

JUNE 2006

PREPARING FOR AN AVIAN FLU PANDEMIC

By David P. Jendrzejek



National and international health experts believe that the world is now closer to another influenza pandemic than at any time in the past four decades. Most experts worldwide believe that an avian flu pandemic will occur, and the

World Health Organization (WHO) estimates that it is "highly likely" that the triggering event for the pandemic will occur within the next two years. In view of these warnings, businesses should prepare now to minimize the impact of a possible pandemic on their business, employees, and customers.

Avian Flu

Avian influenza, or "bird flu," is a contagious disease caused by viruses that normally affect only birds. One particular strain, known as H5N1, has caused severe illness in birds and poultry since its first outbreak in China in 1997 and can be transmitted to humans by direct contact with live birds or bird droppings. To date, 208 confirmed cases of human avian flu have been reported in Asia, Africa, and the Middle East, with a mortality rate of 55%.

Public health experts are concerned that the H5N1 virus could mutate into a form that is easily passed from person to person and cause a global flu pandemic. There would be no human immunity to the new virus, and no vaccine can be produced until the new virus emerges and is identified. As of now, it does not appear that the virus has become a pandemic strain. But if it does, it could cause a pandemic like the Spanish flu outbreak of 1918, which infected

one-quarter of the global population and took the lives of more than 50 million people, or perhaps cause a less severe pandemic like those that occurred in 1957 and 1968.

The Impact of A Pandemic

If and when a pandemic flu virus emerges, its global spread is considered inevitable. Given the speed and volume of international air travel today, the WHO predicts that the virus could spread rapidly, possibly reaching all continents in less than three months. From past outbreaks, it is thought that the pandemic may occur in "waves," each of which may last for six to eight weeks, and circle the globe for two to three years before dying out.

A severe flu pandemic could lead to high levels of illness, death, social disruption and economic loss. According to a draft of the U.S. government's National Response Plan, recently made public, "While a pandemic will not damage power lines, banks or computer networks, it has the potential ultimately to threaten all critical infrastructure by its impact on an organization's human resources by removing essential personnel from the workplace for weeks or months." The report forecasts that as much as 40% of the national workforce could be off the job. The International Monetary Fund predicts economic disruption of supply chains from such high absenteeism and adds, "There may also be disruptions to transportation, trade, payment systems, and major utilities, exposing some financially vulnerable enterprises to the risk of bankruptcy. Moreover, demand could contract sharply, with consumer spending falling and investment being put on hold."

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How Businesses Should Plan

Federal and state agencies and various international organizations have been preparing for the pandemic for several years. The U.S. Department of Health & Human Services (HHS), the federal agency assigned to spearhead the national response, recommends that private businesses “develop specific plans for the ways that you would protect your employees and maintain operations during a pandemic.” Like other business continuity or business disruption plans, preparing for an avian flu pandemic requires careful planning. Following are some of the steps that the U.S. Centers for Disease Control and Prevention (CDC) recommends to help businesses prepare:

- **Plan for the impact on your business.** Identify a coordinator or team responsible for preparedness and response planning. Identify essential employees and critical inputs, such as suppliers and services, required to maintain operations during a pandemic. Plan for scenarios likely to change demand for your products and services during a pandemic. Determine the impact on business related travel. Find up to date, reliable pandemic information from public sources and make sustainable links. Establish an emergency communications plan.
- **Plan for the impact on your employees and customers.** Forecast and allow for employee absences due to factors such as fear of exposure, personal illness, caring for sick relatives, and school and public transportation closures. Implement guidelines to reduce the frequency of face-to-face contact (e.g., hand-shaking, shared workstations). Evaluate employee access to health care services during a pandemic. Identify key employees and customers with special needs.

- **Establish written policies for dealing with a pandemic.** Establish policies for employee compensation and sick leave absences unique to a pandemic. Establish policies for flexible worksites (e.g., telecommuting) and flexible work hours (e.g., staggered shifts). Establish policies for preventing the spread of flu at the worksite and restricting travel to affected areas.
- **Educate your employees.** Develop and distribute information about pandemic fundamentals and your preparedness and response plan. Anticipate employee fear and anxiety, and plan communications accordingly. Develop communication platforms (e.g., hotlines, dedicated websites) for communicating pandemic status actions to employees, vendors, suppliers, and customers.
- **Coordinate with external organizations.** Collaborate with insurers and health plans to share your pandemic plans and understand their capabilities and plans. Collaborate with federal, state, and local public health agencies to participate in their planning processes.

Education and outreach are critical to preparing for a pandemic. A copy of the CDC's checklist may be found at www.pandemicflu.gov/plan/pdf/businesschecklist.pdf.

To obtain additional information regarding avian flu and updates regarding this situation, visit these websites: www.pandemicflu.gov or www.avianflu.gov (HHS), www.cdc.gov/business (CDC), www.health.state.mn.us/divs/idepc/diseases/flu/pandemic/index.html (Minnesota Department of Health), or www.who.int/csr/disease/avian_influenza (WHO).

David P. Jendrzejek practices employment law with an emphasis on litigation. He represents businesses in lawsuits alleging discrimination and other employment-based claims and in the prosecution and defense of related business claims involving trade secrets, covenants not to compete and other matters. He may be reached at Jendrzejek@moss-barnett.com.

MOSS & BARNETT SPONSORS EXECUTIVE BRIEFINGS



From left to right: Nancy Kiskis - attorney, Moss & Barnett; Shari Schroeder - President, OTP; Molly Lagermeier - Director, Product Management, UnitedHealth Group; and Ming-Fung Yung - Director, Client Implementation, UnitedHealth Group

Moss & Barnett is a sponsor of the Executive Briefing seminars hosted by Minnesota Public Radio. These briefings feature local executives, who speak on various topics of interest to members of the business community. The speaker at the most recent briefing was Marti Morfitt, Chief Executive Officer of CNS, Inc., a consumer health care products company, probably best known for its Breathe Right® nasal strips. Ms. Morfitt described the renaissance she led at CNS, in “Transforming a Business: The Power of Great Marketing.” Her presentation was most impressive, as she described the need to synchronize core values and internal culture with marketing to drive sales. The next Executive Briefing will be held on June 26, 2006, and will feature Jack Rooney, Chief Executive Officer of Campbell Mithun, discussing reestablishing a corporate culture and identity.

HAVING THE LAST WORD: HEALTH CARE DIRECTIVES IN MINNESOTA

By Cindy J. Ackerman



Last year, the nation watched as Terri Schiavo's family fought in court over removing her nutrition and hydration because she was in a persistent vegetative state with no hope of recovery. Although Terri Schiavo had told her husband that she did not wish to live in a vegetative state, she did not express her wishes in writing or communicate her wishes to other family members. If you want to make your wishes about health care clear

for your family and avoid the involvement of the courts, we recommend that you take the following steps.

Prepare A Health Care Directive (Living Will)

A health care directive in Minnesota consists of two parts. In the first part, you may appoint one or more agents to make health care decisions on your behalf whenever you are unable to make or communicate your health care decisions. Your health care agent steps into your shoes as a substitute decision-maker. Your health care agent has the power to consent to medical treatment or withhold consent to medical treatment as if you were making these medical decisions for yourself. Your health care agent has full access to all of your medical records. In addition, your agent has the power to choose where you would live whenever you need health care and may determine whatever personal security measures are needed to keep you safe. In the event that a guardian is appointed by the court to make decisions concerning your health care, the health care agent nominated in a health care directive has priority to serve as the court appointed guardian.

In the second part of a health care directive, you may state your wishes concerning your health care. The wishes that you state in this part provide guidance to your health care agent in the event you are in a terminal condition, a coma with little hope of recovery, a persistent vegetative state, suffering from advanced dementia or completely dependent on others for all of your physical needs. You may state broad goals for what you would like to achieve for your health care, for example, care to support comfort and pain management. On the other hand, you may express your wishes in terms of the specific type of treatment you would like to receive or not receive, for example, no feeding tubes.

This year, the Minnesota Legislature considered a bill that would have provided that a person is presumed to direct his or her health care provider to provide the person with sufficient nutrition or hydration to sustain life. This presumption could be

overcome by expressly authorizing the withholding or withdrawal of nutrition or hydration. Because this legislation could be introduced again, we recommend that you specifically address this issue in your health care directive.

Some questions to consider:

- Do you wish to receive whatever care is appropriate to keep you as comfortable and free of pain as reasonably possible even if some of the drugs or procedures may hasten your death?
- Do you wish to receive feeding tubes, artificial nutrition and hydration to prolong your life?
- Do you wish to be kept alive by artificial means (e.g., respirator) or heroic measures (e.g., cardiopulmonary resuscitation (CPR))?
- Do you wish to receive hospice care at home, if possible?

In addition to designating health care, the health care directive may be used to provide for the donation of organs, tissues and other body parts and may also be used to authorize cremation or other burial instructions.

Appoint A Health Care Agent to Carry Out Your Wishes

It may not be possible to anticipate all possible situations when stating the specific types of treatment in a health care directive. Appointing a health care agent to act as a substitute decision-maker provides flexibility in responding to a particular medical need. Ideally, your health care agent should be someone who understands your wishes and goals concerning your health care and is willing to follow your wishes.

If you appoint more than one agent to act at the same time, disputes among your health care agents (and family members) may arise concerning your health care. You may provide a mechanism to resolve disputes in the health care directive, for example, designating one of the agents to make the final and binding decision in the event of a dispute.

No matter how many health care agents or successor agents you appoint in your health care directive, you should discuss with your agents not only your health care wishes, but also their beliefs and opinions concerning health care to make sure that they will follow your wishes when the time comes.

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Communicate With Health Care Agents and Family Members

Communication is the key for accomplishing your goals regarding your health care and easing the situation for family members. You should candidly discuss your wishes concerning your health care with your health care agents and family members. The topic may not be pleasant, but the conversation with family members is vital to avoid heartbreaking disputes among family members.

Failure to communicate health care wishes in a written directive or in conversations with family members has led to contentious family disputes requiring intervention by courts and legislatures. A well written health care directive, the appointment of a health care agent who will carry out your wishes and candid conversations with family members can protect you and your family from governmental intervention in your health care.

Cindy Ackerman represents individuals and business clients in the areas of estate planning, probate and trust administration, taxation and non-profit organizations. She may be reached at AckermanC@moss-barnett.com.

XCEL AND MOSS & BARNETT JOIN IN INTERNSHIP PROGRAM

This summer we have teamed with Xcel Energy to offer a combined summer and academic year clerkship for two law students. Breia Euteneuer and Jeff Lin will spend the summer with us and join Xcel Energy in the fall. Both have completed their first year of law school. Breia, a graduate of St. Olaf College, attends the University of St. Thomas, and Jeff, a graduate of the University of California (Berkeley), attends the University of Minnesota. They are working primarily in our corporate and business law and regulated utilities practices.



Breia Euteneuer and Jeff Lin

KATHIE COLE RETIRES AFTER 34 YEARS

On March 24, 2006, Kathie Cole, a long-time member of the Moss & Barnett family, retired to a new home in Park Rapids, Minnesota. Kathie had been with the firm for 34 years and had served in several positions, including legal secretary, office manager and paralegal in the probate, taxation and real estate departments.



Left to Right: Dave Senger, Kathie Cole and Tom Shroyer

Kathie was a dedicated professional. In 1972, she was selected Minnesota Legal Secretary of the Year. She served as president of the Minnesota Association of Legal Secretaries from 1972-1974 and as a member of the national board of directors for the National Association of Legal Secretaries from 1980-1986. During the early 1980s, Kathie co-authored a series of community-college textbooks and workbooks published by West for use in teaching future legal secretaries/assistants. She also was the first paralegal to serve as a presenter at Minnesota CLE Seminars.

Dave Senger, Chairman of the Moss & Barnett Board of Directors and a lawyer who frequently worked with Kathie, noted, "We could always count on Kathie to help with any project that needed attention. Although we hate to see Kathie leave, we wish her all the best in her new life as a retiree. We will miss her."

When Kathie was not busy working as a legal secretary or paralegal, she pursued her interest in various crafts. She served as president of the Twin Cities Decorative Artists Guild from 2004-2005 and was one of the founders of the Moss & Barnett knitting/craft group. In her more relaxed life, she hopes to devote even more time to those interests and perhaps find a few new ones.

All of us at Moss & Barnett salute and thank Kathie for her many years of outstanding service to our firm and clients — and wish her much continuing joy!

THOUGHTS FROM ADJUNCT DIRECTOR CECILIA RAY



Under a new program, the Moss & Barnett Board of Directors has invited a shareholder to serve with the board as an Adjunct Director. I currently hold that position, following Jay Littlejohn's appointment for 2005. One purpose of the program is to develop new firm leadership by introducing younger shareholders to the governing process.

As Adjunct Director, I attend each of the Board's meetings and have unfettered opportunity to offer my fresh perspective on all issues. Most importantly, I have been able to see that Board members devote substantial time and effort

to running our firm, in addition to conducting their own successful law practices. I have also seen that they draw from their collective experience in working to resolve issues collaboratively.

We are currently focused on strategic planning for the firm. As always, our goal is to ensure our continued ability to provide the highest quality legal services to our clients. I am honored to have a seat at the Board's table this year to see it all happening!

Cecilia Ray advises businesses and individuals in real estate transactions (acquisitions and sales, loans, leasing and development). She also provides legal advice to and representation before the Minnesota Public Utilities Commission for telecommunication service providers and other regulated companies. She may be reached at RayC@moss-barnett.com.

IMPORTANT NOTICE

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney client relationship is formed by the publication or reading of this document. Moss & Barnett, A Professional Association, assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

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BE SHREWD, BUT CAUTIOUS, WHEN MARKETING ON THE INTERNET

By J. Vincent Stevens



The internet era provides exciting marketing potential for companies. Effective marketing tools include creative websites, domain names, links or media presentations. But while the free flow of information is literally at our finger tips, companies must be cautious of committing copyright infringement, because a one-time mistake can lead to statutory damages of \$30,000, and a finding of willfulness can increase those damages to \$150,000. In addition, willful

infringement of a registered work for the purpose of commercial advantage or private financial gain can, under certain circumstances, subject the infringer to criminal fines and penalties.

Use Caution

Companies all too frequently download, copy or adapt material from the Internet for use in their own websites, presentations or advertising materials, be it text, music, graphics or logos, without considering whether use of the material infringes the rights of the owner. Such activities can subject you to allegations of copyright infringement. A number of recent court cases have ruled in favor of owner-protection and against unfettered copying of materials on the Internet.

A copyright infringement claim is judged under “strict liability,” which means that defendants can be liable even if they did not know they were doing something illegal. A plaintiff need only prove that the defendant had access to the copyrighted work and copied it without the authorization of the owner.

As in the hard-copy world, facts, ideas or methods of operation cannot be copyrighted, but the expression of those items on the Internet can be. And although copyright law usually does not protect names, titles, slogans or short phrases, they may be protected under trademark law.

Under modern law, owners need not register their copyright nor include a copyright notice in order to claim protection, although failure to do so may impact the owner’s ability to collect damages. Copyright protection in a work attaches as soon as the work is affixed in a “tangible medium,” which has been held by the courts to include the Internet. Therefore, simply because there is no copyright symbol on web content does not mean that it can be freely used by others.

Additionally, it is advisable to carefully read the terms and conditions of any website from which material is used. Aside from copyright infringement, you can be liable for breach of contract if you use material, without permission, in violation of contractual conditions found on the site.

All of this caution does not mean that you should avoid the use of others’ work entirely. There are lawful avenues to exploit, such as requesting permission, seeking licensure for use or using work already in the public domain.

The Fair Use Doctrine As A Defense to Copyright Infringement

The fair use doctrine, originally created by the courts and codified in the 1976 Copyright Act, may, under the right circumstances, provide a defense to a claim of infringement. The purpose behind the doctrine of fair use is to allow the public to use limited amounts of another’s work for “purposes such as commentary, criticism, news reporting, teaching, scholarship or research.” The statute provides that in determining whether the use made of a copyrighted work is fair use, the factors to be considered will include:

- (1) the purpose and character of the use, including whether it is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the work.

When material is used for commercial purposes, courts disfavor applying fair use, although this factor alone is no longer dispositive.

The defense of fair use is somewhat of a moving target and there is significant disparity among the courts as to how the doctrine is applied. It is difficult to predict with certainty when an otherwise infringing act will be found to constitute fair use of copyrighted material. Careful consideration must be given to all of the facts before expecting protection from the doctrine. When in doubt, seek the permission of the owner before copying the material.

Conclusion

Generally, any material found on the Internet should be presumed to be protected until it is determined to be otherwise. Therefore, although fair use is a possible defense to copyright infringement, you should be aware of the risk involved and avoid taking actions that could subject you to involvement in a costly lawsuit. The Internet can be a useful source of information that facilitates marketing, and it should be used to its fullest potential. However, you must apply sound judgment when using material found on the Internet, and remember that publication on the Internet makes detecting infringement easier than ever before. Clever marketers can use the Internet effectively, but should always be wary of the risk involved.

Vince Stevens practices in general civil litigation, focusing on several areas, including contract cases, construction cases, employment matters, commercial disputes and professional malpractice. He may be reached at StevensV@moss-barnett.com.