

Employer liability with Ebola panic

Forcing workers to take leaves, sending them home not best practices

By Liz Bernier

In North America, at least, there is no outbreak — there have been only two confirmed cases of Ebola contracted on American soil and no confirmed cases in Canada.

But while the virus itself isn't sweeping through the population, Ebola panic certainly is. With intense media coverage, fears around the deadly disease have taken hold — but hastily reacting to those fears could create legal woes for employers.

For most, there's no reason to panic, said David Whitten, partner at Whitten and Lublin in Toronto.

"Unless you're a first responder or somebody who is required to travel to West Africa and hang out in hospitals on a regular basis for your job, the odds of this ever becoming an issue are pretty slim," he said. "Despite all that, there's going to be a lot of people that are going to start, on the employer's side, (to) have some discriminatory treatment."

Some employers might rush to judgment, sending employees home or putting them on leave unnecessarily.

But employers need to use caution, said Erin Kuzz, a founding member of Sherrard Kuzz in Toronto.

"If employers react in a knee-jerk way... then what they're going to do is, number one, create legal liability for themselves. But they're also going to create much more stress and panic in the workplace.

"So it's ultimately not in anyone's best interest," she said, adding that employers could open themselves up to discrimination claims around ethnic or national origin, disability and privacy, among other areas.

If any concerns do come up about potential Ebola exposure, employers should start by simply asking the question, "Are you aware that you had any exposure to anybody that's suffering from Ebola?" said Kuzz.

"And if the answer is no, I think the most an employer could do is... give them the information that describes what the symptoms are, and (advise them) to track themselves for any symptoms... and report if they do have any."

Employer options

If there is reasonable potential for exposure, employers have a few different options, said Whitten — keeping in mind that unreasonably sending someone home without pay could trigger a constructive dismissal allegation.

"First of all, employers have the right to dictate when employees take vacation — that's something a lot of people don't realize. So an employer, rather than just paying people because they may be exposed to (Ebola), they can insist that they utilize vacation time," he said.

"Another strategy, if you're concerned about that employee infecting others, is to have them work from home, if that's possible."

In Ontario, there are several unpaid leaves — including new ones — that could also be used in instances of serious illness, such as family medical leave, personal emergency leave, family caregiver leave and "declared emergency" leave if the government declares a state of emergency, said Kuzz.

"These are all unpaid leaves, but we have to make sure that we're aware that employees are entitled to them (and employers are) entitled to ask for reasonable proof."

Short-term disability may also be an option in some circumstances, said Whitten.

Employers need to look at all of these issues through the lens of providing a safe work environment, he said.

“An employee does have the right to refuse to work in an unsafe work environment, if they have a reasonable basis for doing so. And if they do, then that triggers an obligation on the employer’s part to investigate and to ensure whether or not there is a hazard that needs to be dealt with.”

Assuming Ebola exposure is covered under work refusal rights and the employee is not in an exempted job category, employers need to go through the entire investigation process, said Kuzz. And if an employer finds there is no rational basis for the refusal but the person continues to refuse the work, the Ministry of Labour has to conduct its own investigation.

“If they conclude that there’s no basis for the refusal... the employee could be subject to discipline, up to and including (dismissal),” she said.

The key to maintaining productivity, minimizing fears and avoiding liability is education and communication, said Douglas Angus, a professor and management expert at the Telfer School of Management at the University of Ottawa.

“Communication — it’s absolutely critical. And the more (organizations) communicate, the more assurance that people will have,” he said.

“It is important to have contingency plans, and then that also becomes part of the communications side of it. You should be letting people know that there are contingencies that could be put in place should things get serious enough.”

Simply having that knowledge and education can help minimize fears, said Kuzz.

“One of the things we all need to be careful about around this is not upping the panic and increasing the paranoia. I think employers do themselves a favour and, frankly, their employees by educating them. Public Health Ontario has put out some really good literature around how the disease is transmitted and how it’s not, so I think employers need to start by informing themselves, and then they have to take each situation on its own facts.”

Influenza: The outbreak you should worry about

In Canada, there’s a much greater chance of contracting seasonal influenza than contracting Ebola, according to Kevin Katz, medical director of infection prevention and control at North York General Hospital in Toronto.

“Influenza is a very common illness. The estimate is between 10 and 15 per cent of Canadians are infected every year. And because the strains of influenza shift every year, the requirement for vaccination is, unfortunately, every year.”

It’s important for employers to encourage employees to get vaccinated, he said.

“The benefit of getting the shot is it actually is the best public health measure we have to reduce the incidents of influenza. And there’s good data that it actually reduces influenza on the order of about 60 per cent. So 60 per cent of people who get the shot don’t become ill at all.

“There’s also data that it reduces absenteeism at work and has economic benefits related to that.”

Fears about Ebola are understandable, given the dramatic media coverage and high fatality rate, said Katz, but in North America the risk is extremely low.

“The average person is fearful about it but there’s not really anything they can do that’s productive around that fear. Whereas influenza, on the other hand... we have several thousand deaths annually and we actually do have an intervention that can reduce that risk. And the irrationality there is that people don’t actually take the public health measures that everyone recommends to protect themselves.

“It all comes down to risk perception, and if people don’t feel that it’s a direct risk to them, then they’re not worried about it.”