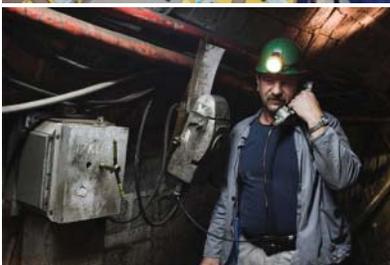




The Microbiological Threat to the National Power Grid



Advanced Pandemic Planning for Utilities Executives



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Preface

On July 11-12, 2007, executives from seven of the country's leading power and utility companies came together in New York City to participate in the *Executive Roundtable Series: Advanced Pandemic Planning for the Energy Sector*. 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. Two half-day 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:

- Ameren Corporation
- Consolidated Edison, Inc.
- Dominion Resources
- Entergy Corporation
- Pacific Gas & Electric
- PPL Corporation
- Public Service Electric & Gas

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 McMenamin, and Dave Kieffer, experts in three different dimensions of pandemic preparedness, designed the roundtable format, led the exercises, and served as facilitators.

The authors thank Roche for providing a grant to fund the roundtable and this paper.

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 utilities – find it challenging to direct executives' time, necessary resources, and an appropriate budget to pandemic planning.

Strategic Implications

- There will be “winners” and “losers” among power and utility companies 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 overlook some key workforce matters.

Business Continuity Planning (BCP)

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

- Improving the reliability of your supply chain will make a major difference in your ability to continue to function.
- The only pharmacologic option currently available for potentially preventing, shortening, or reducing the severity of influenza is an antiviral drug. Therefore, every utility 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.
- 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.

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 power companies.

- 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

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

Smart 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 – especially for niche jobs with few incumbents.
- 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 companies – are not governed so much by legal constraints as they are by leadership values, organizational 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

Those in attendance at the Executive Roundtable for the energy sector were well-versed in the basics of pandemic flu planning, but this *A Different Game* section provides a brief background for anyone who might appreciate a review before delving into the in-depth recommendations that follow.

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 storms knocking down power lines and transformers and not having enough people to repair them. Most companies 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 effectiveness to legal risks.

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:

- 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 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 an entire nation. It seems impossible, but computer modeling has demonstrated this repeatedly.
- Economic shockwaves may actually precede public health difficulties. At the earliest sign, many investors may shift from stocks and bonds to cash or gold, throwing the global economy into a nosedive perhaps within days – or hours. Conversely, prices for coal and natural gas will almost certainly soar.
- The 24/7 cable and satellite news channels will be in a frenzy – spreading rumors and fear. Bloggers may very well do the same, perhaps on an unprecedented scale.
- 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; some companies won't be able to meet customer demands; and some companies will see demand collapse.
- Health care will not be available to all that 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.

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 companies, many top executives are immersed in pressing day-to-day issues with little time to dedicate to a possibly long-shot event.

All of that nay-saying and deflecting begs the preponderance of evidence that the world should expect but is under prepared for a severe pandemic. And the early warning signs are in Southeast Asia now.

Strategic Competitive Opportunities

“It seems to me that that the level of (high) preparation some companies are engaged in could pose legal risks for others of us (who are not investing as much),” a senior utilities executive worried out loud in our July Executive Roundtable. He was addressing the potential of competitors setting a legal precedent – a higher standard of protection – against which others might be held liable. He was, however, raising a much larger strategic issue: A severe pandemic will result in distinct winners and losers in all business segments, including utilities and power companies.

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

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*)
- Avoiding decisions/actions for which not all data are available – making the probability seem unknown (*ambiguity effect*)
- Believing we, as individuals or our business, can deal with whatever happens (*overconfidence effect*)
- Believing that everything will be okay (*positive outcome bias*)

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

These are not abstract theories. The winner companies are already beginning to produce competitive advantages through their advanced solutions. They have elaborate action plans for protecting their employees and for 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.” “You’re an important asset for us; you will have a compelling career with us.” Similarly, winner-companies’ communications and involvement with customers, suppliers, government leaders, and their communities send inescapable signals of leadership, good will, and reliability.

Engaging Executives

“Our CEO is concerned about the potential of a pandemic, but his attention to it pales in comparison to a rate case,” observed a major power company leader at the same roundtable. He seemed to be speaking for many utilities both in the room and around the country.

It is hard for most executives to conceive of what high rates of absenteeism might really mean to their businesses. While they have been through many hurricanes, tornadoes, fires, and floods, they’ve never never experienced anything like a severe pandemic. It is difficult to imagine the effect of a simultaneous loss of significant numbers of colleagues, managers, and employees. There is a certain unreality to it. Yet it is

critical to grasp the potential severity of the problem in order to successfully advance a pandemic preparation strategy.

One of the best ways to give executives this experience is to take them through an exceptionally well-planned and facilitated simulation of a pandemic. Some utilities have done this. To effectively alter 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.

Another way to engage your leadership team in this challenge is to introduce the concept of how, in a pandemic, 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 and circuit breakers to keep the corporation away from such thresholds. Defining these 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, over time, become very costly.

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.

Summary

- It is possible that there will be a pandemic, potentially severe, in the foreseeable future.
- The prospect of a pandemic is not widely cast as a true *strategic* matter in the energy/utilities sector.
- There will be winners and losers in the sector – based on whether or not companies prepare now.
- 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 a robust pandemic simulation.
- 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 pandemic action-planning.

Mobilizing the Enterprise – Ready, Set, Go!

By Regina Phelps, Emergency Management & Safety Solutions

“Planning for a pandemic is a *significant* undertaking, requiring the full engagement of the entire organization,” noted a senior utility executive. Given the critical nature of the energy sector, utilities will also need to reach out to key stakeholders within the community in both the public and private sectors to develop necessary relationships for success.

Pandemic Task Force

The Pandemic Task Force (PTF) is a powerful tool to mobilize an organization, and all of the utilities at the Executive Roundtable were developing their plans utilizing this process. A pandemic touches virtually every aspect of a business. Because of the depth of the impact of a pandemic, and its duration, you will need to bring all of your great thinkers together from across the enterprise. Executive sponsorship is critical to the success of the planning initiative. The role of the PTF is to develop and test the pandemic plan, serve as pandemic ambassadors across the company, share specific expertise, and participate in meetings and exercises.

Companies represented 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 power generation, emergency restoration, transmission and distribution
- Legal
- Purchasing/procurement
- Risk management
- Safety
- Security
- Technology
- Telecommunications
- Travel

Management Response

Your company’s management involvement and response are critically important to the success of your utility’s pandemic planning efforts.

Incident Management Team

A company’s Incident Management Team (IMT), sometimes known as a Crisis Management Team, must be involved with the pandemic planning process from the beginning. It is likely that many of the PTF will already be members of the IMT as was the case with the utilities at the roundtable. If they are not in the PTF, you will need to bring them up to speed with training about the overall threat, the company plan, and some of the unique challenges and opportunities of pandemic planning. Most utilities’ IMTs include representatives from the following areas: facilities, security, technology, telecommunications, environmental safety and health, human resources, travel and meeting planning, employee assistance programs, legal, regulatory compliance,

investor relations, communications, finance, payroll, risk management, business continuity planning, and all of the key lines of business such as power generation, emergency service, transmission, distribution, and customer service.

Pandemic Exercises

In addition to training the IMT, it is critical to engage team members in exercises to practice their pandemic plan and roles. All the utilities at the roundtable had either completed at least one pandemic exercise or were planning for one in the near future.

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, regulators, ratepayers, 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. As several players remarked, “It was eye-opening to see what *could* happen and not have anyone sick in the United States.”

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. To complicate the experience, we placed the exercise date in the winter (when seasonal flu is more prevalent) with severe ice storms and utility 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 IMT 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 power plants, in control rooms, network operations centers (NOCs), and call centers. All mission-critical departments should experience several different iterations of the pandemic exercise.

Virtual Emergency Operations Center (VEOC)

Take your existing protocol for managing your Emergency Operations Center (EOC) and explore ways to develop 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 how it would work.

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. All these issues need to be thought through and documented in advance.

Economic Modeling

Executives and the IMT members 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

Owing to their routine work in the area of emergency response, utilities already have a rich relationship with local emergency responders such as the local Office of Emergency Services/Management, police, fire, Homeland Security, and many others. These relationships are valuable and should be cultivated and grown. One entity, however, that may not be on that list is your local department of public health (DPH). 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 your destiny. 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.

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.
- A fully-engaged Incident Management team (IMT).
- Pandemic exercises that challenge the IMT at different times within the pandemic cycle.
- Plans and processes to move your emergency operations center (EOC) to a “virtual” world.
- Analysis of the economic impact on your company.
- And last, since no utility is an island, an effective plan requires you to have deeper relationships with local governments and to develop new associations with entities such as county and state departments of public health.

Digging Deeper – Continuing Business

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

Roundtable members were asked – What business functions and services are absolutely critical for a utility company? Everyone agreed that the community depends on utilities for reliable power, regardless of the situation; therefore, the energy sector must perform two primary, critical functions:

1. Generation or procurement of power.
2. Restoration of service.

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

- Equipment and supplies.
- Facilities.
- Staff.

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 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.

- Identify minimum inventories required for critical supplies and products. You will need to take into account peak periods such as winter storm and emergency restoration services.
 - Identify prudent quantities, defined as the minimum plus a certain percent margin, of critical materials supplied by countries at or near ground zero of a highly pathogenic influenza outbreak.
- Collaborate with suppliers and exchange information on plans and strategies for addressing supply chain disruption and people risks during a pandemic.
 - Develop joint crisis management/recovery plans with key suppliers.
 - Pre-qualify alternative domestic or local suppliers.

- o Identify which resources are provided by a sole- or single-source
 - Which sole-source or single-source resources have alternate providers?
- Inventory the extended enterprise and points of integration with overseas entities.
 - o Identify where critical products and services originate.
 - o Identify single points of failure in the supply chain.
 - Don't forget to include those people tasked with performing critical support functions overseas (e.g., production, call centers, IT development, etc.).
 - o Identify where single- and sole-source suppliers are.
 - o Determine whether your contingency plans cover disruption in the supply chain.
 - Assess whether the contingency plans cover failure of single- or sole-source suppliers.
 - o Determine how critical products are sourced and shipped from overseas locations.
 - Ascertain if contingency plans cover failure to source and ship critical items.
 - Find out if contingency plans cover the impact of a pandemic on:
 - Sole-source service providers.
 - Sole-source vendors.
 - Transportation and shipping partners.
- Determine whether critical vendors pose any exposure risk to staff and visitors.
 - o Identify and evaluate pandemic plans your vendors may have.
 - 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.

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.
 - o 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 anti-bacterial and antiviral properties.

Security

Review your existing security post orders for management of infectious diseases. It is quite likely there will be no mention of this issue. Power plants could be targets for looting and thefts – security will be a prime concern for employees.

- 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.

Maintenance

The maintenance of your facilities and plants is likely to be reprioritized during a pandemic. It is also probable that routine maintenance will have to be deferred – at least for a period of time – owing to staffing and supply constraints. It is best to plan on this, review all schedules, and adjust as necessary.

- For plants, review current schedules for planned shutdowns and develop guidelines on how to adjust.
- Review air handling with your HVAC vendors, and perhaps with public health authorities, to determine if different filters, cleaning agents, or more frequent cleaning might be desirable.
- Conduct training procedures to provide additional protection to staff and maintenance personnel.
- Identify PPE and additional cleaning supplies needed to support modified cleaning, temporary care, and air-handling procedures.

Facility Restrictions

All participants plan to significantly restrict visitors during WHO 6. “Why introduce more potential illness to a facility?” noted one executive. 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 internal gathering places. Eventually, it will likely be required that you do so. 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 46.)
- Identify which internal services and gathering places will be closed.
 - Include cafeterias, day-care 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 maintain a clinic, 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 the event of respiratory arrest. Unfortunately, you should also consider how you will deal with a corpse (or corpses) in the event of work site deaths.

Staff

Staff must be categorized into “two buckets:” mission critical and non-mission critical. This categorization is essential for future allocation of necessary resources and training. Most participants had categorized their staff and understood their mission-critical needs. Within each of those categories there are two subcategories.

- 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** 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 Category Two staff.)
 - Category Four – Who performs an activity that is **not mission critical** and **cannot be performed via remote access** (e.g., mailroom clerk or shipping attendant)?



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.

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

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 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 apart.
- 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, NOCs, and plant control centers, 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 the 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

It is likely that some essential work will require staff to work more closely than the recommended six-foot distance. This situation could arise in an NOC or a plant control room, or a task might require 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. 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.

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. As with social distancing, hard data demonstrating the efficacy of PPE do not exist. 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.

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.

The general consensus of the group was that masks would be provided, but it was likely that staff would wear them only in situations where individuals 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

At present, the only pharmacologic option for potentially preventing, shortening, or reducing the severity of illness among your employees 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 energy sector and the fact that medications exist that can treat the illness, every utility company 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?
 - o If so, for whom?
 - o Will the company program cover the employee’s family or just the employee?
- When would the medications be ordered?
- How would they be ordered?
 - o Through an internal medical department?
 - o Outside medical group?
 - o A drug distributor?
- Where will antivirals be stored?
 - o How will they be protected during storage?
 - o What is their shelf life?

- When will they be distributed?
 - o How will they be distributed?
- How will employees be educated about their use and storage?
 - o How will you discourage employees from using them for ordinary colds and seasonal flu?

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 will 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.

Who has an antiviral program?

In New Jersey, one utility instituted an extensive antiviral program. It has so far provided antivirals for 76 percent of its employees and their families.

In eastern Canada, two major utilities have an extensive program that includes a six-week supply given to mission-critical staff for prophylactic use.

One roundtable participant has a volunteer antiviral program covering 76 percent of all employees and their families. Others in attendance debated the question but had either not made a decision or felt that the cost and the mechanics of a program were prohibitive at this time. There was also a 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 utilities need to use current information and conduct a serious discussion to decide whether to include antivirals in their pandemic preparedness plans. Participants agreed that a decision on antivirals is necessary when putting together a comprehensive plan.

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.

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 some form of work from home as part of their

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 in categories three and four who are not mission critical and not working now 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.

Travel

Many 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). The group discussion focused on the company travel policy before and during a pandemic.

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.

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?
 - What information will be required from travelers in advance?
 - 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 or travel guidelines? For example, at a WHO 3, you might provide antivirals, masks, gloves, and hand sanitizers to staff who are traveling to countries where H5N1 (in the human and bird population) is known to exist.
- Develop procedures for employees who become ill while traveling. This is likely to become an issue if health care services are restricted or overcrowded.

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.

Equipment and Supplies

- It is critical that you conduct a thorough assessment of your supply chain and develop a clear understanding of your risks and exposures.

Facilities

- Facilities preparation includes site cleaning, security and maintenance, 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.

Travel

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

Enterprise Resiliency

- Finally, when you look at your utility'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 utility – regardless of the threat.

Pandemic Flu: The Legal Issues

By Joseph McMenamin, McGuireWoods LLP

The Legal Discussion Was Different

Although three lawyers were present at the Executive Roundtable, time and the array of nonlegal issues 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 19th Century, long before the “rights revolution” of the mid-to-late 20th 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.¹ The recurring nature of pandemics creates sound business and legal grounds for energy 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, of course, be compounded because the suppliers of those companies, and the suppliers’ 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.

The ability of energy companies to continue functioning during a pandemic will have a direct impact on the magnitude of the threat to public health. Most backup electric power systems are not designed to function for an extended time. If energy companies are unable to continue operations in a pandemic environment, the harm to public health could be substantially greater – think of hospitals, sanitation systems, police departments, ambulance authorities, morgues, or food processing companies without electric power – than

¹See, 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).

would be the case if energy companies are prepared and able to continue to function at some level.² There is probably no way to guarantee that any level of preparedness will permit uninterrupted generation and transmission of power. There may well be ways, however, to diminish the disruption that a pandemic will cause.

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.³ For businesses, the standard of care is ordinarily the behavior of reasonable companies in similar circumstances.⁴ 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.⁵

The reasonableness of a course of action must be analyzed in light of the circumstances at the time it is taken.⁶ 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.⁷ 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.⁸ Companies may question whether governmental performance will be any better in event of pandemic.

² It is unlikely that a hospitalized patient harmed by the failure of power needed to operate a machine, such as a ventilator, will be able to recover against the power company involved. See, e.g., *S.W. Elec. Power Co. v. Grant*, 73 S.W.3d 211 (Tex. 2002) (utility’s tariff provision limiting the utility’s liability for personal injury damages resulting from power outages or service interruptions is reasonable as a matter of law and enforceable against a claim of negligence by the utility’s customer); *Strauss v. Belle Realty Co.*, 482 N.E.2d 34, 38 (N.Y. 1985) (limiting the liability of a public utility for gross negligence in causing a power outage because sweeping liability might lead to the utility’s insolvency).

³ 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.

⁴ The standard of care is generally defined as what reasonable companies do in similar circumstances. Citing Deloitte Center for Health Solutions, “Business Preparations for Pandemic Flu” (2006), DHS has stated that “most large businesses have extensive contingency plans on hand for managing natural and man-made disasters.” 4.1 Overview of Business Continuity of Operations Plan-Essential (COP-E), *The Pandemic Influenza Preparedness, Response, and Recovery Guide for Critical Infrastructure and Key Resources* (Sept. 19, 2006) at 20.

⁵ 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) § 4.01(c)).

⁶ 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”).

⁷ 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).

⁸ 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.⁹ As fiduciaries, the Board members are under the highest duty known to the law.¹⁰ Shareholders dissatisfied with the performance of their directors may, and often do, bring claims against them in court. Sometimes such claims succeed.¹¹ 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.¹² 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 energy 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.¹³ In some circumstances, however, courts may impose a duty of care higher than that prevailing in the industry or profession at the time.¹⁴

Negligence cases are decided by lay juries with limited understanding of the complexities of the power 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 whose knowledge, training, and experience qualify them to testify about practices with the industry.¹⁵ 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

⁹ 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).

¹⁰ See, e.g., *La Scala v. Scruferi*, 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).

¹¹ 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).

¹² 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).

¹³ But note that in February 2007, the Occupational Safety and Health Administration of the U.S. 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).

¹⁴ 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).

¹⁵ 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.

statutes,¹⁶ regulations,¹⁷ and professional codes.¹⁸ Operators of nuclear power plants, of course, are subject to a whole variety of statutes and regulations not applicable to most other companies; these too may be invoked.¹⁹ 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 of at least some of the less highly valued, more burdensome regulations for the pandemic's duration. 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.²⁰ 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, 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 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."²¹ 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 plaintiffs' lawyers will attempt to utilize pronouncements such as this in fashioning claims. 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.

¹⁶ 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).

¹⁷ 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).

¹⁸ 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).

¹⁹ See, e.g., Ark. Code Ann. § 20-21-402(b)(3) (2001); Cal. Health & Safety § 114660(b)(3).

²⁰ 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." The Business Continuity of Operations Plan-Essential (COP-E), *The Pandemic Influenza Preparedness, Response, and Recovery Guide for Critical Infrastructure and Key Resources* (19 Sept. 2006) at 20.

²¹ 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).

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 energy 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. If other energy companies, especially those seen as industry leaders, begin to adopt a particular course of action, 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 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. That is 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.²² If a company furnishes antivirals to some employees, but not all, those excluded might bring claims. Hence, 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

²² Worker’s compensation law may be relevant here. See discussion below.

public.²³ 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.²⁴ 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 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 labor 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. Thus, 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) Act²⁵ 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.²⁶ 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."²⁷ Violations do not give rise to a private right of action, however.

²³ 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).

²⁴ 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).

²⁵ 29 U.S.C. §§ 651-678.

²⁶ See generally, Mark A. Rothstein, *Occupational Safety and Health Law* § 12, St. Paul: West Group (4th ed. 1998).

²⁷ 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. 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

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 because 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.²⁸ 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.²⁹ The Virginia Workers' Compensation Commission ("Commission") has held that injuries caused by vaccination or inoculation injections may fall within the realm of workers' compensation in certain situations.³⁰ 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.'" ³¹ 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.³² 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. An injury sustained as a result of a voluntary recreational activity can be a compensable worker's compensation injury under certain circumstances.³³ "The dispositive question is whether the social or recreational function is so closely associated with the employment to be considered an incident of it."³⁴ The factors to consider in making this determination include: (1) the degree to 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.³⁵ Each factor is relevant; however, no one factor is essential to a determination that the event

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 (last visited Aug. 6, 2007).

²⁸ 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.

²⁹ *Kim v. Sportswear*, 10 Va. App. 460, 464 (1990).

³⁰ *Lovinger v. Children's Hosp.*, 2002 WL 149373, VWC File No. 186-90-44 (Va. Workers' Comp. Comm'n Jan. 7, 2002).

³¹ *Id.*

³² 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).

³³ *Mullins v. Westmoreland Coal Co.*, 10 Va. App. 304, 307 (1990).

³⁴ *Kim*, 10 Va. App. at 466.

³⁵ *Id.* at 465-66.

³⁶ *Id.* at 468.

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.³⁷

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.³⁸ Nor do they enjoy any special protection from adverse employment decisions. Energy 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.³⁹

The FMLA

There is, however, a strong likelihood that infected workers will qualify for protection under the Family and Medical Leave Act (FMLA),⁴⁰ 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

³⁷ 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").

³⁸ 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.

³⁹ 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 such as flu do not generally qualify as disabilities under the Act.

⁴⁰ 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 of federal labor laws, see www.dol.gov.

public employees only. A few laws go beyond the federal law, such as by covering smaller employers.⁴¹ While most companies generally comply with the FMLA, the increased hardship associated with a 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, 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.⁴²

Contracts

Every energy company is both a buyer and a seller. Most commercial contracts contain force majeure clauses.⁴³ 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.⁴⁴ 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.⁴⁵ 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.⁴⁶ In some 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.⁴⁷

⁴¹ For instance, California employees are entitled to up to six weeks of paid leave. Cal. Unemp. Ins. Code §§ 3300-3305.

⁴² See, generally, the National Labor Relations Act, 29 U.S.C. §§ 151-169.

⁴³ *Force majeure* (French: a "superior force") means 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). BLACK'S LAW DICTIONARY 263 (Pocket Edition 1996). See, Glossary.

⁴⁴ 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).

⁴⁵ 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).

⁴⁶ *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).

⁴⁷ *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).

The party invoking *force majeure* has the burden of proof.⁴⁸ Whether a *force majeure* arose is a question of fact for the jury.⁴⁹

Energy companies should examine their contracts to see what provisions help and hurt them and may wish to renegotiate those agreements in pursuit of better terms, although renegotiation might well require payment of additional consideration.⁵⁰

In addition, energy companies should be making inquiries of their suppliers, particularly those that supply critical items (e.g., coal or nuclear fuel products and services) 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. You might also consider asking them to allow you to see and evaluate the plans they have developed. And as discussed elsewhere, energy companies may wish to assess their 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 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 condition of the insured's policy.⁵¹ 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 carrier's 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

⁴⁸ *Naxera v. Watham*, 159 N.W.2d 513, 517 (Iowa 1968).

⁴⁹ *Lee v. Mobil Oil Corp.*, 452 P.2d 857, 861 (Kan. 1969).

⁵⁰ 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).

⁵¹ 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).

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.⁵² Carriers denying coverage for losses occasioned by Katrina have also been sued.⁵³ 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-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,⁵⁴ 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.

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.

To an extent greater than is perhaps the case in any other sector of the economy except public health, energy companies will be called upon in a pandemic to communicate clearly, early, and often. The audience will include customers, employees, suppliers, lenders, shareholders, regulators, legislators, and the media. Co-author Regina Phelps discusses how companies can address these audiences in a previous chapter, *Mobilizing the Enterprise – Ready, Set, Go!* 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 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

⁵² 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).

⁵³ 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).

⁵⁴ 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.

subject to claims.⁵⁵ It may be prudent to confer with counsel about any templates you prepare in advance, to spot and, where possible, diminish legal pitfalls.

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 energy companies to operate in a pandemic environment will have a direct impact on the extent a pandemic poses a threat to public health. Also, for any business organization, but especially for energy companies and other segments of the “critical infrastructure,” a pandemic implicates an array of legal issues as well. In developing their plans, energy companies 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.
 - o The reasonableness of decisions will be analyzed in light of the circumstances, including the limits of governmental capabilities.
 - o 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.
 - o Companies should weigh the risks and benefits of antivirals and other health measures and compare their decisions with those made by others.
 - o Companies may wish to promote:
 - Tort reform
 - Regulatory relief
 - o To the extent feasible, companies may wish to attempt to shelter sensitive 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
 - o The OSHA General Duty Clause imposes a duty to maintain a work site “free from recognized hazards.”
 - o 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.
 - o The federal FMLA and its state analogues may provide protection for infected workers.

⁵⁵ 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).

- o Companies may wish to evaluate the adequacy of their workers' health insurance and the cost of augmenting it.
 - o 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.
 - o 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?
 - o To what extent have your suppliers made reasonable preparations?
 - Do you wish to request to see their plans?
 - o Consider whether to stockpile critical supplies, and if so, which ones and how.
- Insurance
 - o Confer with your carriers' representatives or your counsel, or both, respecting adequacy of coverage.
 - o Solicit their recommendations on risk management.
 - o Consider legal challenges to denials of coverage.
- Quarantine
 - o Identify the circumstances, if any, under which you would challenge an order of quarantine or isolation.
- Communication
 - o Consider developing templates to assist the communication effort.
 - o In developing templates, confer with your counsel to minimize legal risks.

The People Factor: Mission Critical

By Dave Kieffer, Dave Kieffer Partners

People

Call them whatever you wish: workforce, management and labor, talent, exempts and non-exempts, human capital, or the people. The simple fact is they 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 great paradox of much pandemic planning is that it tends to focus all *around* people but not *on* people. So we talk about security, antivirals, masks, social distancing, air ducts, cleaning desktops and doorknobs, working at home, and school closings. Such matters are necessary but not sufficient. Generally lost is consideration of what actions are necessary 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 companies – both in the power business and beyond.

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 extreme circumstances, are absent and inclined 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: nature of the work, personal effectiveness, intrinsic rewards, feedback and recognition, rate of learning/growth, career opportunities, and perceptions of the organization.

For many people, that last consideration is pivotal, so 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 among people. 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 consider its effectiveness in a crisis is available now.

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

Pivotal Questions to Ask

Can the company not take certain actions "on behalf of employees?" Do you have enough employee relations equity to draw upon in a crisis, or is that account low on reserves?

Actions to Take Now

Some utilities executives remember when turning out for an emergency or a disaster was close to a matter of honor – almost on a par with firefighters. That isn't always the case anymore. It's useful context to factor into your thinking about a pandemic. What steps might you consider now to increase the probability of people being willing to do exceptional things in a pandemic?

12-hour days, or get some pivotal employees to sleep and work at certain facilities for a week or two, or get unions to relax certain work rules. Leaders have to be able to look others in the eye and tell them the maintenance of the key corporate customers' service, the community standing of the enterprise, or the stability of the regional or national grid 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.

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.

Chances are you know the standing of top leaders and line supervisors in general. If it's broken, it must be fixed. Leadership can not 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 turnover of key talent to how many people – with what frequency – turn down emergency shifts, as well as the level of grievances filed in various locations or functions.

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.

- 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 most executives, and executives often need to get the counsel of such specialists. An example would be that BCP and security experts might want to put 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. We who advise about such matters are likely to say it's critical that leaders model behaviors that convey, for instance: The company is going to look after everyone's welfare; work is a safe place; and the CEO will be washing his hands with the same frequency as you. Just keep in the mind the old Marine tradition: Officers eat only after the troops have their food.
- 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 utilities or comparably-sized companies in the community are offering them.

Did You Know?

The renowned, mid-20th-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."

One of the companies that attended the executive roundtable has a wholly-differentiated approach to pandemic action-planning. Its attitude is, “We are going to be the pre-eminent regional player in, through, and out of a pandemic.” This company even implies that you, as a worker, will be as safe or safer at work than at home. It is distinctly raising the bar on commitment to customers and employees and their families. Some other attendees lamented that the company was creating a whole new standard of protection for their employees which, in effect, put the competition at a disadvantage. The attendee smiled as if to say, “You betcha.” (Co-author Joe McMenamin, MD, JD says it’s unlikely that just one company could redefine the legally-enforceable performance standards for the whole sector, but he acknowledges that the aggressive plaintiffs’ bar should not be underestimated in its willingness to try to establish such a precedent.)

- You want to condition your leaders, managers, and employees to the potential of a pandemic so they are not shocked by the actual event. You must, in effect, immunize them psychologically against the needless stress, 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 protocols) and what they will experience outside of work (e.g., banks may have more limited hours, inventories of groceries will ebb and flow, schools may close, mass transit may be suspended). All of this dovetails with “Training,” which follows.
- 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 and PTO extensions. 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 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.
- 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 the information through 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.” Follow up soon with local meetings presided over by trained leaders. Shortly thereafter, launch your series of training components – some published, some Web-based, and some face-to-face.
- 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. The team should also consider developing a special Web site that is kept

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 their values and intentions (which is not to say the communications advisor can’t coach or even challenge the executives).

Caution

Be very careful about communications sequencing. And don’t start before you are prepared to answer pointed questions about your intentions on antivirals, grace periods on arrival times, flexibility on leave for family matters, incentive pay, extensions on medical leave/PTO, etc.

“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 a designated local radio station 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 many businesses will reduce or eliminate advertising.

- 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 ideally, even in the community, or at least in the industry. That will come as the sum of all of the above actions, and it will be priceless.

Training/Development Opportunities

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

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

- In any case, 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 long before a pandemic.
- 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 found third-party vendors to prepare and distribute home-kits.
- 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 the plant manager is out, the department head is sick, the shift supervisor is not available, or the crew chief isn’t at work. 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.

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.

- If the company does decide to stockpile antivirals, it is essential 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 at least one major utility 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 reasons, or, possibly, imposed quarantine or isolation by health authorities. The reality is no one knows what the range or cycles of absenteeism will be. Many believe there could be periods where it is around 25 percent; some think the combination of factors could take it significantly higher.

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.

Start by identifying 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 revenue or profit generation, i.e., you probably want to protect units that generate – directly or indirectly – the most money. Legal obligations should be factored in. Maybe you even need to consider 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? Whatever way you choose, you will know you weren't tough enough if practically everything is critical.

Key Issue to Resolve

What functions, jobs, and individuals are really critical? Answering requires discipline. Confront the fact that certain activities can be skipped or tabled. (Reduce the social pressure by explaining to people that being non-essential in a crisis doesn't diminish the job or the person's value in normal times.)

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 crucial to the operation of those priority units. With those critical jobs defined, you can then find other jobs that require the same or comparable experience and competencies. A simplified example: A given critical job is typically held by an electrical engineer with five years of experience in your company's substation maintenance group. You nose around your HRIS system for all other jobs that have comparable profiles – at least finding all the EEs with five-plus years at the company. You may find some who are in noncritical jobs who could be easily transferred or trained up to bridge the gap in the critical job. So, you find potential near-match jobs – and categorize them as “close-enough” matched jobs and those requiring some cross-training in advance. Even if you do large-scale assessments with your HRIS at the job level, at some point, you end up at the individual name level that follows.

2. **Individual levels:** If the numbers are relatively small, you might choose to skip directly to individual-level decision making. An example: Say a critical job is senior technician in a nuclear power plant control room. And, for the sake of discussion, you need two per shift (six a day) and you presently have 10 incumbents who rotate to cover weekends, etc. So you – or the plant manager or control room supervisor – could think: If 25 percent of the workforce is out, we theoretically still have seven or eight, and we can get along okay working staggered six-day weeks. If more are absent, 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 senior tech per shift. If regulations prohibit such options, then you have to go to Plan B sooner. Plan B starts with two obvious steps:
- Are former incumbents available who can still do the job (e.g. current shift supervisors, assistant plant managers, recent retirees)?
 - Are there high-potential techs on the verge of becoming senior techs who can step up? Between peers, former incumbents, and high-potential candidates, many situations can probably be covered – especially with certain shift changes. If it still looks dodgy, then enlarge the pool of candidates from the job matches in Step 1.

Immediate ROI

The investment in identifying contingent replacement talent produces short-term results by more systematically spotting high-potential people and potential supervisory and leadership talent.

This is particularly important for an industry sector with a conspicuously aging workforce that is going to lose huge numbers of people in the next five years or so.

Compensation Tactics

While some planners in other sectors seem to anticipate that they will need to pay incentives to get people to come to work, virtually none of the utilities at our energy roundtable agrees. The line of thinking seemed to be, “Crises are regular occurrences for us – it’s part of our job, it’s our culture – we don’t have to pay extra . . . it’s covered in overtime.”

Additionally, many worried about equity and employee relations if selected people received incentives. And all said emphatically that under no circumstances would they pay extra to leaders for work during a pandemic.

Other compensation issues include paying quarantined employees or paying people if certain operations are closed down for several weeks. Pay is not required when people are not working, but you may be inclined to pay them because of the extraordinary circumstances. Such judgments are part of a wide range of similar policy decisions that we take up in the next section.

Contingent Employment/Benefits Policies

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

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.
- Refuse to pay quarantined people, etc. 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.

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 what is legally required and what is not. It's also crucial to know if the company can actually afford your instincts for generosity. Plan ahead by pricing out possible scenarios in advance.

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 upper and lower thresholds in the marketplace, but in the end, your company must decide what to do based on your history, culture, leadership, financial strength, and employee relations.

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.

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 them through all of the values-based decisions the organization needs to make.

Finally, a case could be made for doing as much for employees as possible in the crisis without jeopardizing the enterprise's financial foundation – not merely to be generous, but because it's likely to reward the company with stronger job 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.

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 required challenge is to determine if that level is 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.

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.

Compensation Tactics

- Incentives or “hazard pay” don't seem to be of interest to at least some of the nation's largest energy and utility companies.

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: Where Do We Go from Here?

After the pandemic, your utility will be judged by your employees, the communities you serve, the regulators, the government, and the courts. 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? Where does one start?

- First of all, take this threat seriously. 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 the CEO to the lineman, 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.
- 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.

Just get started...now!

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%

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

Category Three - CFR 0.5% to 1%

Category Four - 1% to 2%

Category Five - 2% 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 (1 to 5 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: Means 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 healthcare personnel in healthcare 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.

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: Pathogens are 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 (e.g., 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): World Health Organization (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

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