar. Over the years, insurers have enhanced the coverage available under business interruption policies by offering coverage extensions for other types of business losses, including losses caused by acts of civil authorities that prevent access to an insured location or interruptions at supplier businesses that interrupt the insured's supply chain. Even with these coverage extensions, however, insurers are likely to take the position that business interruptions caused by an outbreak of an infectious disease do not result from a physical loss to property and so are not covered. Any business faced with a loss attributable to supply chain interruptions, employee absenteeism, or decreased customer demand as a consequence of an infectious disease outbreak should consider conferring with legal counsel familiar with insurance coverage issues regarding whether coverage is available under the particular terms and conditions of the insured's policy.<sup>67</sup> And because the insurance industry may not be entirely monolithic on this point, it may be worthwhile now, in advance of need, to shop for the best possible coverage.

If no carrier will agree to provide coverage explicitly designed for pandemic-related business interruption, there might be ways to challenge the carriers' position on coverage already in force. If regular maintenance is deferred for the duration, for example, plant and equipment could deteriorate, and the company might be able to invoke such deterioration in support of its claim. Then, too, consider an analogy to the airline industry. Airlines have on occasion successfully sued their insurers for losses occasioned by hijackings, even where losses from hijackings are not expressly covered by the applicable contracts of insurance. The courts have reasoned that in the modern era, hijacking is unfortunately a fact of life, a risk inherent in the operation of airlines, and companies insuring such airlines have to anticipate that they will be on the hook for those losses.<sup>68</sup> Carriers denying coverage for losses occasioned by Katrina have also been sued.<sup>69</sup> After a pandemic, coverage litigation between insured companies and their carriers is likely.

## Challenging Quarantine

Influenza is an equal opportunity threat. Your janitorial staff and your C-suite are more-or-

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<sup>67</sup> See, *Archer-Daniels-Midland Co. v. Phoenix Assur. Co. of New York*, 936 F.Supp. 534 (N.D. Ill. 1996) (business was entitled to coverage for extra transportation expenses incurred after disruption of barge traffic on Mississippi River based on language in contingent business interruption policy that provided coverage for losses resulting from damage to the property of any "supplier"; the Army Corps of Engineers and Coast Guard qualified as "any supplier of goods or services" within meaning of the policy by virtue of their roles in constructing improvements to the navigability of the Mississippi River); see also, *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968) (holding that the term "direct physical loss" in insurance policy extended coverage to damages resulting from the loss of use of a building where an accumulation of gasoline vapors rendered the property uninhabitable).

<sup>68</sup> See, *Pan American World Airways v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974) (losses from hijacking covered because not excluded from "all risk" policy).

<sup>69</sup> See, e.g., Complaint, *Shows v. State Farm Medical Automobile Insurance Co., et al.*, Civil Action No. 1:2007cv00709 (S.D. Miss. 2007), available at <http://www.scruggskatrinagroup.com/> (Last accessed June 26, 2007) (alleging *inter alia* RICO conspiracy, fraud, breach of contract, negligence and breach of fiduciary duty). In the aftermath of Katrina a reported 6600 insurance-related suits have been filed in District (federal) Court in Louisiana, of which 3700 are still pending; thousands more have been filed in state court there. "Insurers Bear Brunt of Anger in New Orleans," *Advisen FPN*, September 3 2007, available at <http://www.advisen.com/articles/article668602711171643491.html>, (Last accessed September 4, 2007).

less equally at risk. There is a real possibility that members of your top leadership could be subjected to isolation or quarantine, and if that happens, their ability to lead and to make decisions could be threatened.

In proper circumstances, quarantine diminishes contagion and so saves lives. Quarantine is also a massive violation of civil liberties, however. The law does provide protections from abuse of power by the civil authorities,<sup>70</sup> and it may be possible to challenge imposition of quarantine orders if procedural requirements are not met or constitutional rights are violated. While a full discussion of this topic is beyond the scope of this document, you may wish to consider whether and under what circumstances you might challenge a quarantine order imposed on, for example, your CEO or Board Chairman.

In its “Statement on Preparations for ‘Avian Flu,’”<sup>71</sup> the FSSCC raised the possibility of splitting critical staff into “two or more teams operating out of different locations,” so that if one were quarantined the other might not be. This approach may work well for many, but may not be feasible at the highest levels.

## Communications

We have already considered internal communications above, in connection with litigation that might be brought against the company by shareholders or others. Let us now consider briefly the vulnerability of external communications to exploitation by other adversaries.

In a pandemic, financial services companies may be called upon to communicate clearly, early, and often. The audience will include customers, employees, suppliers, shareholders, regulators, legislators, and the media. As some of our participants observed, most companies already have designated individuals to deal with the press; employees speaking without authorization to media representatives may be subject to discipline up to and including discharge. One approach may be to identify topics likely to be important and what the company wishes to say about them, so that templates are available for use when needed.

In a pandemic, all of the company’s audiences will want information quickly and frequently. Unfortunately, at the time they are called upon to speak, those responsible for such communications may have far less information and far less reliable information than they would ideally like to have, even if they have prepared templates or outlines in advance. They will be under tremendous pressure and will likely have significant difficulty in meeting

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<sup>70</sup> The best example is the writ of *habeas corpus*. (Latin: you should have the body.) A writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment is not illegal. See, Glossary. *Habeas* “is not an action or suit, but is a summary remedy open to the person detained. It is civil rather than criminal in nature and is a legal and not equitable remedy.” *State ex rel. Deeb v. Fabisinski*, 152 So. 207, 209 (Fla. 1933). In general, any person “restrained of his liberty under any pretense whatever, may prosecute a writ of *habeas corpus*.” See, e.g., RCW 7.36.010. Generally, the petitioner will need to show actual prejudice resulting from constitutional error. In re Hagler, 97 Wash.2d 818, 825-26, 650 P.2d 1103 (1982). If it determines that his detention is unlawful, the court is to release the detainee. Ind. Code § 34-25.5-1. Some states explicitly provide that *habeas* is not to be suspended during execution of public health statutes. See, e.g., Ind. Code § 12-26-2-1.

<sup>71</sup> FSSCC, “Statement on Preparation for ‘Avian Flu’” January 23, 2006, available at <https://www.chicagofirst.org/resources/fsscc-avian-flu-statement.pdf>, last visited August 28, 2007.

the information demands of their various constituencies. The possibility of inaccuracy is high. To the extent that members of your audience detrimentally rely on your statements, you could be subject to claims.<sup>72</sup> It may be prudent to confer with counsel about any templates you prepare in advance, to spot and, where possible, diminish legal pitfalls. In communications you disseminate well ahead of time, you may also want to point out, as a couple of roundtable participants did, that you are not in the news business.

## Conclusion

A pandemic is first and foremost a threat to public health. All other issues pale in comparison. As discussed at the outset, however, the ability of financial services companies to operate in a pandemic environment will have a direct impact on the extent of the threat to public health. Also, for any business organization, but especially for financial services companies and other segments of the “critical infrastructure,” a pandemic implicates an array of legal issues as well. In developing their plans, companies in the sector must factor in these issues to be in the best position to survive the disease and its aftermath.

## Summary

- Corporate boards could face claims that, as a result of their failure to exercise due care, pandemic-related losses were larger than necessary.
  - The reasonableness of decisions will be analyzed in light of the circumstances, including the limits of governmental capabilities.
  - Plaintiffs may invoke multiple proof sources to establish the standard of care.
    - Companies should compare their actions and decisions with those of competitors whose actions may be held up as standards.
    - Companies should examine legal authorities such as statutes and regulation for compliance.
    - The company should temper the requirements it imposes on itself so that an adversary will not be able to convert a statement of aspirations into a pseudo-legal requirement.
    - Companies should consider whether to confer with governmental officials about the unintended adverse consequences that the officials’ pronouncements could have upon the post-pandemic litigation positions of critical infrastructure businesses.
  - Companies should weigh and periodically re-evaluate the risks and benefits of antivirals and other health measures and compare their decisions with those made by others.
  - Companies may wish to promote:
    - Tort reform
    - Regulatory relief
  - To the extent feasible, companies may wish to attempt to shelter sensitive

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<sup>72</sup> See, e.g., *Hoepfner v. Jess Howard Elec. Co.*, 780 N.E.2d 290 (Ohio Ct. App. 2002) (to invoke the doctrine of equitable estoppel, plaintiff must show detrimental reliance on misrepresentation).

documents from discovery, yet prepare them with the supposition that in fact the documents will be discoverable.

- Labor and employment law must inform corporate personnel policies
  - The OSHA General Duty Clause imposes a duty to maintain a worksite “free from recognized hazards.”
  - Workers’ comp claims will probably fail, but if a worker is harmed by a treatment required by his job, or even, possibly, by a treatment given voluntarily, such claims might succeed.
  - The federal FMLA and its state analogues may provide protection for infected workers.
  - Companies may wish to evaluate the adequacy of their workers’ health insurance and the cost of augmenting it.
  - Companies with unionized employees should discuss pandemic policies with union representatives in advance of need.
- In a pandemic, it may be difficult to live up to contracts.
  - Scrutinize *force majeure* clauses in your contracts.
    - As a buyer can you require your vendors to supply what they promised?
    - As a seller, can you invoke your clause as a defense to your own non-performance?
  - To what extent have your suppliers made reasonable preparations?
    - Do you wish to request to see their plans?
  - Consider whether to stockpile critical supplies, and if so, which ones and how.
- Insurance
  - Confer with your carriers’ representatives or your counsel, or both, respecting adequacy of coverage.
  - Solicit their recommendations on risk management.
  - Consider legal challenges to denials of coverage.
- Quarantine
  - Identify the circumstances, if any, under which you would challenge an order of quarantine or isolation.
- Communication
  - Consider developing templates to assist the communication effort.
  - In developing templates, confer with your counsel to minimize legal risks.

# Nothing Works Unless People Work

By Dave Kieffer, Dave Kieffer Partners

## People

Conventional and investment banks routinely sell some of their capital risks for a price. One risk they can't sell at any price is their core human capital.

The simple fact is that people are what this is all about. Just as in good times, you can't have high performance without the right mix of talent and commitment; you cannot weather a prolonged crisis like a pandemic without enough of the necessary people.

## The People Paradox

The great paradox of much pandemic planning is that it tends to focus all *around* people but not *on* people. For example, we talk a great deal about antivirals, security, social distancing, masks, cleaning desktops and doorknobs, air ducts, and working at home. Such matters are necessary but not sufficient. Generally lost is consideration of what actions are required now and in the crisis to *keep people engaged and committed* to their work. That is the essential question that is not being directly pursued by most organizations – both in financial institutions and beyond.

### Pivotal Questions to Ask

Do we enjoy a *demonstrably* strong level of commitment among our people throughout the enterprise? Can we afford *not* to take certain actions “on behalf of employees?” Do we have enough employee relations equity to draw upon in a crisis, or is that account low on reserves? What steps should we take now to increase the probability of people being willing to do exceptional things in a pandemic?

## The Critical Issue

That question cannot be answered without understanding and addressing the concept of *job commitment* – the determinant of whether people show up as scheduled and put in a hard day's work or, in the worst case, are absent and starting to quit. It's related to job satisfaction, but ultimately it's more complex and important. Job commitment is built on a number of elements: personal financial requirements, nature of the work, personal effectiveness, intrinsic rewards, feedback and recognition, rate of learning/growth, career opportunities, and perceptions of the organization.

## Do the Homework

It's extremely important to understand how the company stacks up in the minds of managers and employees throughout the enterprise. You can do this by checking the results (and trends) in recent employee surveys. If such data don't exist, give serious consideration to conducting focus groups around the company to gauge the level of

commitment. It's fundamental to know how much equity or good will the company has with people. If there's not much cushion, then it's crucial to build those reserves before the pandemic (or any other disaster). In the conflict between work and family, the company is not going to fare well unless it has a strong foundation and reputation for meeting its obligations, if not going beyond the norms. That's why this issue – which may seem soft and squishy to some – is of paramount importance. Indeed, it is a strategic imperative.

## Leadership

Leadership, at both the executive and local levels, is a major part of how people experience and perceive the company. Since leadership is already in place and functioning in your organization, the opportunity to anticipate its effectiveness in a crisis is available now.

### A Leadership Requirement

One of the essential capabilities of corporate and line leaders in a crisis – particularly one as protracted and grinding as a pandemic – is the ability to be persuasive. They must be able to convince people to work 12-hour days or even get some people to sleep and work at certain facilities for a week or two. Leaders have to be able to look others in the eye and tell them complying with Treasury Department requirements, meeting the needs of key corporate customers, or preserving the very stability of the company itself requires that they do some extraordinary things – at a time they are feeling a strong need to be home with their families. At that moment, you do not want those people wondering whether the CEO or the supervisor is telling the truth.

#### Did You Know?

The renowned, mid-20<sup>th</sup>-century CBS journalist, Edward R. Murrow, once said:

“To be persuasive, we must be believable,  
To be believable, we must be credible,  
To be credible, we must be truthful.”

Certainly the immediate circumstances will weigh into their evaluation, but people will be most influenced by their history with that leader. Has he or she been consistently candid and truthful? Has he or she communicated in an accurate and timely manner? Has he or she been respectful and trustworthy? That's why the effectiveness of leadership in a crisis is shaped by the patterns of leadership today.

### Do What's Necessary

Chances are you know the standing of top leaders and line supervisors in general. If it's marginal, it must be fixed. Leadership cannot be delegated. It is right up there with critical priorities like supply chain links and public health protocols. Admittedly, it is not an easy subject to broach. On the other hand, the person who can surface the point and successfully address it will win the respect of peers and bosses alike. If you don't have data – or you need some political cover – hire a reputable outside resource to examine the

situation through employee surveys, focus groups, and/or selected interviews. Consider other measures of trust and commitment ranging from exceptional levels of absence and turnover of key talent to how many people – with what frequency – turn down emergency assignments or overtime.

## Organizational Communications

Obviously, leadership is the top tier of organizational communications. Actions really do speak louder than words.

There are, however, some specific pandemic tactics to consider.

## Employee Relations

Assure that the pandemic task force is getting the best possible employee relations and communications advice. Those resources probably are available internally; but, if in doubt, don't stint on investing in outside counsel. The fact is that really savvy employee relations and communications people have different instincts than many executives. An example would be putting a cocoon around executives – perhaps even keeping them in de facto quarantines in their homes where only a select number of people have access to them. The communications/employee relations expert might counsel that this sends unintended messages such as: 1) It's too dangerous to go to work; 2) Employees are being asked to do things executives won't do; 3) Executives' lives are more important than the lives of others. The old Marine tradition may be a useful metaphor: Officers eat only after the troops have their food.

## Key Message

Through both your actions and messages you want to be saying something like, "The company is going to do whatever it can within its resources to keep you and your family healthy and safe." Of course, you have to first decide the proper wording of that intention-statement. The sentiment needs to be pressure-tested against leadership beliefs, corporate values, brand standing, employee relations, and, ultimately, financial stability – for example, how much largesse can you afford before getting "far from equilibrium"? The more compelling your "value statement" is to them, the more likely you will enjoy high job commitment, high attendance, and low turnover. Never, however, promise what you can't deliver, and do have answers ready for why you can't do certain things – especially if other financial institutions or comparably-sized companies in the community are offering them.

### Key Issues to Resolve

Communications messages, like many other sensitive actions, cannot be completed without the participation of top leadership.

The best communicator in the world can't just make up the key messages. Messages must flow from the strategic imperatives defined by leadership and informed by its values and intentions (which is not to say the communications advisor can't coach or even challenge the executives).

## The Fear Factor

You want to condition your leaders, managers, and employees to the potential of a pandemic so they are not shocked by the actual event and so scared they don't want to work on site or even in their home. You must, in effect, immunize them psychologically against the fear and anxiety that will be prevalent unless definitive steps are taken in advance. You do this by communicating earnestly – and training thoroughly – so there are no surprises. This means portraying to them what they will experience at work (e.g., heightened public health and security protocols) and what they will experience outside of work (e.g., inventories of groceries will ebb and flow, schools may close, mass transit may be suspended, and postal service may be irregular.) All of this dovetails with “Training/Development Opportunities,” which follows.

## Don't Get Ahead of Yourself

Perhaps, counter-intuitively, you do not want to launch communications until your leadership has resolved some of the tough issues that are bound to arise, e.g., antivirals, hazard pay, PTO extensions, grace periods on arrival times, and flexibility on leave for family matters. If you start communicating before those matters are reconciled – and snappy answers and rationales are developed – you're just asking to be hammered. You have one shot to launch this on the high ground and do it right or risk squandering credibility, good will, and job commitment. While many companies have already started communicating before nailing down the tough issues – and gotten away with it – it's going to become increasingly difficult because, as employees hear what their neighbors' companies are doing, they will learn what questions to ask.

If questions come up before you are ready to talk, just say that you understand their concern; you want them to know the company is working intensively on a comprehensive plan; and you will brief everyone as soon as the essential details are resolved. Then, resolve them.

## How Things Are Getting More Complex

An example: There's good news and bad news for financial institutions with facilities in New Jersey. The good news for PSE&G power users is that the company is doing exceptional things to prepare for a pandemic. The bad news for other employers in the region is PSE&G is doing exceptional things to prepare for a pandemic. Among many other things, it has already offered antivirals to all employees and family members. The company even implies that their people will be as safe as or safer at work than at home. These kinds of actions are raising the bar for other companies because the PSE&G employees have relatives and friends working at big NYC financial institutions and, over time, the relatives and friends will learn about the exceptional measures PSE&G is taking. At some point, they will start asking why a “mere utility company” is doing more for its people than some of the most prosperous enterprises in the world. This is a preview of

how the communications, employee relations, and job commitment issues will get much more challenging going forward.

## Leverage Line Leaders

When you are ready to start communicating, craft a low-key, “We’re-on-top-of-it” CEO message outlining the organization’s intentions, action planning, and commitment to keep people informed. Be sure to roll out most of the information through specifically trained middle managers and first-line supervisors. First of all, they typically are the most trusted links in the chain of command. Second, you do not want those crucial leaders to be in the position of answering employee questions with, “I’ll be damned if I know.” Those kinds of comments will sabotage your whole effort. Shortly thereafter, launch your series of training components – some published, some Web-based, and some face-to-face.

## Map Future Messages

Meanwhile, your communications team needs to attend to a wide range of contingencies. It should define various scenarios and events that might emerge in a pandemic and draft communications templates that can be used – or at least serve as an expedited departure point – with those affected. The more robust that work, the better. Remember: Some of your best communicators may be sick or at home with sick kids.

## Media Alternatives

The team should also consider developing a special Web site that is kept “dark” until needed, one that becomes a single source of company and community news. The communicators also need to think about worst-case communications alternatives. Say the Internet does sag or buckle and phone lines are like Mother’s Day times five. Maybe the company has a contingency to buy time on one or more designated local radio stations for three to five minutes at specified times. Some days, the segment might start with a leadership update from the CEO and/or the regional business leader. Additionally, the time could be used to address location-specific guidance, shift schedule changes, work-at-home protocols, and phone and Internet issues. It’s not ideal, and the medium limits certain proprietary information, but it’s worth considering. It may sound extravagant, but air time probably will be very cheap in a pandemic because most businesses will reduce or eliminate advertising.

### Controversy

There is no consensus about the role of financial institutions in providing “news” to their employees.

One participant said, “If you can, keep one step ahead of the new media.”

In contrast, another asserted, “We’re not in a news organization. We can only advise on our action plan and what steps to take to make the workplace and your home environmentally safe.”

The history, culture, and ambitions of each organization will dictate how it resolves the issue.

## The Enterprise as a News Channel

Over time, you may want to establish the company as *the* source of the most reliable information about what's going on – certainly within the company and the industry and, ideally, even in the community. That's a high hurdle, but those who can pull it off will have a credibility platform that could be invaluable in a crisis of this potential. They will be assured of getting their essential messages through while filtering out rumors and speculation and allaying fear and anxiety among their people.

## The Inescapable Antiviral Message – One Way or Another

Antivirals are addressed earlier in this paper in terms of efficacy and legal risks. Consider them here as a message, not a medication. One attendee said his leadership didn't want to give antivirals to some and not others. That's keen sensitivity, but others implied they had plans to give antivirals to certain executives, elite specialists, and ex-pats while a couple seemed to be on the track to give them to everyone. As one person said, "There's the whole antiviral secret – who's stockpiling, who's not?" [The box at the end of this section addresses two of the biggest objections to distributing antivirals to employees and their families.]

Antivirals would be a major signal to employees that the firm is going to take significant steps to protect all of its talent. Such a "message" would almost certainly have a huge impact on employees' job commitment – unless antivirals become so ubiquitous that they lose their symbolic value which seems, at this point, unlikely.

The essential question to ask is: What will employees make of the antiviral message you choose to send? Will it color their inclination to do exceptional things for the firm in a crisis?

One participant seemed to lament his company's values: "Our culture is that we won't do it until our backs are against the wall." First of all, that will be too late. The feds will probably have taken over all available antiviral inventories and/or antiviral manufacturing because the government isn't taking the necessary steps presently to have a stockpile for all of the military, police, fire, and health care workers. More important, what does that thinking (which must manifest itself in other ways) say to employees now – let alone when there's a crisis?

Another question to ask – particularly of those executives who might object to the cost of antivirals: What will the operational cost be if we don't provide antivirals? What if our no-show rate is twice as high as key competitors?

From an employee relations standpoint, the ROI on the medication will be good if it is just kept in employees' kitchen drawers . . . and exceptional if the dosages are actually used – even if they are effective for a smaller percentage than in current applications. It will not be lost on anyone that you did what you could to protect them with the options you had.

It's impossible to put a price on that kind of good will. It's the kind of action that can affect productivity and retention for years.

### Addressing the Objections to Antivirals

Roundtable members identified two major challenges to using antivirals: their efficacy and cost (of both the medication and administration). Lesser issues included legal concerns which could conceivably cut both ways and the potential of discrimination if the meds were given out selectively, which is resolved by providing to all or none.

**Efficacy:** Let's stipulate that there is no perfect medicine, and neuraminidase inhibitors are not going to be 100 percent effective. Would you buy them for yourself or your family members if they're 90 percent effective? Certainly, right? Would you buy them for your family if they were only 50 percent effective? Probably. What about 10 percent? Maybe, maybe not, eh? What if we stated that differently? What if it reduced the chances of prolonged illness or death by 10 percent? Does partial efficacy still seem so dubious? That takes us to the cost question.

**Cost:** You can adapt this example to your company: Say you have 20,000 employees and need about 60,000 antiviral "courses" for them and their family members. That would cost about \$4.8 million for the meds, and, let's say, another \$2.2 million for the administration expenses. Let's put that \$7 million in perspective. We'll say your total annual labor costs are in the range of \$5 billion, although it's probably much more since a survey of CFOs pegged the average U.S. company's total annual labor costs [pay, benefits, development] at about 36 percent of sales. So the antiviral investment is not more than one 14 ten-thousandths of one percent of your labor costs (.0014 percent). That seems to be in the realm of a rounding error. More important, let's look at the possible productivity impact. Depending on your specific business, your annual revenue could be around \$30 billion a year. For the sake of discussion, let's say the pandemic and the resulting absenteeism – without antivirals – cut your revenues by only 10 percent for four weeks, a very low number. Your revenue is about \$577 million a week, so such a loss would be \$231 million. Now, let's say you used antivirals, but they were marginally effective and reduced those losses by only 10 percent or \$23 million. Even with those exceptionally conservative assumptions, the ROI on the antiviral investment would be 328 percent – not to mention the intrinsic return discussed in the main text. This is the kind of business case you might create for your executive team. You could also reasonably raise the effectiveness assumptions significantly without risking your credibility.

## Training/Development Opportunities

Organizational communications are seamlessly tied to training. Some activities even defy just one category or the other.

### It's Already Started

Like communications, training – implicitly or explicitly – is going on now in your organization. The culture of your company alone teaches people how to behave. They learn to be responsible or to cut corners. They learn that when a leader says something is critical, it may or may not be. So it's useful to review or audit such realities as context for your training agenda.

## The Basics

In any case, specific pandemic training can begin immediately – with quantifiable, short-term results. Public health training is an easy example. Chances are your people are not particularly diligent about washing their hands regularly. Just changing that behavior alone – along with keeping hands away from mouth, nose, and eyes – can cut routine absences resulting from colds and seasonal flu. It's one of many pandemic action-steps that can pay for itself in the next six months.

### Immediate ROI

Much of the training needed to prepare for a pandemic will produce immediate, short-term effects that will reduce absenteeism, improve mid-range and first-line leadership, and increase productivity.

## Home Preparation

Other early-on instruction would include advisories on how to prepare at home – what things to stockpile in suggested amounts. Public health tips for home should also be distributed. While it's obviously in the company's interest to have people properly prepared at home, it also sends signals that the enterprise is concerned about the whole family's welfare. Some companies have hired third-party vendors to prepare and distribute their home-kits.

## Operations-oriented Simulations

After the basics are covered, the company can move on to more “operational” training. Selected people or whole work groups should be taken through simulations aimed at sensitizing them to the issues that will arise at their location or in their function. Such simulations should be held periodically with increasingly more nuanced and complex challenges introduced. These training experiences build competencies across a broader base for real-time situational assessments and decision-making – capabilities that will be crucial when an EVP is out, the department head is sick, or a first-line supervisor is not available. Again, such training and development produce short-term returns by better identifying high-potential talent for accelerated career progression, diversifying such competencies across more people, and building confidence and *esprit de corps* among work teams – a sense that they can deal with whatever is thrown at them. That's invaluable with or without a pandemic.

## Antiviral Training

If the company does decide to stockpile or distribute antivirals, it is essential – for practical and legal reasons – that those to receive them be trained in their use. You don't need to make them doctors, but you do have to explain why the company is taking such a step, how these medicines can help, how they are – and are not – to be used, and the possible associated risks. And make sure you document having done so.

## Replacement Staffing

Some organizations – including the New Jersey utility company that we mentioned before – are aiming to hold absenteeism to normal levels through the pandemic by taking extraordinary measures to keep the workforce healthy and safe. They may or may not succeed. Most enterprises will experience higher absenteeism owing to actual sickness, time off to care for family members, self-quarantining to avoid infection, fear of being in public for various other reasons, or, possibly, being quarantined or isolated by health authorities. The reality is no one knows what the range or cycles of absenteeism will be.

## Absenteeism – The Big Unknown

Many believe there could be periods – as little as three or four weeks although more likely five to six weeks – when the wave crests in a given location at around 25 percent absenteeism. It's important to know that such estimates are extrapolated from the 1918 pandemic. Co-author physician Joe McMenamin cautions it's all quite speculative and contingent on how aggressive the virus turns out to be.

Nonetheless, it's useful if not critical for executives to anticipate what the range of levels might be. Some of the roundtable members are planning for the event to be even deeper and longer. One of the major BCP chiefs in our roundtable is in the high-side camp: "People won't feel safe unless they're hunkered down in their bedrooms. The estimates of 20 to 40 percent are a myth," i.e., it will be much higher. Two others agreed and raised the stakes. One said the feds don't realize how troublesome the financial functioning could become: "I think there is a real failure of imagination over how bad it is going to get." Another of the top BCP leaders went even further: "Absenteeism will either be 10 percent or 80 percent or more." He believes once it goes beyond a certain point, vast numbers of people will just stay at home, and many markets would actually close. (By the way, co-author and emergency management expert Regina Phelps believes such outcomes are extremely unlikely.)

## Plan Now . . . or Lose to the Competition

In any case, the prudent approach is to anticipate absenteeism and map out a replacement staffing strategy *appropriate to your sense of the threat of disruptions due to absence*. This requires serious work. Making it up on the fly may result in chaos. For some functions, the replacement strategy may be very granular – down to people's names. For other functions, the tactics may be more general or even ad hoc.

## Mission-critical Functions

As everyone knows, staffing plans start with the identification of the critical business units, functions and/or locations in your organization. This is not easy because practically every group will try to make the case that it is essential. Decide what criteria you will use and what exceptions you will make. A starting point could be some combination of cash

flow or revenue generation, assuring timely settlements, keeping ATMs functioning, and/or maintaining retail credit transactions. You probably want to make special contingent staffing efforts for those in such mission-critical functions. (Of course, what generates some of the most money during normal times may not produce the most money in a crisis, e.g., M&A work.) Legal obligations should be factored in; thus, you may need to consider certain low- or no-yield functions that are essential to meet regulatory expectations (or maintain public support). You might stratify your critical ratings by two or three tiers of priority – what are our first-cut “critical” units or functions; what is the reduced set if you really get pushed against the wall; and finally, if times get dire, what are the bare bones operations?

## Identifying the Essential Tasks and Talent To Do Them

Having identified the must-be-up-and-running units and functions, you turn to staffing itself. You can go one of two directions depending on the number of people involved, your human resource information system (HRIS), and your own inclinations:

- 1. Job level:** You can start by determining within the above critical units/functions which *jobs* are required to the operation of those priority units. With those necessary jobs defined, you can then find other jobs that require the same or comparable experience and competencies. A simplified example: A given pivotal job is typically held by a PhD macro-economist with a CFA and five years of experience. You search your HRIS system for all other jobs that have comparable profiles – starting with the same spec and then perhaps widening the search, say, for all the CFAs with a master’s degree in economics or finance with maybe three-plus years at the company. You may find some who are doing nonessential tasks could be easily transferred, with some modest coaching or systematic training, to bridge the gap in the critical job. So, you find potential near-match jobs – and categorize them as 1) “close-enough” to the target jobs; and 2) those requiring some advanced cross-training.

### Rethinking Job Content

Contingent replacement staffing is crucial, but certain other tactics should be considered concurrently. As one roundtable executive observed: First eliminate all the nonessential work not required of people who are otherwise largely involved with mission-critical tasks. Either table the nonessential tasks for the duration or give them to others. Similarly, look for people in critical functions who spend a small portion of their time on critical work but could do more with some coaching and supervision.

Even if you do large-scale searches with your HRIS at the job level, at some point, you will probably wish to drill down to the individual name level (see next section) – especially for key jobs with few incumbents and limited replacements. Still, in large companies, people tend to forget that there are many managers, analysts, economists, lawyers, and accountants who have advanced to somewhat unrelated jobs but are still capable of holding down the fort in their old roles. The HRIS system surfaces such overlooked candidates.

2. **Individual levels:** If the numbers in certain must-be-working jobs are relatively small, you might choose to skip directly to this individual-level decision-making. An example: Say a critical task is leading teams in call or processing centers. And, for the sake of discussion, you need six such people per shift (18 a day). So you – or the executive in charge of such centers globally or the individual center leaders – could think: if 25 percent of the workforce is out, we theoretically still have about 13 team leaders, and we can get along okay working staggered six-day weeks and/or we could move to 12-hour shifts which are still manageable for short periods. You could also consider whether you can get by with just one team leader per shift, although this is unlikely because replacement people will require closer supervision and more coaching and checking.

At some point in this thought process, you may have to go to Plan B. Plan B starts with two obvious steps:

- A. Are former incumbents available who can still do the job (e.g. shift supervisors, assistant center managers, recent retirees)?
- B. Are there high-potential people on the verge of becoming team leaders who can step up?

Between peers, former incumbents, and high-potential candidates, many situations can probably be covered – especially with certain work schedule changes. If it still looks dodgy, then enlarge the pool of candidates from the job matches in Step 1.

## Compensation Tactics

Pay issues are part of the constellation of workforce policy issues where concepts of fairness sometimes get mixed up with legalities. (This point also arises in the following section on policies and benefits.)

### Extended Pay

So for example, some people in the roundtable said that their corporations are legally bound to pay employees who are quarantined or sent home for other reasons. Most labor lawyers would say that's absolutely not true. If there is no work performed, there is no legal obligation for pay (other than what might be appropriate under FLMA). It may or

#### Handling Tough Decisions with Sensitivity

Some companies matter-of-factly refer to certain jobs and people as being critical or non-critical seemingly without creating much fuss. In other organizational cultures, such labels are regarded as awkward or undesirable. Depending on which world you work in, you might want to consider referring to the *work* to be done – vs. *people* who do it – as critical or non-critical. This is not merely a rhetorical nicety; it's actually more accurate since no one spends all of his or her time doing critical work. Getting people to think about their tasks that must be done vs. those that can be delegated to others or left undone for the duration is technically more accurate and perhaps a little more palatable.

may not be fair, but it's legal. One participant reflected that reality: "How long we will pay people is a huge issue for us." He seemed to be saying, we are motivated to support our folks as much as we can, but there could be an economic limit to how far we can go. That is the crux of the matter, not the law.

## Incentive Pay

While some planners in other industries seem to believe that they will need to pay incentives to get people to come to work, among the financial institutions attending the roundtable, there didn't seem to be a lot of interest in ad hoc incentive ("hazard pay"): "You can incentivize during the pandemic, but you run the risk that employees will come in sick."

But there were exceptions. Several felt that it would take incentives to get "Gen-Xers" in to work: "We will definitely have to take a look at how to handle this."

And some clearly are holding open the prospect of paying one-time bonuses *after* the event to those who played pivotal roles in weathering the crisis.

## Workforce Policies and Benefits

Decisions around employment policies and benefits seem to be where many companies – both in and outside of finance – get stuck. Some planning teams seem to believe these matters are laden with legal complexities. Many others search for best practices for definitive guidance.

## Manageable Legal Issues

The fact is your company can make a wide range of decisions without running afoul of the law. You can:

- Send people with symptoms home.
- Lay off whomever you wish.
- Fire people for not reporting to work or not complying with public health protocols.
- Extend PTO (medical leave) . . . or not.
- Pay selected people incentives in the same unit where others don't get incentives.

### Key Issues to Resolve

Planning teams have a certain tendency to mix questions of legality and fairness. While it may be generous and honorable to extend pay or benefits in such a crisis, it's important to be clear about what is legally required and what is not. It's also crucial to know if the enterprise can actually afford your instincts for generosity. Know your thresholds. Plan ahead by pricing out possible scenarios in advance.

### Key Issues to Resolve

Like key communications messages, workforce policies cannot be defined without the participation of top leadership.

Do your best to weigh costs against employee relations implications and make recommendations for them to react to.

Alternatively, get the executive team in a room or off site for a half-day or a day and take it through all of the values-based decisions the organization needs to frame – if not make – in advance.

- Refuse to pay quarantined people or people sent home because there was no electricity, etc.

The only caveat is the standard one: You can't discriminate. The point is, your hands on these policy matters are not tied by legal knots. (You should, however, pay close attention to the many more menacing legal issues raised in the previous chapter by co-author Joe McMenamin.)

## Limits to “Best Practices”

As for best practices, they are very valuable in a number of areas – operations, safety, and environment, for instance, but best practices are generally overrated in making workforce policy decisions. They do have some utility in that they tell you about the norms and the range of what others are doing in the marketplace, but context is everything. So, deciding whether you're going to fire people who can't get to work because the transit system isn't working, extend medical leave, pay quarantined employees, or offer “hazard pay” are ultimately questions each company must sort out for itself. Morgan is not Bear; Fidelity is not Vanguard. So, in the end, your organization must decide what to do based on *your* history, culture, leadership, employee relations, and financial strength.

For example, one attendee said his organization has already made one major decision: “We will continue to pay those employees who stay home to take care of their children.” The group didn't talk about it, but one assumes that firm's leadership 1) wants to make a statement about supporting employees and their families (perhaps women in particular) as part of its brand image and social contract with its people, and 2) they have the deep pockets to make such a pledge without reservation.

In contrast, some companies – certainly in narrow-margin business sectors – would not have the financial resources to do that even though they might want to.

## Other Policy Issues

- Will you extend medical leave or PTO? (If the flu were to hit in December, many people may have limited PTO left.)

### Proof

There aren't universal answers to these policy questions. A great example emerged in the roundtable regarding ex-pats. Three large and highly-respected organizations had three wholly different responses to dealing with ex-pats:

- One will get them out as soon as possible – potentially using contracted security to evacuate them. “We would never ask people to do something they were uncomfortable with.”
- Another will consult with local governments and the medical community about the situation. If they don't recommend that the ex-pats leave, the Americans will have to pay for their own expenses to return and use vacation time.
- The third will leave them in place because to do otherwise would discriminate against their local employees.

This is a perfect example of “context being everything.” There is no right or wrong in these kinds of decisions – only what's appropriate to the history, culture, and values of each respective organization.

- Employees are not going to have normal access to medical care. Documentation from doctors could be hard to get. How are you and/or your claims administrator and carrier going to deal with this reality?
- Will you expedite 401K loans?
- How will you deal with ex-pats and stranded business travelers? (See sidebar on page 61 titled “Proof.”)

## Balancing Two Key Factors

One participant said, “For us, it’s a moral, ethical and social decision on how to resolve these issues.” That is generally right, but it’s not literally right. These things are typically not simply matters of right or wrong. They are layered decisions largely of 1) values but inescapably bounded by 2) financial resources, which most corporations need to carefully balance.

## Do as Much as Possible?

Still, to return to the original imperative of assuring a strong level of job commitment going into a crisis, a case could be made for doing as much for employees as possible in a pandemic without jeopardizing the enterprise’s financial foundation – not merely to be generous, but because it’s likely to reward the company with stronger employee commitment, less absenteeism, less turnover, greater standing in the community, and a burnished brand image that could last for years. But, to repeat, that kind of decision must not jeopardize the economic visibility of the company and can be made only by the executive team, if not the CEO (probably after numerous briefings and some tough discussions). Finally, it is obviously something to frame in advance – perhaps with several scenarios – and not in the heat of the emergency.

## Summary

### People

- The key is to optimize *job commitment* among your people. Your company has a certain level of engagement and commitment at this point. The essential question: Is that level sufficient to carry you through some hard times?

### Leadership

- A critical capability for leaders in a crisis is the ability to persuade people, which hinges in large part on how leaders handle current matters.
- If leadership’s credibility is shaky, steps need to be taken to shore it up.

## Organizational Communications

- Actions really do speak louder than words.
- The more compelling your communicated intentions, the more positive behaviors in a crisis.
- Make major efforts to condition people to what they will experience in a pandemic.
- Don't start communications until you have answers to the predictable tough questions.
- The use of antivirals – or the non-use – will be a significant message in and of itself.

## Training and Development

- The investment in development will generate short-term rewards for the company.

## Replacement Staffing

- Decide now what your contingent staffing strategies will be.
- Focus most intently on critical units and functions.
- You can focus on jobs and then individuals – or just start with individuals.
- Use various tactics to reduce the demands on essential talent.

## Compensation Tactics

- Incentives or hazard pay don't seem to be of interest to at least some of the nation's largest financial institutions.

## Contingent Employment/Benefits Policies

- Context is everything. The answers don't reside outside of your firm, nor are they legally complex.
- The essential considerations are corporate values, employee relations, and cost.

# Conclusion

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## Now That You Know What You Know... Now What?

After the pandemic, your employees, your investors, the communities you serve, the regulators, the government, and the courts will judge your company. You will be compared to your peers, some of whom might have heeded the warnings and aggressively prepared. Hindsight will, of course, be 20/20.

How does one prepare for what could be the greatest threat of our lifetime?

- First of all, take this threat seriously. Heed the guidance provided by the FSSCC. As the pandemic threat disappears from the front pages of contemporary news publications, many will breathe a collective sigh of relief and assume that we are now “safe.” Nothing could be farther from the truth. Medical experts, scientists, and historians all tell us it is a matter of when, not if.
- Engage your organization at all levels. Education and knowledge are key. From your CEO to the bank teller, all should have some knowledge about the illness and ways to keep themselves and their families safe that will help mitigate fear and minimize illness. Engage your employees’ children as the secret weapon in preparedness.
- Be decisive. Many of the policy issues and questions are difficult. Make a decision. You can always change the policy if the situation dictates it. Decisions made under pressure or duress are often ill-formed and fraught with issues.

Get started and stay focused.

# Glossary

**Antivirals:** A type of drug that interferes with the ability of a virus to replicate in the human body. This class of medication may be given as a prophylactic to prevent infection. Once symptoms appear, it is also used to prevent the illness from progressing.

**Broad-spectrum:** Effective against a wide range of organisms.

**Case fatality ratio (CFR):** Proportion of cases of a condition that are fatal; the number of deaths attributed to the condition divided by the number diagnosed.

**Categorization of employees:** Placing staff into groupings to assist in the development of business pandemic plans. Often, four categories are created:

Category One: Performs a mission-critical activity and must be at work.

Category Two: Performs a mission-critical activity and may work remotely (i.e., from home).

Category Three: Does not perform a mission-critical activity, but the activity could be done remotely (i.e., from home) if feasible (sufficient bandwidth) or possible (has the necessary equipment).

Category Four: Does not perform a mission-critical activity, and the activity cannot be done remotely (for example, a mail room clerk or shipping attendant).

**Categorization of pandemics:**

Category One - CFR of less than 0.1 percent

Category Two - CFR 0.1 percent to 0.5 percent (1957 and 1968)

Category Three - CFR 0.5 percent to 1 percent

Category Four - 1 percent to 2 percent

Category Five - 2 percent or higher (1918)

**Centers for Disease Control and Prevention (CDC):** The CDC is one of the major operating components of the Department of Health and Human Services. Its mission is to promote health and quality of life by preventing and controlling disease, injury, and disability.

**Disinfectant:** An agent that frees from infection, such as a chemical that destroys vegetative forms of harmful microorganisms.

**Droplet nuclei:** Small particles (one to five microns – a micron is one one-millionth of a meter) that are discharged when a person breathes, speaks, coughs, or sneezes. The mode of transmission in respiratory illnesses.

**Epidemic:** An illness affecting, or tending to affect, an atypically large number of individuals within a population, community, or region at the same time.

**Fiduciary:** One who owes to another the duties of good faith, trust, confidence, and candor.

**Fit test:** The use of a protocol to qualitatively or quantitatively evaluate the fit of a respirator on an individual.

**Force majeure:** (French: a “superior force”) An event or effect that cannot be anticipated or controlled; it includes both acts of nature (e.g., floods or hurricanes) and acts of people (e.g., riots, strikes, or wars).

**Hemagglutinin (H):** Protein on the outer surface of the virus that helps the virus attach to cells.

**Incubation:** The provision of proper conditions for growth and development of microorganisms.

**Incubation period:** The period of time from when a pathogen enters the body to the time the first signs and/or symptoms appear.

**Infection control:** Measures practiced by health care personnel in health care facilities to decrease transmission and acquisition of infectious agents (e.g. proper hand hygiene, scrupulous work practices, use of personal protective equipment (PPE) [masks or respirators, gloves, gowns, and eye protection]; infection control measures are based on how an infectious agent is transmitted and include standard, contact, droplet, and airborne precautions

**Influenza:** An acute, highly contagious respiratory virus disease, characterized by sudden onset, fever, prostration, severe aches and pains, and progressive inflammation of the respiratory mucous membranes. It is often further delineated with the letter *A*, *B*, or *C* to denote disease caused by a virus of a specific one of the three genera.

**Last mile:** The final leg of delivering connectivity from a communications provider to a customer.

**Market maker:** A brokerage or bank that maintains a firm bid and ask price in a given security by standing ready, willing, and able to buy or sell at publicly quoted prices (called making a market). Market makers are very important for maintaining liquidity and efficiency for the particular securities that they make markets in.

**Negligence:** The failure to exercise the standard of care that a reasonably prudent person would have exercised in the same or in a similar situation.

**Negligence per se:** negligence as a matter of law, so that breach of the duty is not a jury question; negligence per se usually arises from a violation of a statute or regulation.

**Neuraminidase (N):** Protein on the outer surface of the virus that helps the virus break out of the cells it has attached to and release new viral particles that will attack previously uninfected cells.

**Pandemic:** Disease outbreak occurring over a wide geographic area and affecting an exceptionally high proportion of the population.

**Pathogen:** Organisms, frequently microorganisms, that cause disease. Examples include bacteria, viruses, and protozoa.

**Personal protective equipment (PPE):** Any devices or clothing worn by the worker to protect against hazards in the environment and create a barrier against workplace hazards. Examples are respirators, masks, gloves, and chemical splash goggles.

**Social distancing:** Technique used to minimize close contact among persons in public places, such as work sites and public areas. It involves keeping people at least three to six feet apart.

**Universal precautions:** A set of standard procedures required to achieve a basic level of infection control, and which are recommended best practices. They include good hygiene practices such as washing hands, the use of protective barriers (i.e., gloves and masks) when dealing with a potential infectious agent or person, and appropriate handling and disposal of contaminated or infectious waste.

**Vaccine:** Suspension of killed or attenuated microbial pathogens administered for prevention or treatment of infectious diseases.

**World Health Organization (WHO):** WHO is the directing and coordinating authority for health within the United Nations system. It is responsible for providing leadership on global health matters, shaping the health research agenda, setting norms and standards, articulating evidence-based policy options, providing technical support to countries, and monitoring and assessing health trends.

# Screening Questionnaire

Use the following questionnaire to screen visitors, vendors, and possibly employees once a WHO 6 has been declared or if there are human cases in your area. Forms such as this were used extensively during the SARS 2003 outbreak. To minimize contact, have sufficient pens/pencils on site and instruct the applicant to keep the writing device. Temperatures are not required (and may be falsely elevated). Use disposable thermometers if taking temperatures and dispose of properly.

## Section A

1. Have you had close contact (within 3 – 6 feet) of a person with respiratory flu symptoms?

No

Yes

## Section B

2. Have you traveled outside the United States in the past 10 days?

No

Yes

## Section C

3. Are you experiencing any of the following symptoms?

- Myalgia (muscle aches) **OR**
- Malaise (severe tiredness or unwell) **OR**
- Severe headache (worse than usual) **OR**
- Cough (onset within 7 days) **OR**
- Shortness of breath (worse than what is normal for you) **OR**
- Feeling feverish, or have had a fever in the last 24 hours

No

Yes

## Section D

4. Record temperature using an accurate thermometer. Temperature \_\_\_\_\_ ° F

Is the temperature above 100.4 °?

No

Yes

**PASS** Response is NO to Sections A, B, C and temperature is normal

**FAIL** Response is YES to Sections A, B or C and/or temperature is above 99 ° F

**I declare that to the best of my knowledge the information that I have provided for the purpose of completing the Health Screening Tool is true.**

**Interviewee Signature:** \_\_\_\_\_ **Date:** \_\_\_\_\_

## Faculty

**Regina Phelps** is founder and CEO of Emergency Management and Safety Solutions (EMSS), an emergency management consulting practice founded in 1982. EMSS provides incident/crisis management team training and development, EOC design, emergency exercises that test both, and business continuity planning consulting services. She became interested in pandemic planning in the mid-1990s and since then has assisted more than 150 companies develop domestic and global pandemic plans. She is a popular speaker at emergency management conferences such as DRJ, CP&M and the World Conference on Disaster Management. She is the recipient of numerous awards including the Award for Excellence in Business Continuity Planning by BRMA. Contact: [regina@ems-solutionsinc.com](mailto:regina@ems-solutionsinc.com).

**Joseph McMenamin** is a partner in the Richmond, Virginia office of McGuireWoods LLP. He is an attorney and a former emergency physician with an interest in medico-legal topics generally, and related litigation in particular. He advises companies on legal issues pertinent to business disruption and pandemic preparedness. Board Certified in Legal Medicine, Joe is active in the Pandemic Preparedness Committee of the Homeland Security Division of the U.S. Chamber of Commerce and lectures and publishes widely on these and related topics. He is an associate professor of Legal Medicine at Virginia Commonwealth University. He also chairs the Board of the Richmond Ambulance Authority, responsible for all pre-hospital care there. Joe can be reached at [jmcmenamin@mcguirewoods.com](mailto:jmcmenamin@mcguirewoods.com).

**Dave Kieffer**, founder, Dave Kieffer Partners. Dave advises executives on crisis leadership communications, key-talent strategies, and making tough workforce/ “HR” policy decisions. He has two articles out currently in the new *Disaster Resource Guide* – one on the leadership and workforce questions all companies need to address before a pandemic and one on “HR” policies that might need changing before or during a pandemic. He is the co-author of *Play to Your Strengths* (McGraw-Hill, 2004) – a breakthrough approach to developing and measuring firm-specific workforce strategies. He has been awarded three Gold Quill honors for leadership and change communications from the International Association of Business Communicators. Contact: [Dave.Kieffer@verizon.net](mailto:Dave.Kieffer@verizon.net).

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