Ebola: Employer Liability Issues
By Mark A. Lies II and Kerry Mohan

By now, the worldwide health authorities and media have publicized the Ebola hemorrhagic virus (EHV) or the Ebola virus disease (EVD) that has been reported throughout western Africa. Although the U.S. has only experienced several cases of EVH, it is only a matter of time before it surfaces in more cases throughout the country. Given high density areas of human contact such as mass transportation systems, schools, hospitals and the workplace, the potential is great for this widely circulating virus to spread from human-to-human in a short period of time.

Background
What is Ebola?
EHV originated from Africa. It derives its name from the Ebola River, which is in the vicinity of where the virus was first identified. An individual infected with EHV will often suffer the following, worsening systems:
- fever (greater than 101.5°F);
- severe headache;
- muscle pain;
- weakness;
- diarrhea;
- vomiting;
- abdominal pain;
- unexplained hemorrhaging (bleeding or bruising);
- death.

Though an individual’s symptoms may appear anywhere from 2 to 21 days after exposure to the virus, the average is 8 to 10 days. The virus has a mortality rate in certain areas well in excess of 50% of individuals who become infected.

How is EHV Transmitted?
Unlike other diseases, such as influenza, measles and the norovirus, EHV is not easily transmitted. An individual who has been exposed is not contagious until an infected individual shows symptoms.

EHV is transmitted through direct contact, either broken skin or mucous membranes, with an infected individual’s:
- blood or bodily fluids, such as urine, saliva, feces, vomit, semen; and
- objects that have been contaminated with the virus (i.e., needles and syringes).

Although EHV is not readily transmitted by coughing or sneezing, it is possible that an infected individual could transmit the virus if his/her saliva or mucous from a cough or sneeze comes into contact with another individual’s eyes, nose or mouth. In many cases, the virus contaminates a surface (e.g., desk, arm rest, chair, table, bedding, clothing and another individual comes in contact with the virus through normal daily activities. Moreover, EHV may live outside of the body in blood or other bodily fluids for up to several days. The virus can remain infectious in human semen for several months.

What are the Legal Ramifications that Employers Should Consider?
There are several employment and other laws that may be directly involved with EHV and must be considered by employers. These are as follows:

Occupational Safety & Health Act

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General Duty Clause
Under the Occupational Safety and Health Act (“Act”), the employer has a legal obligation to provide a safe and healthful workplace. One of the agency’s enforcement mechanisms is the ability to issue citations with monetary penalties to employers. The General Duty Clause (Section 5(a)(1)) of the Act requires an employer to protect its employees against “recognized hazards” to safety or health that may cause serious injury or death.

Given that the Act does not have a specific regulation that deals with EHV, OSHA will utilize the General Duty Clause. To determine the scope of the employer’s obligation under the General Duty Clause, OSHA is empowered to utilize outside nationally recognized consensus standards or other authoritative sources. In this case, OSHA would rely upon recommendations issued by CDC, NIOSH, World Health Organization (WHO) or other similar resources. If OSHA can establish that employees at a work site are reasonably likely to be “exposed” to EHV (e.g., serving as healthcare providers, emergency responders, transportation workers), OSHA will require the employer to develop a plan with procedures to protect its employees.

Multi-Employer Work Site
Under the Act, the host employer may also have additional legal obligations to the employees of another employer who may come to the host employer workplace and may potentially be exposed to the hazard (in this case to EHV carriers). OSHA can utilize its authority under the multi-employer workplace doctrine to issue citations to the host employer when personnel of another employer are exposed. In these instances, citations can be issued by OSHA to the host employer if another employer’s staff members are exposed or if the host employer created the hazard or exposed the other employees to the hazard. The host employer or the controlling employer at the site will ultimately be held responsible to correct the hazard.

Response Plan
OSHA will expect the responsible employer to develop a program based on a hazard assessment of potential exposure at the work site (hygiene and decontamination), including:
• conduct employee awareness training regarding the hazard;
• develop procedures requiring the issuance and use of PPE (e.g., masks, gloves) if necessary to prevent infection and transmission;
• develop a means of reporting infection and providing medical surveillance for employees who contract the disease;
• maintain appropriate documentation of the foregoing actions;
• preserve medical records;
• record on the OSHA 300 Log any illnesses which are occupationally related.

Whistleblower Protection
Because of the significant health hazards associated with this disease, it is possible that an employee could refuse to work because s/he believes that his/her health is in imminent danger at the workplace due to the actual presence or reasonable probability of the disease at the workplace. An employee who makes such a complaint is engaging in “protected activity” under Section 11(c) of the Act and is not subject to adverse action by the employer for refusal to work until the employer can establish through objective evidence that there is no hazard or that the employer has developed a response plan that will reasonably protect the employee from exposure to the disease.

Worker’s Compensation – Disability Benefits
If an employee contracts EHV as a result of occupational exposure (e.g., the illness “arises out of and in the course of employment,” which the employee must prove with competent medical evidence), the employee is entitled to receive temporary total disability benefits in lieu of wages, reasonable and necessary medical treatment.

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and an award for any resulting permanent disability (e.g., reduced respiratory capacity). An employer should evaluate whether it has adequate worker’s compensation insurance coverage and coverage limits that include occupational diseases.

If an employee contracts EHV and it is not occupationally related, the employee may be entitled to disability benefits if the employer provides such benefits. Again, the extent of such benefits and any exclusions should be carefully evaluated by the employer. The employer must consider that EHV is going to involve significant medical issues, such as determining 1) whether the employee is infectious; 2) what type of treatment is necessary; 3) whether the employee presents a health risk to others; and 4) when the employee can safely return to work. Therefore, it is essential that the employer identify a competent medical professional with expertise in infection control who can advise it on all medically-related issues, including worker’s compensation.

**Family & Medical Leave Act**

Under the Family and Medical Leave Act (FMLA), employers who have more than 50 employees are required to provide up to 12 weeks of unpaid leave to a qualified employee who has a “serious health condition.” An employee is also eligible under FMLA in the event of a “serious health condition” affecting its spouse, child or parent(s).

If an employee contracts EHV, this disease will most likely be considered a serious health condition under FMLA warranting the unpaid leave. Similarly, if an employee’s parent, spouse or a child contracts the disease, this will likely be a qualifying event entitling the employee, with physician’s documentation, to utilize leave time to care for such an immediate family member.

It is certain that issues may arise if the employee contracts the disease but is able to continue working while potentially exposing other employees to infection. Since CDC appears to recommend removal of such individuals from the workplace during the incubation period of the disease (2 to 21 days) to prevent transmission of the disease, the employer may have to consider placing the employee on an FMLA leave or providing some other form of leave despite the employee’s desire to continue working.

If the employee exhausts the entire 12 weeks of FMLA leave, and is unable to return to work at that time, the employer may wish to consider additional unpaid leave for the employee, although such leave would be outside of the FMLA required reinstatement rights.

**Americans With Disabilities Act**

The Americans with Disabilities Act (ADA) provides certain protections to employees who may have physical, mental or emotional disabilities but who are otherwise qualified to perform the essential functions of their jobs. Typically, a disability is an impairment that substantially limits one or more of the major life activities of an individual (e.g., breathing, working, speaking), which is chronic in nature. Thus, EHV, which is expected to involve temporary infection, and hopefully recovery, would not appear to qualify as a disability.

The ADA may become a factor, however, if an employee develops a disability as a result of the disease and cannot return to their former work duties because of such impairment. The employer must then be prepared to engage in an interactive process with the employee which involves a case-by-case dialogue regarding the employee’s ability to return to work, any work restrictions, what accommodations may be available which do not cause undue hardship to the employer or whether the employee’s disability presents a direct threat to the safety or health of the employee or other employees. Again, it is recommended that employers engage competent medical advice regarding any accommodations that may be warranted as a result of the long term effects of this disease.

**Premises Liability**

Under general common law principles in most jurisdictions, a landowner (sometimes the employer) who allows third parties to enter upon its premises for business or related purposes (such as clients, vendors, contract

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employees), owes these individuals a duty of reasonable care to protect them against hazards at the premises which are not open and obvious. In the case of EHV, if the landowner (e.g., a healthcare provider, emergency responder, transportation related company) is (or should be) aware that there are infectious persons at the premises (whether its own employees or tenants) who may create a health hazard to these third-party entrants, there may be a duty to warn such third parties, or to prevent access to certain facility areas. In the event that the building ventilation system or washroom facilities may become contaminated with EHV, the landowner may have an obligation to prevent such contamination through enhanced sanitation measures.

In many cases, the legal duty of the landowner for site security and sanitation will be defined by contractual documents, such as leases. The landowner should review such documents to confirm its obligations regarding third parties who may have access to the property.

**Recommendations**

It is recommended that employers become knowledgeable about this disease by accessing recognized sources of information. In addition, employers should determine, based on a hazard assessment, whether an EHV response plan is required. For example, does the employer employ individuals

a) in industries where exposure may be likely (healthcare, emergency response, transportation); or

b) who have or are expected to travel to/from western Africa or other geographical areas where the disease has been identified.

If so, the employer may need to consider:

1) means and methods to protect employees before they travel to areas known to have experienced the EHV disease;

2) what procedures will be followed when these employees return to the U.S. from such areas (e.g., possible quarantine, fitness for duty medical examination if the employee exhibits the symptoms of EHV). In some cases, the employer may offer employees the option of remote work to isolate these employees from the general working populace during the incubation period.

Finally, in the event that the employer engages in activities where there is a possibility of employee infection, the employer should consider consulting with its local Department of Public Health to obtain guidance, as well as engaging with a medical provider who has particular expertise with infectious diseases of the magnitude of EHV.

**Where Can I Find Additional Information on EHV?**

**Informational Websites**

- CDC: www.cdc.gov
- U.S. Department of Health & Human Services: www.flu.gov
- OSHA: www.osha.gov
- WHO: www.who.int
- CDC Emergency Response Hotline for health employers: (770) 488-7100
- Local Department of Public Health

**NOTE**: If you wish to receive complimentary copies of this article and future articles on OSHA and employment law related topics, please contact Mark A. Lies, II at mlies@seyfarth.com to be added to the address list.

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