

Title: Pandemic Preparedness: Developing Your Company's Plan, Thinking Through the Legal Issues

Presented by **ACC's Employment and Labor Law Committee and the law firm of Littler Mendelson**

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ASSOCIATION OF CORPORATE COUNSEL

Moderator: Patti Phelan

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Operator: At this time I'd like to turn the call over to our moderator, Patti. Patti, please go ahead.

Patti Phelan: Hello and welcome to the ACC webcast on Pandemic Preparedness. Many thanks to ACC Employment and Labor Committee and to the law firm of Littler Mendelson for presenting this program. I'm Patti Phelan, Chair of ACC's New to In-house Committee and today's moderator.

I personally experienced how life in a city can change when there is a health related crisis. I live in Toronto, Canada and during the outbreak of SARS, Severe Acute Respiratory Syndrome, three years ago. I saw people wearing protective face masks on streets and the subway. I have a colleague who was quarantined in her home with her family for about 10 days. SARS was declared a global epidemic. 800 people around the world died from SARS, between the first case, which appeared November 2002 and July 2003 when health officials declared that the epidemic was over. 44 people died in Toronto. For what we will be talking about today, is unfortunately something very real. ACC has many resources directed at disasters and crises and I would just like to mention a few of these. On the ACC home page, on the right-hand side, under the heading Resources, is a subheading ACC Responds to Hurricane Katrina. Click on there and

you will be taken to a page with links to numerous articles. ACC also has an Info Pack and a Practice Of profile on disaster planning and response. These can be accessed, either from the webpage for this web case – webcast or by going directly to the virtual library from the ACC homepage.

Before introducing our speakers, there's some housekeeping matters that I'd like to address. We encourage you to submit questions. At the bottom of your screen, you should see a box, in which you can type in the question and after that, just click on the Send button and it will be received by us. At this point, we're not sure how many questions we'll be receiving and able to answer. For the questions that cannot – that we cannot answer during this webcast, they will eventually be answered and the answers will be posted to this transcript which will appear in the virtual library with the archived webcast. Now, the transcript will probably be posted between seven and ten days from today's date. The program itself can be – will be archived within 48 hours. We encourage you to fill out the webcast evaluation before logging off and this appears at the ACC webcast webpage.

I will now introduce and welcome our speakers. Because of time constraints, my introductory comments will be brief. You can learn about the speakers from their bios, which can be accessed from the webcast webpage. With us today are Chris Hansen and Keith Roberatory, both of American Red Cross, Ed Eaton of Crisis Management International and Peter Susser, a shareholder at Littler Mendelson.

Keith Roberatory is Manager Preparedness Planning and Development at American Red Cross. Keith is responsible for the disaster preparedness information that the American Red Cross recommends nationally as actions the public can take to be better prepared for the unexpected.

Chris Hansen is an attorney with American National Red Cross. He serves as senior counsel and the primary focus of his practice involves counseling the Red Cross's biomedical services

nationwide operations on compliance with labor, employment and workplace safety laws, as well as managing all workplace law litigations and investigations for those operations.

Ed Eaton is Managing Director, Crisis Management International, Inc. He is a senior crisis management consultant there and has done so many things, I can only refer you to his bio. It's most impressive.

Peter Susser is a partner with Littler Mendelson. He specializes in employment law and is an expert on questions arising under the Occupational Safety and Health Act. He is a prolific writer. Among other matters, Peter is the author of two leading employment law series, Disability Discrimination in the Workplace and the Family and Medical Leave Handbook. We're very fortunate to have the speakers with us today.

I'll now just briefly outline the format of the program. Keith will begin the program by exploring some of the most significant scientific and public health issues involved in pandemics. Peter and Chris will follow. They will address those aspects of employment law that we most need to be aware of. Ed will then lead us through preparation and planning. Following that, there will be Q&A. We will try to answer one or two questions after each speaker and the extent which we do this will depend on our timing. I will now pass the program over to Keith.

Keith Roberatory: Thank you very much. What we're going to talk about is Pandemic Influenza: What You Need to Know Today. And I think the important thing to keep in mind as we talk about this, is the science is constantly changing. We do know a lot about seasonal flu and flu virus and when I say we, I mean the scientific community. The pandemic influenza virus that would occur, we kind of need to see how the ((inaudible)) changes on that, so at the end of this series of slides, I'm going to have some resources up from different websites that you may want to take note of and since this presentation's going into the archive, if you don't take note of them now, you can always refer back to it.

The – we're going to introduce the influenza virus, what makes a pandemic, some past pandemics, what a future pandemic might look for and then some information that the Red Cross is promoting for people on how to become personally prepared for a pandemic.

The flu is a contagious respiratory illness, it causes mild to severe illness. The thing about a flu that makes it unique, in a way, is that you can transmit the flu to other people, one to two days before you have symptoms and then you can continue transmitting it to other people four to five days after the symptoms start. What this means is that you can't just look for sick people and just say, oh, that person looks sick, therefore they must have the flu. You could have it and be giving it to people and not know about it yet. Influenza is spread by contact with an infected person by sneezing, coughing or touching items recently contaminated by an infected person. So this could be – you've seen people sneeze and cough before – if somebody sneezes to their hand and grabs the door handle and walks through the door and you follow through them, if there are – if there's contaminants on that door handle, you could pick them up on your hand and then it's just a matter of rubbing your eyes, nose or mouth and then you can pick it up. So, it's primarily spread by contact, usually respiratory droplets. The flu symptoms, I'm sure most people have heard about them or had the flu before and it can include fevers, body aches, sore throats, stuffy nose, headaches, fatigue, just that general run-down feeling. The hallmark of influenza is a sudden onset of these symptoms ((inaudible)) and that's how you can usually tell that you're getting the flu.

To separate this out, I want to talk a little bit about what seasonal flu is. On average, five to 20 percent of the population gets the flu, it usually occurs between December and March and each year, a few hundred thousand people are hospitalized and about 36,000 people die from the flu. Most people who get it, recover within one to two weeks and don't require medical treatment. People who have – people who are at the greatest risk, usually get complications because of influenza, such as pneumonia, dehydration, worsening of other chronic medical conditions, such

as heart disease, diabetes or they are infants, pregnant women or nursing home residents seem to be at the greatest risk for this. The difference between a seasonal flu and a pandemic flu is that a seasonal flu is fairly predictable, where a pandemic flu is not predictable. A pandemic flu is usually caused by a novel virus that humans have not been exposed to, so therefore humans don't have a natural resistance or immunity to it and just by definition of being a pandemic, it's going to infect a large number of people of different ages, all over the world, causing serious illness and death. Another thing that has occurred in past pandemics is that even young and healthy people can get the pandemic flu and it can be very deadly to them as well. So, it's not just the traditional risk groups of the seasonal flu, but because it's a novel virus that has not – humans don't have an immunity to, it can be more virulent. Pandemic, by definition, is a disease outbreak that spreads rapidly and affects many people. And a pandemic is actually measured by how fast the virus spreads. So, if it's – if it's spreading at a particular rate that epidemiologists measure outbreaks, epidemics and pandemics by, that's how it's actually defined.

Historically we've had a couple major pandemics in this last century. A lot of people talk about the Spanish flu, which was the 1918, 1918 – 1919 pandemic. A half million deaths in the U.S. and as you can see, 4 million – 40 million deaths worldwide. The Asian flu in '57, '58 the Hong Kong flu in '68 and '69 and the Russian flu in '77, '78. so, you can see there's kind of a cycle to it. Depending upon how widespread these pandemics are, recently they've had less and less impact and that can be for a number of different reasons. You have to look at each one of these ones independently. They say a lot of people are looking at the 1918 pandemic as kind of the benchmark for a really bad one. As a little additional background, we've had past threats of potential pandemic in '97, '99, 2003 in places like Hong Kong, China and the Netherlands. The one thing that has prevented these past threats from occurring, is that there was no sustained person-to-person transmission of the virus. And that's going to be key for defining a pandemic, is that the same human-to-human transmission.

Pandemic waves – a pandemic just doesn't occur, pandemics actually occur in waves and the first wave in a local area's likely to last six to eight weeks. So, this is one of the numbers to look at, so there's actually going to be three different timeframes. You've got the one to two days before that you can share symptoms – or share the disease, four days after you start showing symptoms to share the disease, so there's about a week that you can transmit this. Then in the local area, the wave is likely to last six to eight weeks. Now, pandemic waves are varied but in 1957 pandemic, the second wave occurred three months after the peak of the first wave. The 1968 pandemic, the second wave began 12 months after the peak of the first wave, so people should expect that second wave, if we're looking at the past, anywhere from three to 12 months after the first wave. Current concerns about Avian flu – and this is one of the things where you kind of have to be careful about when you're looking at the news and you're looking at different reports that are coming out – avian flu is an influenza that occurs in birds. And normally, we try to refer it as a potential pandemic flu if it's going to be occurring in humans, just trying to separate it out, the disease in birds versus the disease that would occur in humans. Right now, there's a historically unprecedented disease outbreak in poultry. In humans, as of May 19, this reported by the World Health Organization, there have been 217 cases and 123 deaths and this is significantly higher than any of the other pandemic potential threats which is why there is so much attention on this. And there is no sustained human-to-human transmission identified. There's been a couple of situations where there may have been human-to-human transmission, but it was not laboratory tested and sustained, which is why we haven't gone to the next level of pandemic. When we're talking about a pandemic, usually the first people ask is, is there a vaccine available. A vaccine to protect people is not available now and it will probably not be available at the start of the flu pandemic. So the best protection that people can do is start practicing their healthy hygiene now, so that way it's kind of inherent and second nature during a flu pandemic. It'll also – or it may also, keep down other diseases that are contagious and spread from person to person, if you implement good healthy habits now, it could protect you from the seasonal flu as well.

So, preparing for a pandemic, some of the things that you can do today, stemming off of that, practice healthy hygiene. Clean your hands often, washing them with soap and water is your best option. When soap and water are not available, clean them with an alcohol-based hand sanitizer. Cover your mouth and nose when you sneeze and then clean your hands afterwards. And if you use a tissue, you use it once and throw it away. Don't take the tissue that you just sneezed into that has all the germs and put it back in your pocket. Keep your hands away from your face and stay away from people who are sick. Those are some standard healthy hygiene things that you can do, the best protection is to keep your hands clean. Washing them with soap and water, cleaning with an alcohol-based hand sanitizer. When you're preparing at home, prepare now for how you're going to handle if someone in your household becomes sick. Who's going to care for them? How they can be cared for. If you have a child that gets sick, who's going to stay home with them or if somebody already going to stay home with them. If the person who brings – the breadwinner of the family gets sick, how are you going to work around that. So, these are the things that you need to think about now for how you're going to plan for people getting sick at home. And this is not only true for a pandemic, but it's also true for seasonal flu. You know, if somebody's sick for a couple days or a week in your household, how do you take care of them. And as part of that, determine what supplies you need to provide care at home. So, stock up now, reduce your need to go out during a flu pandemic by stocking up on extra food, water and supplies at home and if you have extra supplies at home, you reduce your risk of having to go out and expose yourself to other people, but also if you get sick, you can reduce the spread by staying at home and not running out of supplies that would make you need to go out while you are sick.

In preparing at your workplace, the Red Cross is encouraging people to talk to their employers and talk to their employees and say, well what is our plan? You know, will employees who get sick during a pandemic and need to stay home, what are we going to do for them. Do employers know that they can send their employees home? How do we encourage that from handling – or how do we encourage that to be handled correctly, so that way, if someone's sick, you don't force

them to come into the office, if it could make the rest of your workforce sick. And then how do you keep the business functioning if your key staff is sick and can't come to work. And that 40 percent number that a lot of people hear about is not only people who will get sick – 40 percent of the workforce may not be available are not only people who get sick but people have to stay home and take care of other people and employees who may have to do social distancing, if that's in a particular area of the country, they say, you know, stay at home while this wave passes. They're going to be looking for sick-leave benefit and wages and these are questions that employers should be putting out ahead of time so the employee knows, OK, if I'm told to stay home by the local authorities, then I know that my employer is going to do this or if my job is at risk or it's not at risk or what my benefits are going to be.

Same thing with the schools. People need to talk to their children's school or day care regarding a pandemic. If that's going to occur, will the – does the school plan on closing down, do they plan on staying open, how are they working with their public health department and then if you have a child who is sick, encourage the parents to keep that child at home, so that way they won't take the disease, the flu, the sickness to the school to spread it. Children are a amazing vector for sharing diseases. So, it's very important to kind of keep them at home or make your plans for how you're going to do that and then if the schools do close down because of a pandemic, the next questions are well, how does my child continue to get educated, what kind of materials are these teachers looking to have their children do while the school's still in session. So, discuss these questions now with your school administrators, cause this could have an impact on your plan. You may say, well, I'm going to go to work, but then if your school's – your child's school closes down, how are you going to go to work.

What to expect. Unlike other disasters, the pandemic flu is an infectious disease that won't damage homes, utilities, buildings and other structures. What it's going to do is cause the people who maintain those systems to get sick. So, you may look outside the window and you may not see anything different, the buildings will be all there, the different parts may be functioning

correctly, but then as the people who get sick are not able to go there, transportation systems may shut down. If the people who maintain the electrical grid can't go to work because they're sick, there may be problems with the electrical system. It's similar to other disasters because it will disrupt your daily routine and you will be asked to take personal action to reduce the spread of the flu pandemic. So it'll look different physically than other disasters, but it's still going to impact you. What to expect.

Internet resources, World Health Organization, Centers for Disease Control and Pandemic Flu dot gov are some good resources to go to, as well as CDC, NIOSH, OSHA and the National Vaccine Program Office. Again, these links will be available in the archive of this presentation afterwards or you can go to the links section and pull the slides down and look at those.

Thank you for your time and please remember to clean your hands.

So, now, Peter, do you want me to hand this over to you?

Peter Susser: Sure, that'd be great.

Keith Roberatory: OK.

Peter Susser: Thanks Keith.

Keith Roberatory: Thank you.

Peter Susser: Obviously there are many potential serious challenges for businesses raised by the prospect of an influenza pandemic, to the point that regulatory agencies have cautioned the regulated community about maintaining operational capabilities in the event of a pandemic. For example, the Federal Reserve Board, the Federal Deposit Insurance Corporation and the Office

of the ((inaudible)) Supervision, dispatched and alert in March to regulated financial institutions, putting them on notice of their need to enhance continuity plans so that they can maintain essential services. The governments National Preparedness Plan also noted the urgency of private sector preparedness which some parts of the economy have already understood and considered. For example, segments of the food industry and other sectors of study. The special challenges, the compelling needs they'll face to continue serving the public in the wake of a severe pandemic. So there are broad range of issues, both operational and legal that would be raised by circumstances approaching or at a pandemic stage. And Chris and I will focus on those concerns raised by employment statutes and regulations, how they might intersect with the developing public health crisis of the type described in the moderate or worse case forecast that we see from national and international public health agencies. And these include of course, safety and health issues, leave and disability discrimination questions, privacy and confidentiality concerns, labor relations and other laws that might be implicated by staffing actions or plans as well as other important compensation and benefits questions, such as Keith already alluded to.

Turning to the question of safety and health in the workplace, most corporate counsel are generally familiar with OSHA and the requirements imposed by the Occupational Safety and Health Act. These include compliance with specific safety and health standards that are promulgated by that federal agency or state plans if you have facilities and a state plan jurisdiction. As well as employers' general obligation to provide workplaces and employment that are "free from recognized hazards that are causing or are likely to cause death or serious physical harm" that's what's known as the general duty clause of the OSHA statute. OSHA has no specific standards dealing with influenza virus – that may not be too surprising. As to the broad area, therefore employers would be left with satisfying their general duty clause obligations and meet requirements of any specific standard that might be related, such as those dealing with personal protective equipment. One question is would avian influenza constitute a recognized hazard causing or likely to cause death or serious physical harm? I think by the time a pandemic influenza crosses the U.S. it'd be hard to say, that that hazard would not be recognized and it

certainly appears clear at this point that it would pose a serious risk of death or serious physical harm. So, in all likelihood, it seems like it would constitute a hazard, within the meaning of the OSHA statute, so potential legal obligations may apply, but to do what? The best advice probably will be to comply with and apply the recommendations that appear from the public health agencies such as CDC, OSHA, World Health Organization, to do what you can to minimize unprotected employee exposures, with the public and coworkers to the extent possible, consider administrative issues such as scheduling or remote work if feasible to minimize contacts and incorporate hygiene issues, cleansers, disinfectants, et cetera and employee education.

One specific area that may be relevant, as I mentioned, is the OSHA rules dealing with personal protective equipment. Employers should be familiar with their general responsibility under OSHA's regulations to evaluate workplace hazards and determine what, if any, personal protective equipment or PPE, would protect against hazards such as those to the head, eyes, face, hands et cetera. Employers also have to maintain a certification that such an assessment of hazards, if they are present, has been performed. A key issue that will be the subject of respiratory protection, such as that provided by certain types of protective masks. These are covered by OSHA when it comes to significant items of protection, for example, full face, powered, air purifying respirators. However it's important to know that many requirements in OSHA's rule also will apply if an employer requires use of what I refer to as filtering face pieces, which include the N-95 or T-95 protective masks that are widely available in hardware stores. Multiple requirements of the Respiratory Protection Standard as to employee screening, fit, instruction, et cetera, may apply to these types of items of protection and also, it should be noted that OSHA does not regard surgical masks as respirators for purposes of that standard, so this key distinction there in terms of things that are widely available, OSHA does not view surgical masks as a respirator, but some of these filtering face pieces available at Lowe's or Home Depot and many other places, can be viewed as covered by OSHA's respiratory protection standard if they're required by the employer.

It's also going to be important to emphasize hygiene practices and protocols as I mentioned before using cleansers, disinfectants, notices about hand washing, notices perhaps urging employees who have been recently ill or exposed to the virus to listen to the public health directors and stay away from entering workplaces and public settings. All of those may make sense. As a matter of administrative action, if the company utilizes contractor cleaning crews, it probably should check on those entities' planning and programs and it also will probably make sense to step up the level and frequency of that kind of cleaning throughout the workday.

OSHA's already posted on its website guidance relating to protection from avian flu for workers in specific industry sectors. These are incorporated as an appendix to the Info Pack on developing effective disaster preparedness and business continuity plans, which is one of the links on this program page. And that document explores a number of issues relating to potential influenza pandemic, including several forms and check lists that may be helpful. The scope of that document is somewhat broader, dealing with the broader subject of emergency preparedness, but you'll find some helpful information with this particular aspect as well. Well, of course if the organization has employees functioning in the sectors already addressed by OSHA, you certainly would be well advised to consider and incorporate those recommendations. The concern in this regard may not be realistically the possibility that the company would be cited by OSHA at some point down the road for non-compliance, with the general duty clause, that could happen, but there could be additional substantial concerns that might be coming about as a result of those standards, those guidance, documents, those recommendations establishing de facto standards of care and failures to meet those kinds of guidance and direction from public health agencies, could have some financial implications of your certain state workers comp schemes that provide enhanced recoveries to employees when injuries result from employer's willful acts or in third-party liability claims if someone can somehow establish that they as business invitee on company premises contracted their illness due to the company's failure to adopt reasonably prudent protective measures.

Well, there currently is no vaccination for avian flu as Keith described and development of such a specific vaccination will almost certainly be delayed for a period of many months following the emergence of any mutated strain that does indeed lead to more ready transmission on a human-to-human to basis. There are, of course, vaccines developed for seasonal flu, generally available, even though they won't target or prevent avian influenza, they certainly will assist in maintaining good health that will assist individuals in avoiding or resisting the spread of pandemic influenza as Keith described. Well, until the point that an avian influenza vaccine is developed, one medication that's garnered some discussion is Tami-flu which is an antiviral used for treating those with flu symptoms and to reduce the chance of getting the flu. It's not a medication in vast supply and the public health agencies generally have urged individuals and organizations not to stockpile those medications as a precautionary measure for fear that those supplies will become exhausted before a pandemic outbreak occurs and won't be available in the geographic areas that need them most. So, with respect to Tami-flu or maybe down the line, at a point at which a vaccine for avian influenza virus is developed, how might an organization approach vaccination? Make it available only to top executives? How will those excluded from availability fair health-wise and how might they react in terms of legal challenge, long-term employee relations harm, problems with business operations, might accompany attempt to mandate use of medications or vaccines by key personnel. These are difficult and different issues for most organizations to confront. Ready conclusions, I don't think are right there at this point. One step that may be desirable with an eye towards potential development and spread of pandemic influenza is the adoption of more formal procedures governing employee return-to-work from absences or illness of several days or more. Should companies adopt those requirements which likely will lead to some medical evaluation and opinion before and employee's allowed back into the workplace. Those types of requirements could be very helpful, on the other hand, on some of the worse case scenarios that we here talked about, the nation's health care system's going to be severely overburdened, so how practically speaking might that be applied? Another difficult question to contemplate.

Employers today deal with protected absences in a number of context, all in theory, could be involved in a pandemic influenza outbreak, including leave under the Federal Family Medical Leave Act or state equivalent laws. Employer provided sick leave, paid time off, vacation or disability policies, disabilities laws potentially provide leave as a form of reasonable accommodation of protected disabilities. Worker's comp absences, if the condition arises out of and in the course of employment and maybe even (USARA), if the National Guard and Reserves are called on to deal with these consequences.

Under the FMLA, garden variety colds and flu, typically are not viewed as covered serious health conditions that trigger leave rights, however, even those routine conditions can be covered if they lead to complications. Looking at avian influenza in the context of a potential pandemic, I think it's pretty likely that those conditions with their real potential for death and serious harm to health would be viewed by almost any reviewing authority as a serious health condition that would trigger FMLA leave rights and also under comparable state laws. But apart from the laws requirements, there'll probably be a need for companies to consider the scope of their existing leave policies from several perspectives. Do they want to encourage or discourage, through their policies of leave and compensation, early return of those with the virus or those who've been exposed to it for humane and employee relations? Do they really want to come down hard on attendance problems during a pandemic and then of course for pragmatic staffing and operational issues where substantial percentages might be affected? Is this the right time to be hardnosed and abrupt in enforcing attendance rules and standards?

Also there are questions under disability discrimination laws. The possibility that leave might be available as a reasonable accommodation of a protected disability, generally the definition of disabilities under the Federal statutes, the Americans with Disabilities Act and the Rehabilitation Act, cover physical or mental conditions that limit major life activities, a history of those kinds of conditions or where individuals are regarded as having those conditions. Under federal law, this typically has been seen as requiring a long-term condition, which may not be present with avian

influenza, which could last weeks or a few months for many of the effected individuals, but maybe not longer. ((inaudible)) in some cases, ADA protections may not be available, at least not to the point of requiring additional leave, however, it should be noted that some state disability discrimination laws, are interpreted in a much more expansive fashion than the ADA, with respect to what's a covered disability. And so, reasonable accommodation requirements could kick in under those statutes.

Also, it seems easy to imagine the possibility that there could arise, conflicts between laws and obligations that impact on employers in this area. Looking particularly at those aspects of recommendations from CDC and other authorities that discourage attendance at the workplace and worksite participation by those who've been ill or exposed to the virus. And an employer's obligation under the OSHA statute to protect employees from recognized hazards that are causing or likely to cause death or serious physical harm on the one hand and on the other hand, those limitations that appear in federal and state disability discrimination laws, medical confidentiality statues, HIPAA, common law privacy constraints, these could be raised by potential communication regarding individuals ill with or exposed to the virus, acting on the basis of someone's perceptions about an individuals condition without, you know, clear facts or maybe scientific precision about the risks of transmission. Or excluding workers whose family members have been ill based on that associations. All of these can trigger concerns and conflicts and trigger some tough decisions and choices for the company. Those are just a few of the challenges that lie ahead.

Now, I'll turn the microphone over to Chris with the Red Cross to consider some of the other employment law issues.

Chris Hansen: Thank you very much Peter. Folks, I'm looking at the time here and I want to make sure I provide Ed enough time to go through his presentation, so we're going to ((inaudible)) up through these issues quickly.

The big issue as I look at it, is staffing issue and it's twofold. First of all, how are you going to make sure you have the staff there in the workplace to operate what you need, but the other matter that some people have sort of glossed over ((inaudible)), the last check marked there too, is what happens is, because of the situation in the community, you do not have the same demand you need on a recently, been working on a task force with the American Association of Blood Banks. And there's a concern because of the nature of the flu, people will not come out to donate blood, therefore, even if your workplace stays healthy, what do you do with those employees who have attempted to come to work, but you just don't have work for them. So, we'll talk about some of those issues as we proceed.

As Peter was saying before, we need to look at the issues with the application and enforcement of your attendance and absentee policies. How do you use vacation leave as a common thing you'll see. Many people will say you have to schedule vacation time in advance, will you forgive that an allow people to use vacation time if sick leave is exhausted, if they are out for an extended period with an avian flu or a pandemic flu situation. So issues like that should be looked at. Some people are not going to want to travel. We should be looking at whether we – travel's required and what options may be available else-wise. Teleconferences, webconferences, all those opportunities can help to minimize exposure. And we're going to talk about union issues next, but – or coming up here following, another area of concern is ((inaudible)) employees. If you have absences, do you have your staff sufficiently trained to pick up for others. There are problems in many union contracts with that, but in a non-union environment there's nothing that would stop that. So, those are some initial issues on staffing.

We should look at what you can do – we recommend looking at what you can do to minimize potential for exposure. Instead of having everyone report at nine in the morning, can you change schedules so that people, especially in an area like DC or New York where you rely on mass transit, aren't taking the mass transit with large numbers of people and therefore less likely to run

into somebody who is contagious. We look at remote sites, what about teller policy, are people going to be able to work from home to avoid coming into a location with many other people and increase the chance exposure, those are options you should be pursuing and looking at. Are you able to shift materials from one location to another, so if you have an outbreak in the mid-Atlantic area of the country, can you shift operations to a facility in the southwest, who can cover that work? And then, most importantly and Keith had touched on it. Most businesses – all businesses need to have a communication plan. Employees are going to be concerned about when they should come to work, when they should not, how they should know whether to come in or not and how their benefits will be affected, how their income will be affected, et cetera. So, those are all matters you should be looking at as you move forward.

As I mentioned just previously, labor law and union contracts often present challenges with staffing issues. Many contracts will have restrictions on the use of non-bargaining employees to do bargaining in a work. You should be talking to your unions if you don't have provisions and contracts already about emergency situations, about supervisors doing work, about temporary sub-contracting to an outside agency if you can't put together sufficient work, bring in temporary employees to do this. In a situation you certainly don't want the restraints of contract to impair your ability to operate a business if your workplace and your employees cannot operate. There may be scheduling assignments that you have to concern about limitations on number of hours worked, issues related to calling in people off of, to fill-in vacancies and absences, whether you have to that by seniority or other options you can use. And then, as we said – as I said in the beginning, there are situations where you may not have customers to serve and in those cases you may have to have layoffs, closings or other workforce reductions on a temporary basis because there's just not work for healthy people to perform.

If your business is interrupted, there are a number of laws you must follow. There's the Workforce Adjustment Retraining Notification Act, WARN Act, which is a federal law and many states have the equivalent statutes, require you to give notice to employees before a workplace

closed or shut down. We get 60 days for a closing, 30 days for a mass layoff, which is a layoff of 30 or more days. There is a provision under WARN to allow you to reduce that notice if certain situations are met. That may or may not apply in the case of pandemic. Certainly with the union you have an obligation to bargain over a decision to outsource operations and possibly to close operations, depending on whether it's an economic effect and then the effects of that are also something you must bargain with the union over, if that comes up.

Finally, policy and benefits program application, structures of operations, many insurance policies are as for example, I know, that you have to be actively at work and if you're not actively at work, it may not be covered use. So, if you have someone who's been out a couple months receiving leave – a couple months, six to eight weeks on a health condition – are they going to be covered with their benefits. They're going to want to know that and you should be in a position to ask that and respond to those questions from your employees as you go forward.

Of course, compensation issues and coordinating your benefits, a lot of this has been talked about. We should make sure with your carriers that they are attentive and prepared to respond to issues because it's likely that these will come in floods if they come. Make sure that – employees will want to make sure they have a way to have a continuation of salary and benefits, so they should understand what options are available to them.

So business travel, the best recommendation is if a pandemic is occurring, to reduce and limit the travel as much as you can particularly across borders where different safety and standards may apply. Again, are there options you have with teleconferences, webconferences, et cetera, to reduce travel to only what's necessary. If your company has employees overseas and you have employees overseas, you should consider what your rules will be with regarding returning those individuals to the U.S. to either escape a situation overseas where they may leave if their at risk from the pandemic. Or if someone has returned, do you want to keep them out of the offices for a while to make sure that they did not bring back a, you know, the flu strain with them.

Finally, the last slide we have here is reference to some documents that you can obtain that talk about disaster emerging management continuity programs the Red Cross has some materials, I think are available on their website. Hopefully Keith can confirm, I know they used to be. But help on the business side look and put together their plans to deal with this in advance so that you're not caught behind.

Hopefully we made up some time, I'm going to pass this along to Ed next, I believe. Ed if you'd like to take over, I will transfer this to you now.

Ed Eaton: Very good. Thank you. Well as we move forward, there are several things that I would like to communicate over the next few minutes. One is definitely to take advantage of the, what I would term the early warning period of time which will be really the time that you have control to take actions that might be helpful to your organization as things move more quickly if a pandemic does occur. Where you would activate preplanned steps and you know, move forward in that way. The next one is to leverage your existing response organization. That's those teams, plans and systems that you have, hopefully already in place for other disasters whether that be hurricanes or other things, because you certainly want to use those systems in existence if you can. And also, to look forward in both planned and dynamic ways if you can.

One of the big questions that we always deal with is how do we convince our management to actually prepare for things. And so, many of the people that we work with have to try to sell programs. Why should they prepare to deal with these issues. Certainly, the pandemic potential to be a global public health emergency is pretty clear and I applaud the explanation and information that we've already gathered this morning. Also, both the U.S. and other governments are taking action. Public health authorities as well as municipal and actually state agencies are doing quite a bit in preparing to respond to the eventuality of a pandemic. Also, another thing, is it's all part of our normal crisis thinking. The time of impact that many people plan for is an

outage of 30 days. Well, this could certainly stretch way beyond that and also have a significant geographic difference between say a normal disaster and a public health one. Also, our entire society is based upon a fairly efficient infrastructure which could be pressed and changed as we would walk through something like this pandemic. We certainly have very few practical experiences that we can base our planning on.

Lastly, I had a conversation with a young lady that was involved in the response to Y2K in New York City, that was in the financial services sector and she was very clear in saying that their Y2K planning had actually allowed them to survive 9/11, even though that – it was not obviously the initial intention of what that effort was for. There – this is a very complex problem. The health and medical issues are clearly, you know, are clearly front and center in this and are the reason and the basis for responding, but because it is so massive there would be a number of other things that we would need to take into account. Government's actions and inaction over time, both in the United States and elsewhere, are really not knowable. They certainly have plans and we can certainly look from the – look to the past to find out how well they've been able to implement plans, but there's certainly a component of that that's unknowable. How the public responds will certainly drive business response and what you need to do as a company in dealing with it.

The media. Not much needs to be said there.

Our social infrastructure as well, will – may very well have to change whether that's dealing with emergency medical, whether that is being able to rely on your local pharmacy or your local grocery to be able to provide things that you would normally be able to get there. We'll certainly be tested. The overall economic impact as well, could address and I think that goes to some of the points that Chris was making a little earlier. And certainly what it does to your own business. If you are in the theater business or the mall business, what does that do to your income stream and how do you deal with that.

Here's several – here's several things, two columns basically, one will kind of allow you too track the disease and how it would flow through, what I would call early warnings, which would consist of the things that we hear from the medial community as well as government, in tracking the illness and watching the patterns develop. If – and then obviously an outbreak could occur and if that triggers actions by and communications by public health agencies and governments. And then all the way to a full-fledged pandemic. And at the conclusion of that, some new – some new state that we're going to have to deal with. I do think that one of the key issues that exists there is if an outbreak occurs, whether that is local to operations that you have or remote and that is, I think an assumption that might need to be – to be looked at in your planning effort.

As far as the company response, I mean, right now we're all in the preplanning and training phase and that can include exercises that can expand your thinking, help teams address things that are beyond normal efforts that they would take place and those kinds of things. At specific trigger points, then you'll want to activate whatever plans you have in place and attempt to take advantage of what I call a window of control. That point, you know, between the time that it looks as if the illness may very well become a pandemic until the point where governments and other activities drive whether they – you can then take further actions. Things like being able to move inventory, being able to move specific people to specific locations. Taking advantage of that timeframe will be – it'll be up to you to be able to do that, but that could very well be critical. If you parallel that to say hurricane preparedness where time between when the hurricane is, you know, 96 hours away, to the time that it strikes, that is the time where you have to really take you know, your final preparations and actions to get people and inventory out of harms way and then be able to reestablish once that – once that disaster passes. They'll be cycles of activity throughout that will basically work in a planned management kind of way that would be helpful for you to think through.

There are two things that I talk with a number of folks about. One would be the things that are knowable and also the things that are within your control. Here's some issues around the knowledge piece. Because there are certainly many things that are outside of your knowledge. We don't really know what the disease will do. We don't know what governments will do. We're not quite sure, we're certainly not sure of how effective the medical community will be in holding off or in treating people that become ill. Well, basically what will happen in society, those are all unknowables. But, there are a number of things that are knowable and in planning, you certainly want to focus on those items. Understanding what your business infrastructure is, where you are, what type of facilities that you have, whether you control those – the access to those facilities or not, understanding your systems and your customers, how accessible you are. If you're in retail business, it's certainly different than if you're in a – in a different kind of business where you don't have face-to-face interface with your customers.

The business impact analysis is a fairly normal effort within the business continuity world. We'll provide you a look at some critical functions, understanding, you know, where your vulnerabilities are to disruption at the various locations and you certainly want to try to map out in your head, those kinds of things in your efforts – map out the kinds of things that are potential so that you can deal with those in the planning effort. What I've termed a revenue chain analysis, in other words, that is a – would kind of be a beginning to end look at from the standpoint of your supply chain all the down to your customer delivery. What are the things that you need to address. And also, the issue of control. Those items that are outside of your control, you need to understand, but there's very little you can do about them. But the things that are inside your control are obviously the place where you would want to concentrate your efforts. Moving inventory, moving people, developing cross-training programs, making sure things are documented so that different people would be able to complete procedures and efforts that specific people with long histories typically do. Also, you know, your, say remote work infrastructure and the competence in using it are things that you can improve on, you know, during this timeframe.

Certainly if you're – if you've made the decision to do something, then, you know, working through a process of defining your objectives, learning everything you can, like participating in webcasts like this. There are a number of things that you can do. One resource that has recently come off is the implementation plan for the National Strategy for Pandemic Influenza, which you can find at some of the websites mentioned earlier. In particular, the executive summary and the appendix A might be useful for anyone looking at planning for ((inaudible)). You certainly would want to define what you think the pandemic will look like. The – as far as your assumptions are concerned what those things might be, location specific, they might be time specific, but issues that so you can actually think through and not – and not assume without really thinking about it, that things that might or might not actually come to pass. Defining your priorities, I think the number of things that have been brought up today, would certainly fit that mold of priorities of staffing people, looking at your customers, looking at change in demand, those kinds of things would certainly help you in that effort.

I think I mentioned earlier, leveraging what you already have. Your business continuity plans, your crisis management teams, you know, using those things in order to apply them to the new problem will definitely be helpful and should be used, at least in my opinion. Using tabletops both from the standpoint of helping people think through this problem and becoming oriented to the things that your organization has deemed appropriate would – is also something that is useful to be looking at in this – in this early warning period. Communicating with everyone will likely be very important in both getting and understanding of what environment you live in and in being able to manage through it successfully. Let me see – and having a planning framework. You know, what are your trigger points, who do you actually choose to manage how you set up your framework of response are things that you can consider. Setting up levels of response so that for each of those, whether that's an activation period or a higher level of response that you already established both response and say management actions have laid out both the audience and the type of communications that you would want to deliver as well as begin, at those stages, to prepare for future and considerations.

Lastly, at the, you know, as things move forward, be time to beginning – time to begin an assessment of what the new normal will look like both from the standpoint of challenges and opportunities that that could present to you.

We also have some practical things that you could look at from the planning standpoint. Sick at work procedures are clearly something that's been talked about. Identifying volunteer and defensive quarantines, all of these things that actually we've heard from Chris and Keith and Peter earlier. So, I think those will be very helpful.

And at this point, I will pass the control back to Patti for our question session.

Patti Phelan: Thank you Ed. In terms of timing and questions, it's about two o'clock now, we've received a number of questions and I'm going to suggest that we take 10 or 15 minutes or so to answer the questions, with a view to closing the program around two-fifteen.

And for the first question, it is, what obligations do businesses operating public facilities or retail operations have to the general public? So, this would relate to someone who is in a shopping mall, what sort of obligations the store owner or the owner of the mall have to that shopper. And I'll ...

Peter Susser: Well, this is Peter, I'm with –

Patti Phelan: -- open it up to everyone.

Peter Susser: Yes, this is Peter. I would put out there I guess, if there are specific laws and regulations that a particular jurisdiction adopts as to operation and safety considerations for those kinds of commercial facilities, obviously those have to be adhered to. But we're generally, I think, there

probably is some standard of reasonable care of that is necessary to avoid liability for negligence in various spheres and that you know, identification of what is standard of reasonable care who's probably influenced a lot by pronouncements and direction of public agencies, such as the public health agencies in this circumstance, so I don't think one could find by quick resort to old codes and regulations that have been on the books, very clear direction in this regard, but certainly some of the local public health agencies will be applying some of the guidance from national and international sources and maybe promulgating or advancing some suggestions as to care. And then some of the principles that are being set forth about contact and minimizing contact may factor into that consideration if there ever is a liability claim asserted with respect to transmission. There are also issues of course under the Disability Discrimination Laws, ADA – the American's with Disabilities Act Title III, deals with access of the public to commercial facilities and public accommodations and that would provide protection to individuals with disabilities if folks fall into that category, but as mentioned earlier, even in that regard, there are good defenses under Title III and even Title I of the ADA with respect to conditions that may pose risks to health and safety of others and so, that could come into play as well.

So, that's what I'd suggest.

Patti Phelan: Because I'm thinking too that with the owner of a shopping mall, it could impose standards on all the tenants, you know, in the interest of both protecting, sort of the shoppers, the tenants and the owner of the mall.

Peter Susser: Right, I mean it certainly could be lease obligations and commitments that would be apart from, you know, regulatory or liability compliance obligations and those could still rest in the landlord obligations or opportunities to change those in the face of changing circumstances and write the contractual responsibilities could obligate retailer or business even more.

Chris Hansen: This is Chris and I agree with what Peter said. I guess, having worked myself in the hospitality industry before joining the American Red Cross, I think that is an area where, you know, I don't have an answer for folks on the call, but I think that they need to be very attentive. You know, obviously hospitals, nursing homes, et cetera and people who operate those need to be particularly attentive. You're dealing with people who have weakened immune systems already potentially, so they need to – I recommend they consult with their attorneys and put in a stringent program to minimize the exposures that may come from there. Though I do believe that to the extent that there is flu vaccine, those are groups of people who will be prioritized in receiving vaccine be it just a seasonal flu vaccine or the actual – if we're fortunate enough to develop – when we're fortunate enough to develop a pandemic vaccine. So, those are areas that need to be careful and be really attentive. Certainly, hotels, you may have individuals who want to extend stays and not return to an area that's infected. In my days when I worked in the hotel industry, you found people who stayed in hotels rather than go home and expose their family to sickness and illness. So those are types of issues to be concerned about and attentive to.

Patti Phelan: Also, for new employees, to what extent can a store owner impose obligations to report ill health, you know within that person's family or you know, the ill health of that person, to the owner as a condition of employment before hiring the person.

Peter Susser: Well, certainly before a conditional offer of employment is made, under the ADA that would be limited, however employers are permitted to administer entrance exams and ask those kinds of questions and if they in fact raise issues that trigger concerns about potential threat or accommodation of a condition, those can be dealt with at that point. So, the timing is important, you couldn't for example put on an employment application, list what conditions you have and those of your family members, but in the course of a post conditional offer exam or questioning, some of those issues could arise, but many of the answers would have to be dealt with in the context of accommodation.

Chris do you have any other thoughts about that?

Chris Hansen: No, I agree that you can't ask them pre-hire, but you certainly can have a policy that says we request you notify us and I think it would be reasonable to impose discipline should you find later that they had failed to. That step of finding out could be difficult, but you know, I think there's nothing wrong with asking them. Unfortunately there's always going to be a concerning issue.

Patti Phelan: Thank you. We'll move on to a new question. The question relates to the interplay quarantine rules and enforce laws. So, that to what extent can quarantine rules variegate from enforce laws? And what are the mechanics of this?

Peter Susser: To my knowledge, the President has designated avian influenza among other conditions that are potentially subject to federal quarantine authorities that could be applied and states and localities often have the same level authority, so they could be applied and can have the effect of enforceable law and violations of those kinds of directives can be punishable. And so, in terms of their intersection with employee rights or applicant rights or public rights for example, I think that they would be very influential in weakening any potential claim, let's say of an employee who wanted to come to work, but despite a quarantine order effecting either the individual, the household, the community, whatever, and the employer refused to allow them to work, certainly a quarantine order that the individual was disobeying, I think would be a pretty effective defense in any kind of challenge on the employment side.

Patti Phelan: Yes. Does anyone else have any comments? OK. The next question is what is the best way to conduct contact management of infected employees in the workplace?

Chris Hansen: I'm not sure that there is a best way, I think it depends on the situation with the employee, with the nature of your business, you know, so I guess, minimizing it as best you can if it is allowing somebody to work from home if they're able to not having those folks in the workplace.

Would – or my suggestion I guess, I'm at a loss for what they mean by contact management specifically.

Patti Phelan: Yes. I think that the telecommunication comes into play but I suppose the – you know, another aspect would be isolating infected employees in a particular room to work together or in a particular part of the building?

Chris Hansen: You can try to do that if you have infected employees ((inaudible)). Certainly making use of – heavy use of disinfectants. I think if you operate a call center where people are using the same telephone repeatedly, plenty supplies of you know, like the Clorox disinfectant wipes and to spray things down and to do that are good methods. Peter mentioned using contract cleaners and if possible, with their schedule, maybe increasing the frequency of those folks coming and you know, disinfecting as well as cleaning, using stronger agents to minimize the possibility of germ exposure ((inaudible)) exposure.

Ed Eaton: This is Ed. That might also actually get into point to where concerned employees let someone else know that they think someone is ill and you know, trying to deal with that circumstance, as far as those communications and actions to prevent the spread of the illness as well as to pacify, you know concerned employees.

Patti Phelan: Thank you. Now, this will be the last question and we received a number of inquiries as to what the panelists think in terms of when a pandemic may come to the U.S., as in for planning purposes, is there anyone who can talk about the likelihood of it coming before the end of 2006 or 2007 and what are the sorts of things that are considered in sort of making this type of assessment or can it even be made?

Keith Roberatory: This is Keith, I'll jump out here first on this one. You're right, there are a number of questions that are coming in about the timing of a pandemic and when it's going to occur. These

are questions that I do not believe can really be answered because what we're waiting for in a sense, is for nature to make a change. The influenza virus is a highly evolving, quickly mutating through antigenic drifts and antigenic shifts. And what we need is two viruses, two types of influenza viruses – the avian virus and then the human virus combining to make something that is fairly effective at human-to-human transmission and meets a couple other criteria. That's why you hear people – some people saying it's a matter of – not a matter of if, but a matter of when. There is no definitive timeline that while we're at this point and we know that in a hundred variations this will occur. There's no way to predict when that's going to occur. What I would suggest in terms of monitoring the current outbreak in terms of determining what the federal government is doing, in terms of what the science actually thinks the likelihood of occurring, would be to monitor websites and especially pandemic flu dot gov because this is where the federal government's going to be putting all that information.

Patti Phelan: Oh, I'm sorry, can you repeat that? Pandemic flu –

Keith Roberatory: -- dot gov.

Patti Phelan: OK.

Keith Roberatory: This is – the pandemic flu dot gov website is maintained by the DHHS and CDC is part of that, so these are the groups within the United States, part of the federal government that are monitoring for the outbreaks. And the Centers for Disease Control and Prevention, CDC, works in consultation with the World Health Organization, WHO, in making these determinations. That's the site I'm watching for and watching the stuff on it. I think that's where we're going to find those types of answers.

Patti Phelan: And do any of the other panelists have any comments?

Peter Susser: No, that sounds right to me.

Patti Phelan: OK. Well, with that, we'll close the program. I very much want to thank Peter Susser, Ed Eaton, Chris Hansen and Keith Roberatory, our panelists today. I also want to thank ACC Employment and Labor Committee and Littler Mendelson for their work in this – in this topic, not only in terms of this presentation, but in terms of the Info Pack that has been produced and is available through the ACC website.

Thank you very much for attending. And with that, I'll say goodbye.

Female: Hello?

Male: Hello?

Female: Hello.

Male: Who's this left over?

Patti Phelan: It's Patti Phelan.

Ed Eaton: Hello Patti. This is Ed.

Female: I think we're still live.

Patti Phelan: OK.

Female: OK, we may have gone to ((inaudible)) conference now.

Female: Hello?

END