

Employee Benefit ■ Plan Review

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The Effect of an Avian Flu Outbreak on Workers' Compensation Insurance Plans

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It seems that discussion of a potential bird flu outbreak is everywhere—in magazines, on television, at the family dinner table. While no one seems sure whether or when an outbreak will actually occur, the experts all agree on one thing: individuals and businesses should know the risks facing them and plan ahead. For employers, this means contemplating what a bird flu outbreak could mean for the workforce. Protecting workers' safety will obviously be every employer's chief concern. But in the event that workers do contract bird flu, companies must know whether their workers will be entitled to benefits under state workers' compensation statutes—and whether companies may be required to pay potentially crippling self-insured retentions under their workers' compensation insurance policies.

IN THE EVENT OF OUTBREAK: WILL AFFLICTED WORKERS BE COVERED UNDER STATE WORKERS' COMPENSATION LAWS?

Assuming one or more of a company's workers contracts avian flu, will the afflicted

worker(s) be entitled to workers' compensation benefits? That depends on how the worker(s) contracted the disease. Virtually every state workers' compensation statute provides that an employee will be entitled to benefits for what is known as an "occupational disease." To constitute an "occupational disease," two conditions must be met. First, the disease must be proven to be due to causes and conditions that are characteristic of and peculiar to a particular trade, occupation, or employment. Second, the disease cannot be an ordinary disease of life, to which the general public is equally exposed outside of employment.¹

The distinction between an occupational and an infectious disease, however, is not always easy to make. As one expert explains:

Unlike traumatic injuries, the causes of diseases are not always clear. Determining that a disease is work-related can be difficult. Proof of a condition is not proof of causation....Occupational disease statutes serve mainly to distinguish between diseases that are caused

by and are peculiar to the industrial setting and the ordinary diseases of life. Occupational diseases are covered; ordinary diseases are not unless a direct causal connection to the workplace and the activities of the worker can be established.²

HOW WOULD A COURT DETERMINE WHETHER A DISEASE CONSTITUTED AN "OCCUPATIONAL DISEASE"?

In the event a business faces one or more claims for workers' compensation coverage arising out of alleged instances of bird flu, said business will have to determine whether or not to challenge the claim(s). Whether or not a bird flu pandemic would constitute an occupational disease, and thus be covered under state workers' compensation law, is an issue of fact. Limited case law dealing with the spread of contagions in the workplace, however, provides insight into the factors a court would examine to determine whether a given outbreak would be sufficiently connected to the workplace to constitute an "occupational disease."

For example, in California,³ a breakout of kerato conjunctivitis—a contagious eye disorder—amongst workers at a shipyard was found to be "proximately caused by and to have arisen out of the employment" and "constituted a special exposure in excess of that of the commonality." The court based its holding upon the fact that conjunctivitis was apparently "epidemic" in the shipyards of the defendant, and that "although there were many cases of the disease among the public, there [was] nothing in the record to show that the same proportion as in the shipyards was affected."

Likewise, in Oregon,⁴ the Court of Appeals affirmed a determination of the Workers' Compensation Board that an on-call emergency medical technician (EMT) exposed to toxic chemicals when reporting an overturned tanker truck was injured in "the course of her employment." The technician came upon the accident returning from the station house where she had just recharged her radio

battery so as to remain on call for the rest of the evening. The board reasoned that while she may not have been required to report the accident, her actions were consistent with the duties of an EMT, thereby concluding that her injury "arose out of and in the course of her employment." In affirming the board's decision, the court espoused a standard under which an occupational injury or disease may be attributed to the victim's employment:

As noted, the question of whether an injury arises out of employment tests the causal connection between a claimant's injury and a risk connected with employment. Here, the causal connection is strong. Stopping at an accident scene may, as it did in this case, involve exposure to a variety of toxic substances. We note that this is not a case in which the personal nature of the on-call employee's activities defeats the requisite causal connection between the employee's injury and the risks associated with his or her work.

Washington, too, requires a direct link between the occupational injury or disease and the employee's scope of employment.⁵ In affirming an award of workers' compensation to an employee who contracted asthma from exposure to dust, smoke, and fumes at his workplace, the court found a correlative link between the affliction and the nature of the employment, the court held that:

Under the present act no disease can be held not to be an occupational disease as a matter of law where it has been proved that the conditions of the extra-hazardous employment in which the claimant was employed naturally and proximately produced the disease and that but for the exposure to such conditions the disease would not have been contracted.

Thus, if a worker contracted avian flu in the workplace, it is conceivable that his or her illness would be covered under state work-

man's compensation laws. It is clear, however, that an employee would need to demonstrate either that there was a proximate link between the disease and his or her employment or that he or she was subjected to some special exposure in excess of that of the commonalty. Simply catching the avian flu at the workplace—for example, from a co-worker or a customer—would not be sufficient to receive workers' compensation insurance coverage.

"DISEASE" VERSUS "INJURY": HOW MANY SELF-INSURED RETENTIONS WILL APPLY IN THE EVENT OF AN AVIAN FLU OUTBREAK?

If workers are able to demonstrate that they have contracted bird flu through their employment and are therefore entitled to workers' compensation benefits, their employers will need to consult their workers' compensation insurance policies to determine how these claims will be paid, and at what cost. One question that is likely to arise is the number of self-insured retentions that will apply for a given outbreak.

Many workers' compensation insurance policies, particularly policies providing excess coverage, provide insurance coverage beyond an initial self-insured retention (essentially, a deductible) for each accident and/or each employee for disease, after which unlimited coverage is provided for workers' compensation coverage up until the applicable statutory caps. Thus, if avian flu is deemed to constitute a "disease," most policies would apply a separate retention for each individual employee asserting a "disease claim." This is the likely outcome—pandemic outbreaks typically constitute "diseases" and not "accidents" for purposes of determining the number of applicable retentions under workers' compensation policies.⁶ Thus, depending on the number of claims made, employers facing multiple claims could face extremely high exposure.

If, however, an avian flu outbreak is triggered by a causal event at the workplace and directly flows from the work being performed, it may be arguable that the resulting

disease has been produced by an accident, thus reducing the number of applicable self-insured retentions:

[I]f the cause of an infectious disease is traceable to a specific incident(s) at or related to work, then contracting the disease meets the definition of accident and qualifies as a covered injury. For example, if contracting typhoid fever could be traced to polluted water in a factory, then the illness is a covered injury.⁷

Whether an avian flu pandemic infecting multiple workers will be regarded as an accidental event or an occupational disease—and, as a result, how many retentions will be implicated—depends on the specific circumstances leading to the initial exposure to the disease. If, however, a specific event led to the spread of the contagion, a bird flu outbreak could be considered an accident causing bodily injury as opposed to a disease. Thus, a business would only be required to pay one self-insured retention, no matter how many employees were actually exposed to the avian flu virus.

CONCLUSION

To be covered under state workers' compensation laws, an avian flu pandemic would have to be deemed an "occupational disease"—that is, a disease that results directly from the employment or the conditions under which work was performed, or that subjects employees to a special exposure in excess of that of the commonality.

In the event an employee *could* demonstrate a causal nexus between the avian flu and his or her employment, a court would then have to determine whether the avian flu constituted a "disease" or an "injury" under the terms of the policies at issue. If the avian flu was deemed to constitute a "disease," under most insurance policies a separate self-insured retention would apply for each individual employee asserting a "disease claim." However, if contracting avian flu were deemed to constitute "an accident," it is conceivable

that a single retention could apply to multiple employee claims. To support this position, an employer would need to demonstrate that multiple cases of avian flu arose from one single underlying cause, and that only one "accident" occurred.

NOTES

1. *AMJUR Workers* §316.
2. Donna J. Popow, *Principles of Workers' Compensation Claims*, American Institute for Chartered Property Casualty Underwriters/Insurance Institute of America (Canada 2004).

3. *Bethlehem Steel Co. v. Industrial Accident Comm.*, 135 P.2d 153 (Sup. Ct. Cal. 1943).
4. *American Medical Response v. Gavlik*, 76 P.3d 117 (Ct. App. Ore. 2003).
5. *Simpson Logging Co. v. Department of Labor and Industries*, 202 P.2d 448 (Sup. Ct. Wash. 1949).
6. 99 C.J.S. *Workers' Compensation* §317 (2006) ("In general, an occupational disease is not compensable as an injury by accident"). See Popow, 2.2.

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