

Pandemic Avian Flu Alert

Willis

Issue 4 – The Risk Management Reality

November 2006

While there has been no substantial change recently in the status of the avian or bird flu virus, the insurance marketplace has taken a noteworthy step, providing the first broadly available product for covering exposures associated with a flu pandemic. Markel, based in Richmond, VA, is offering OutbreakSM Extra Expense to cover costs incurred when business activity is suspended by public officials responding to a covered contagion. The product, heralded as a “vaccine for risk,” may not in fact eliminate the exposure in the way a vaccine normally does, but it is still a welcome addition to the US marketplace.



In Asia, where most of the avian flu hot spots are located, reactions among insurance markets are not significant, though they vary by country. In China, we hear reports of a Life insurance company offering a policy specifically for bird flu. In Hong Kong, avian flu is excluded from all programs, except medical programs for which there are exclusions in the case of a pandemic outbreak. In Taiwan, regulations require insurers to cover losses caused by statutory infectious diseases, and avian flu is on the list, meaning that all applicable coverage will apply. In Europe as well, there is little explicit reaction from the carrier community.

Meanwhile, the world remains at Phase 3 in the six-phase pandemic alert scale established by the World Health Organization (WHO). Phase 3 is defined as “no or limited human-to-human transmission.” We continue to hear reports of poultry infections in Europe and Asia, and human cases involving direct contact with infected birds. There is no evidence that the virus has taken the crucial step of mutating into a form that would signal a move to Phase 4: “Evidence of increased human-to-human transmission.” (Phase 6, a full

pandemic, comes with “Efficient and sustained human-to-human transmission.”) Still, WHO officials maintain that we are closer to a pandemic than at any time since 1968, the year of the last significant flu pandemic. With the lack of recent headline news on the subject, businesses and public organizations may face an additional risk: complacency.

(In a recent news report, some experts have found evidence that the virus has infected some people without producing strong symptoms. This could indicate that the virus is beginning to evolve, or it could mean that these cases have simply gone undetected and the virus may not be quite as deadly as feared.)

In this *Alert*, we look at what businesses should expect to face in risk management/insurance terms should a pandemic strike.

A Potential Scenario

It's impossible to know, but a likely scenario has the fateful virus mutation occurring in Southeast Asia, where the most cases have been reported. Once a Phase 4 or Phase 5

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situation is confirmed, dislocations can be expected immediately for travel and commerce. (Stock market watchers, hold on to your seats.) Despite quarantine efforts and travel restrictions that are sure to follow, most experts expect a highly contagious virus to make its way around the world, thanks to global travel, within weeks. This will give most of the world some kind of warning, unspecific as it may be.

Now is the moment when risk managers and human resources leaders would look at their business contingency/emergency management plans and initiate the first communications. If advance preparations have been effective, the workforce should understand what to expect and what is expected of them, and this should reduce the tendency to panic. As the pandemic strikes areas where the business has operations, the plan goes into effect. Non-essential workers may be asked to stay home. Others may begin to work from home. Clients, vendors and partners are contacted and risks from interdependencies are addressed. Quarantine of people and materials may be in order. The emergency response team will be in contact with state authorities, who will likely provide information on the status of the pandemic, and local authorities, who may provide further information and may institute closings of buildings, transportation services or other facilities.

A commonly heard estimate is that 25 percent of the workforce would be infected in a full-scale outbreak and 60 percent would be absent for a variety of reasons (illness, caring for relatives, fear, etc.). Mortality rates are harder to agree on. One feature of the H5N1 virus as it currently exists is that it lodges deeply in the lungs of the humans it infects. This makes it extremely dangerous – but also less transmissible than typical viruses that lodge in the more accessible linings of the nose and throat. A mutated H5N1 virus will have characteristics scientists can only guess at. If the new virus maintains its predecessor's lethality and also transmits readily from human to human, the world could see an unprecedented natural disaster.

A Health Issue



What does such a situation mean for a risk manager at the moment a pandemic breaks out? In terms of standard Property & Casualty insurance coverage, not much. The only coverages that might possibly be involved are Business Interruption policies for organizations such as hotels

that may have extensions covering infectious diseases or Trade Interruption policies. (See our *Alert #2*, May 8, 2006. This and the rest of the series are available at www.willis.com/publications.) Avian flu is a health issue. Employees will become ill. The first, and likely largest, insurance hit will be in the area of Employee Benefits.

Everything related to an organization's health plan will be under stress: the plan support staff, whether internal or external, will be bombarded with questions, while their ranks are thinned by illness and business closings. The potential for financial stress is also enormous. Self-insured organizations will feel the largest strain. Employees with cost-sharing arrangements (and potentially more than one sick family member) will likewise face an enormous burden. All will be coping with a healthcare delivery system more taxed than ever before. All will be watching news reports as scientists around the world race to isolate the mutated virus, develop a vaccine and then hand the information to the drug manufacturers who will be under pressure to deliver products to various distribution channels while coping with losses of their own.

A business contingency plan should therefore consider the long-term financial effects of a pandemic in addition to the short-term logistical and personal effects of the illness.

Potential Liabilities: The Second Person that Falls Ill

Perhaps the largest unknown in the risk management view of a flu pandemic is the potential for liability on the part of the employer. Governments often require companies to provide protection for their workers, and while this would not normally apply to typical viral infections, e.g., the common cold, the circumstances of a pandemic will certainly raise new issues. In the US, for example, Occupational Safety and Health Administration (OSHA) guidelines don't directly address flu pandemic but they do require that employers keep their premises free of hazards. If it appears that one worker has caught the illness from another, does it mean the workplace is infected, and the employer responsible? (If a worker catches the virus on public transportation on their way to work, can they make a claim against the employer for putting them in harm's way?) If a worker catches the illness from someone at home, there is no question of liability. The issue comes to the forefront, however, when the second employee falls ill.

Another potential source of liability comes to play if employers are given instructions by public authorities regarding quarantine or closures. Should an employer fail to fulfill some responsibility set forth for them, and that failure leads to some employees contracting the illness, the employer could face serious Employment Practices Liability claims.

For those with sufficient healthcare coverage, the issue may never become contentious. For those without, or for those families whose lives are changed by a fatality, the issue may give rise to a suit for damages or coverage under Workers' Compensation rules.

Workers' Compensation

Workers' Compensation rules do not normally apply to illnesses, as illnesses do not fall under the definition of a compensable Workers' Compensation loss: an injury that occurs directly out of employment activity. For the worker in a poultry plant where contact with infected birds brings on infection, a case could easily be made. The case could also be made that health workers, police officers or other public employees who are expected to work closely with the ill or enforce quarantines and business closings, may face exposure to the contagion because of their employment. Overseas workers traveling in highly contagious areas would be highly likely to qualify.

More dubious is the case of a data entry clerk who comes to the office where several people have been infected, hoping to avoid coworkers and public places where germs spread, but who gets sick anyway. They might argue that the only reason they were sick was because they came to work. According to precedent, illness is not treated this way in terms of Workers' Compensation. However, we have learned by watching the aftermath of Hurricane Katrina in the US that in the wake of an unprecedented disaster, the courts may be asked to rule on questions that have not been asked before, at least not as forcefully.

US Workers' Compensation

Each country of course has its own version of Workers' Compensation rules and coverage. In the US, why would an employee seek Workers' Compensation benefits? For someone unable to work for an extended time, the financial benefits are clear. While Workers' Compensation rules vary by jurisdiction, in many cases workers receive two-thirds of their salary tax-free (making it comparable to their usual take-home pay). They also receive 100 percent coverage of medical costs. They may also receive survivor benefits, which would be paid to family members should an employee die of the flu.

It is important to note that adjudicating bodies, whether law courts or special Workers' Compensation boards, tend to favor the employees in Workers' Compensation disputes. Workers' Compensation rules were created by governments to protect workers, and governments tend to want them to succeed. It should also be noted that workers do not have to prove negligence for employers to be obligated to provide benefits; in fact, they are often entitled to benefits even if employers prove that *employees*

are negligent. If workers can simply prove they sustained loss or injury in the course of employment, they will likely win.

What is the difference to the employer? Many Workers' Compensation plans involve large deductibles, retentions for high-frequency, low-severity events, and coverage focused on the low-frequency, high-severity events. A pandemic flu has the propensity to create a high-frequency, high-severity situation. Employee Benefits plans, unlike heavily regulated Workers' Compensation programs, vary greatly. They can also involve heavy reliance on self-insurance. To make an accurate comparison, organizations need to model scenarios and apply them to their Benefits and Workers' Compensation programs. For the most part, however, health plans involve some kind of cost sharing, and health plans also stop paying when the event is over and the employee goes back to work, where Workers' Compensation claims can involve longer term repercussions.

UK Workers' Compensation

In the UK, the rules are a bit more strict in the case of workplace infection. The employee would have to prove that the "injury" took place at work, while the employer could argue that the infection could as easily have been contracted on the train or bus to work. The UK has laws requiring the reporting of injuries, diseases and dangerous occurrences (RIDDOR) but avian flu is not listed as a dangerous disease under the Act. An employer would only report the disease under RIDDOR if it were contracted at work or as a direct result of work.

On the other hand, under UK law, employers are required to ensure the workplace is healthy and safe. The only option that would be sure to prevent future claims would be to close the workplace down. If the employee is unable to prove that the infection took place at work, the liability risk is absent.

Unique Situations

The variation in the rules in each country is yet another reminder of the importance of planning. Risk managers should understand what their programs entail and what the law expects of them and be prepared for the repercussions. To reduce the risk that a company will be responsible for Workers' Compensation benefits as a result of a pandemic, it is safe to advise most organizations that they should reduce the chance that workers will get sick in the line of duty. Closing the office sooner rather than later may be a prudent move, and may reduce further exposure to law suits for personal losses and damages.

Benefits Issues

Similarly, each country of the world has its own standards and expectations in the area of employee benefits. Given the

morbidity and mortality rates expected of an avian flu epidemic, Life and Healthcare plans are going to be central. Employers must also be aware of the extent and nature of their legal responsibilities for the safety of their employees. The Willis North American Employee Benefits Practice published an *Alert* in March 2006 that addressed issues surrounding travel to infected areas and legal implications of an organization's response to avian flu risks. We offer excerpts below to serve as an example of the kind of issues employers will face:

When travel to avian flu-affected areas cannot be postponed, employees should be trained about the risks of exposure and protocols for reducing the incidence of infection. In addition to recommending that shots be up-to-date before departing, travelers should be advised to assemble a health kit containing basic first-aid and medical supplies. Travelers should also review their health plans for medical evacuation coverage and identify in-country healthcare resources before leaving the US.

After returning, travelers should monitor their health for 10 days. If they become ill with fever or respiratory symptoms during that period, they should immediately consult with a healthcare provider and report their recent travel. Employers should also emphasize common sense policies that encourage workers to stay home if they are sick so that they will not infect others.



What are the legal implications?

Employers should also use common sense to respond to the individualized conditions created by their unique operations, work environment and geographic locations. Applying this approach, most employers will avoid running afoul of OSHA guidelines relating to avian flu or any other workplace health threat. Employers familiar with the Americans with Disabilities Act (ADA) and other federal nondiscrimination laws may feel that such laws run counter to OSHA rules. However, the ADA, in particular, contains special exceptions that govern situations where someone poses a "direct threat" to workplace safety.

Still, employers must use caution to avoid violating federal and state employment laws, particularly those governing the use of employee medical information and prohibiting discrimination on the basis of a perceived disability.

An employer may require workers who are at a higher risk for avian flu, or who exhibit avian flu symptoms, to obtain a medical certification before returning to work in order to ensure the safety of other employees in the workplace. Wage and hour laws may present challenges for employers who prohibit employees from returning to work after traveling to avian flu-affected areas – particularly in cases where workers are being asked to stay home. When affected employees are represented by a union, an employer may have a duty to consult with the union before implementing avian flu-related measures.

Should you encounter a situation that demands immediate action, workers should be given time off with pay if they are required to stay home due to avian flu concerns. Above all, you should use reasonable care to ensure that workers are treated fairly, that their privacy rights are respected, and you should carefully document the basis for your decisions.

A Brief Response Plan Review

The fact remains that the most important responsibility of any organization in the face of this threat is planning ahead. Human resources and risk management staff must be involved in creating a plan and being ready to implement it. Our *Alert* #3 addressed business continuity management in depth, but here in summary we offer a brief list of issues particular to pandemics that any plan should address:

- Understand the critical functions needed to keep a business alive during the peak disruption of a pandemic.
- Be aware that pandemics come in relatively short waves lasting weeks or months, but that waves often recur weeks or months after initial outbreak.
- Arrange alternative work environments, including work-from-home programs or temporarily finding alternate resources.
- If work must continue during an epidemic, make plans to improve hygiene, minimize contact and reduce the likelihood of on-the-job transmission.
- Encourage workers who recover from the illness to return to work: they are immune. (Such a policy requires careful preparation and must address issues of privacy, proof of immunity and communication.)
- Be aware that factors other than infection by the virus will affect workers, such as fear and the need to care for others.
- Communication is key: the people in charge of emergency management must be trained and must have backup; everyone in the organization should know, as much as possible, what to expect.

H5N1 (Avian Flu Virus) Data Tracker

Below we offer recent data on the impact and spread of avian flu. For up-to-the-minute statistics and further information, visit the following web sites:

- World Health Organization: http://www.who.int/csr/disease/avian_influenza/en/index.html
- The United Nations' Food and Agricultural Organization: http://www.fao.org/ag/againfo/subjects/en/health/diseases-cards/special_avian.html
- The US Centers for Disease Control: <http://www.cdc.gov/flu/avian/>

Cumulative Number of Confirmed Human Cases of Avian Influenza A(H5N1) Reported to WHO

31 October 2006

Country	2003		2004		2005		2006		Total	
	cases	deaths	cases	deaths	cases	deaths	cases	deaths	cases	deaths
Azerbaijan	0	0	0	0	0	0	8	5	8	5
Cambodia	0	0	0	0	4	4	2	2	6	6
China	1	1	0	0	8	5	12	8	21	14
Djibouti	0	0	0	0	0	0	1	0	1	0
Egypt	0	0	0	0	0	0	15	7	15	7
Indonesia	0	0	0	0	19	12	53	43	72	55
Iraq	0	0	0	0	0	0	3	2	3	2
Thailand	0	0	17	12	5	2	3	3	25	17
Turkey	0	0	0	0	0	0	12	4	12	4
Viet Nam	3	3	29	20	61	19	0	0	93	42
Total	4	4	46	32	97	42	109	74	256	152

Total number of cases includes number of deaths. WHO reports only laboratory-confirmed cases.

Source: World Health Organization

Please note: this Alert is intended to provide readers with general information regarding developments regarding the risks of an avian flu pandemic. Please consult risk management and legal professionals for advice about your specific risks and exposures.

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