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# **Ebola and Beyond: Managing Your Workplace, Insuring against Risk, and Addressing Misconceptions about This and the Next Public Health Crisis**

**Monday, December 1, 2014, 12:30 p.m. – 2:00 p.m. ET**

**Venable LLP, Washington, DC**

# Agenda

- Medical and Public Health Basics  
**Chris Aldridge, MSW** – National Association of City and County Health Officials (NACCHO)
- OSHA Considerations  
**Ronald W. Taylor, Esq.** – Venable LLP
- Employment Law Considerations  
**Douglas B. Mishkin, Esq.** – Venable LLP
- Insurance Available to Mitigate Ebola-Related Risks  
**Glynis Priester** – Wells Fargo Insurance Services USA, Inc.
- Legal Issues Associated with Insurance Coverage  
**Michael C. Davis, Esq.** – Venable LLP
- Questions and Answers



# Medical and Public Health Basics

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# Presentation Overview

- Ebola Basics
- Public Health Response
- Business Need to Know



# Ebola Basics<sup>1,2</sup>

- Ebola is a rare virus that causes a hemorrhagic fever in humans and non-human primates
- Discovered in 1976 near the Ebola river in what is now the Democratic Republic of Congo
- Five strains of Ebola virus, of which four cause disease in humans
- Fatality rate is around 50% with ranges between 25% and 90% depending on strain and other factors



<sup>1</sup>CDC (2014) About Ebola Virus Disease. Available at: <http://www.cdc.gov/vhf/ebola/about.html>

<sup>2</sup>WHO (2014) Ebola Virus Disease. Available at: <http://www.who.int/mediacentre/factsheets/fs103/en/>



# Signs and Symptoms<sup>1</sup>

- Signs and symptoms of Ebola resemble many other diseases
  - Fever, severe headache, muscle pain, weakness, fatigue, diarrhea, vomiting
  - Other symptoms may include abdominal pain or unexplained hemorrhage (bleeding or bruising)
- Symptoms generally appear within two to 21 days of exposure
- A person does not become infectious until they are symptomatic

**Is it Flu or Ebola?**

Flu (influenza)	Ebola
<p>The flu is a common contagious respiratory illness caused by flu viruses. The flu is different from a cold. Flu can cause mild to severe illness, and complications can lead to death.</p>	<p>Ebola is a rare and deadly disease caused by infection with an Ebola virus. Sporadic outbreaks have occurred in some African countries since 1976.</p>
<p><b>How Flu Germs Are Spread</b></p> <p>The flu is spread mainly by droplets made when people who have flu cough, sneeze, or talk. Viruses can also spread on surfaces, but this is less common. People with flu can spread the virus before and during their illness.</p>	<p><b>How Ebola Germs are Spread</b></p> <p>Ebola can only be spread by direct contact with blood or body fluids from</p> <ul style="list-style-type: none"> <li>• A person who is sick or who has died of Ebola.</li> <li>• Objects like needles that have been in contact with the blood or body fluids of a person sick with Ebola.</li> </ul> <p>Ebola cannot spread in the air or by water or food.</p>
<p><b>Who Gets The Flu?</b></p> <p>Anyone can get the flu. Some people—like very young children, older adults, and people with some health conditions—are at high risk of serious complications.</p>	<p><b>Who Gets Ebola?</b></p> <p>People most at risk of getting Ebola are</p> <ul style="list-style-type: none"> <li>• People with a travel history to countries with widespread transmission or exposure to a person with Ebola.</li> <li>• Healthcare providers taking care of patients with Ebola.</li> <li>• Friends and family who have had unprotected direct contact with blood or body fluids of a person sick with Ebola.</li> </ul>
<p><b>Signs and Symptoms of Flu</b></p> <p>The signs and symptoms of flu usually develop within 2 days after exposure. Symptoms come on quickly and all at once.</p> <ul style="list-style-type: none"> <li>• Fever or feeling feverish</li> <li>• Headache</li> <li>• Muscle or body aches</li> <li>• Feeling very tired (fatigue)</li> <li>• Cough</li> <li>• Sore throat</li> <li>• Runny or stuffy nose</li> </ul>	<p><b>Signs and Symptoms of Ebola</b></p> <p>The signs and symptoms of Ebola can appear 2 to 21 days after exposure. The average time is 8 to 10 days. Symptoms of Ebola develop over several days and become progressively more severe.</p> <ul style="list-style-type: none"> <li>• People with Ebola cannot spread the virus until symptoms appear.</li> <li>• Fever</li> <li>• Severe headache</li> <li>• Muscle pain</li> <li>• Feeling very tired (fatigue)</li> <li>• Vomiting and diarrhea develop after 3–6 days</li> <li>• Weakness (can be severe)</li> <li>• Stomach pain</li> <li>• Unexplained bleeding or bruising</li> </ul>

For more information about the flu and Ebola, visit [www.cdc.gov/flu](http://www.cdc.gov/flu) and [www.cdc.gov/ebola](http://www.cdc.gov/ebola).

<sup>1</sup>CDC (2014) Signs and Symptoms. Available at: <http://www.cdc.gov/vhf/ebola/symptoms/index.html>



# Transmission<sup>1,2</sup>

- Ebola virus is difficult to transmit
- Transmission occurs through direct physical contact with a symptomatic individual
  - Exposure to infectious bodily fluids through broken skin or a mucous membrane
  - Needle sticks
  - Handling or consuming infectious fruit bats or primates
- Ebola is not transmitted through the air or water
- Healthcare workers, family, and close friends are at highest risk of exposure

<sup>1</sup>CDC (2014) Transmission. Available at: <http://www.cdc.gov/vhf/ebola/transmission/index.html>

<sup>2</sup>CDC (2014) Risk of Exposure. Available at: <http://www.cdc.gov/vhf/ebola/exposure/index.html>



# Diagnosis and Treatment

- Ebola virus becomes detectable up to three days after on-set of symptoms
- Important to rule out other diseases
- CDC has built the capacity of labs across the country to test for Ebola virus
- No approved medication for Ebola Virus
- Treatment is most successful when started early
  - Providing IV fluids and balancing electrolytes
  - Maintaining oxygen status and blood pressure
  - Treating other infections if they occur

1CDC (2014) Diagnosis. Available at: <http://www.cdc.gov/vhf/ebola/diagnosis/index.html>

2CDC (2014) Treatment. Available at: <http://www.cdc.gov/vhf/ebola/treatment/index.html>





# What is Different in West Africa?

- Previous outbreaks have been shorter in duration and limited in the number of persons impacted
- Number of factors make the West African outbreak different:
  - First time Ebola seen in area
  - Population density
  - Cultural factors (burial rituals)
  - Poor public health infrastructure
  - Mistrust of government
  - Slow international response
- These factors have made the West African outbreak longer lasting and more severe



# Public Health Response

- Funding was made available after 9/11 to build preparedness of public health
  - Developing hospital coalitions
  - Putting in place communication plans
  - Securing personal protective equipment (PPE)
  - Training
- Public health is in a continual state of preparedness for infectious disease outbreaks
- Each response is different, requiring unique elements to be considered
- Lessons continue to be learned



**Public Health**  
Prevent. Promote. Protect.



# Screening Travelers

- Travelers leaving impacted countries are screened for symptoms and Ebola exposure
- Travelers arriving in the U.S. are screened again for symptoms and Ebola exposure
- Travelers are assigned a risk level from
  - No identifiable risk
  - Low (but not zero) risk
  - Some risk
  - High risk



# Monitoring Arriving Travelers

- Persons are monitored by health departments for 21 days based on their risk level
  - This includes travelers and U.S. healthcare workers who treated Ebola patients
- Individuals with no identifiable risk are not monitored
- Low (but not zero) risk individuals undergo Active Monitoring
  - Individual takes temperature twice daily and monitors their symptoms
  - Report to health department once daily
  - Does not need to be done face-to-face
  - No movement restrictions



# Monitoring Arriving Travelers

- High Risk individuals undergo Direct Active Monitoring
  - Individuals take temperature twice daily and monitors symptoms
  - Report to health department twice daily
  - One health department report must be in-person
  - Movement restrictions are imposed
- Some Risk individuals receive either Active Monitoring or Direct Active Monitoring
  - Dependent on circumstances identified through screening



# Healthcare Preparedness

- Active and Direct Active Monitoring make it unlikely an individual will not be identified as symptomatic early
- Health departments are working with emergency medical services to ensure appropriate transportation of persons who become symptomatic
- Health departments are ensuring hospitals can handle symptomatic individuals for Ebola
  - Manage during evaluation phase
  - Transfer to identified treatment facilities



# What Businesses Need to Know

- It is highly unlikely that a patron or employee will present symptomatic at the business site
  - Individuals at any risk level are monitored by the health department
- Businesses do not need to take specific steps regarding individuals who the business believes is “at-risk”
  - The health department will determine if an individual is at any risk and act accordingly
- Fear of Ebola can create a stigmatizing environment for individuals
  - The impacted area represents only a small part of the African continent



# What Businesses Need to Know

- If a patron or employee does become ill and is identified as At Risk for Ebola
  - Isolate the individual to the greatest extent possible and keep contact to a minimum (stay three feet away)
  - Call the health department and notify them of the situation
    - An individual under monitoring will have a number to call
  - In an emergency, call 911 and let the dispatcher know the person may be at some level of risk for Ebola and then call the health department
  - Health department will work with business to monitor employees considered at a level of risk, conduct environmental decontamination, etc.





# Public Health Resources

- CDC: <http://www.cdc.gov/vhf/ebola/index.html>
- WHO: <http://www.who.int/csr/disease/ebola/en/>
- NACCHO: [www.naccho.org](http://www.naccho.org)





# OSHA Considerations

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Partner and Maryland Labor and Employment Practice Group Head  
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# OSHA and Workplace Safety

- OSH Act enacted in 1971 to assure safe and healthy workplaces for America's workers
- Enforcement is through OSHA or one of 26 authorized state plans
- Employer Duties under the OSH Act
  - General Duty Clause – Employer must furnish employees a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm.
  - Standards – Employer must comply with applicable occupational safety and health standards and regulations.



# OSHA and Workplace Safety

- Inspections are the principal means for enforcement of standards
  - Inspections can be Programmed (planned) or Unprogrammed (the result of a complaint or injury/illness)
- Inspections may result in citations with penalties of up to \$70,000 per violation, and more
  - Abatement costs and requirements
  - Effect on how do business
  - Reputational/Indirect costs
  - Precedent for future inspections, including inclusion in OSHA enforcement schemes
  - Prospect of company-wide or follow-up inspections
  - Dramatically escalating penalty costs
- OSHA has not promulgated a specific Ebola standard

# OSHA and Ebola

- OSHA's Bloodborne Pathogens standard (29 C.F.R. 1910.1030) likely covers Ebola exposure as Ebola is transmissible by blood or other potentially infectious material as defined in that standard
  - OSHA believes it does, but answer more complicated unless reasonably predictable occupational exposure
  - In addition, depending on the work task, setting and possible exposure to biological agents, other standards may apply, including standards on:
    - Personal Protective Equipment (gloves, gowns, respirators, etc.)
    - Sanitation
    - Hazard Communication
    - General Duty Clause
- Some states, notably California, have issued interim guidance on Ebola

# What Employers Should Do For Safety

- Conduct risk assessment of the workplace
  - Risks from/to employees
  - Risks from/to nonemployees
- Is occupational exposure reasonably predictable as a result of work with coworkers, patients and others (e.g., who travel to/from foreign countries with current Ebola outbreaks)



# What Employers Should Do For Safety

- Develop procedures for minimizing identified risks
  - Follow existing Bloodborne Pathogens standard if exposure to blood/OPIM is predictable as result of duties
  - Consider need for additional measures
    - Consider whether employee informational training would be beneficial
  - Consult frequently with CDC guidance related to infection control and prevention
- Isolating individuals who recently travelled to foreign countries with outbreaks is NOT currently required under OSHA guidance





# Employment Law Considerations

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# Ebola and Employment

- Family and Medical Leave Act
  - Ebola would be a “serious health condition”
- Workers Compensation
  - If employee contracted Ebola through work responsibilities
- Americans With Disabilities Act
  - Is it a “physical impairment?” Temporary medical conditions are not.



# *Valdez v. Minnesota Quarries*

2012 WL 6112846, 27 A.D. Cases 298 (D.Minn.2012)

- Swine flu pandemic of 2009
- Valdez goes to Mexico for sister's funeral
- Mexico was center of pandemic
- Valdez returns, gets fired
- Valdez alleges: because employer feared he was exposed to swine flu virus in Mexico
- Valdes says: employer "regarded" me as "disabled" under ADA



## *Valdez v. Minnesota Quarries (cont.)*

- Plaintiff need only prove he was regarded as having impairment
  - Need not prove impairment would have limited major life activity
- Employer affirmative defense
  - Not “regarded as” disabled if impairment is “transitory and minor”



## *Valdez v. Minnesota Quarries (cont.)*

- Employer: Swine flu is transitory and minor
- Valdez: When they fired me, swine flu perceived to be serious, not minor
- Court: “...the question turns not on perception but on reality. And from an objective standpoint, swine flu must be considered transitory and minor.” 29 CFR pt. 1630.
- The question that is begged here...



# Valdez and Ebola

- Employer affirmative defense: Ebola is “transitory and minor” – “regarded as” claim fails.
  - Employee: thousands are dying
    - Employer: When treated properly (e.g., in U.S.), no long term effect
  - Employee: if minor, why keep me home?
    - Employer: We’re entitled to keep sick employees home even from minor illnesses



# Your Other Questions

- When can I do medical examination?
  - Not pre-offer
  - Post-offer pre-employment to everyone in same job category, not just “disabled”
  - During employment if job-related and consistent with business necessity
  
- May I ask an employee what country s/he has been in?
  - Yes, because it is not a disability-related inquiry.



# Your Other Questions

- May I ask an employee if s/he has symptoms of Ebola (e.g., a fever of 101.5 or above)?
  - Yes, because the inquiry is not disability-related OR the person with the symptoms poses a “direct threat”
- May I send a symptomatic employee home?
  - Yes
- What do I say to employees who are concerned that another employee has Ebola?
  - ?



## CLE Code: “Solutions”

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1.5 hours, of which 1.5 hours applies to the general credit requirement, and by the State Bar of New York in the amount of 2 credit hours, of which 2 credit hours can be applied toward the Areas of Professional Practice requirement. Approval for MCLE Credit by the State Bar of Virginia is pending. Venable certifies this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California and State Bar of New York which govern minimum continuing legal education. Venable is a State Bar of California and State Bar of New York approved MCLE provider. This program is appropriate for both experienced and newly admitted attorneys.







# Insurance Available to Mitigate Ebola-Related Risks

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# Ebola Specific Industry Risk Issues

- Multinationals / NGOs operating in West Africa
- Healthcare Industry
- First Responders
- Hazardous Waste Transporters / Disposal Firms
- Hospitality & Real Estate



# What Coverage Exists for Ebola Under Various Type of Insurance Policies?

- General Liability
- Business Interruption
- Workers Compensation
- Directors & Officers Liability
- Travel Accident
- Healthcare Coverage
- Environmental Insurance for All Industries and for Healthcare Industry
- New Emerging Solutions



# Coverage Forms and Pollution Gaps



	General Liability	Property	Excess Liability	Business Auto	Site Pollution/ Environmental Liability
<b>Underground Storage Tanks (UST)</b>	Likely excluded	Likely excluded	Cleanup excluded - time element possible	Likely excluded	Scheduled primary or excess of underground storage tank policy
<b>Waste Disposal at Landfills, Recyclers</b>	Likely excluded	Likely excluded	Cleanup excluded - time element possible	Likely excluded	Add optional non- owned disposal coverage
<b>Hazardous Substances Transport</b>	Limited coverage possible	Likely excluded	Cleanup excluded - time element possible	Limited coverage upset and overturn	Add optional First Party or Contingent Transportation
<b>Hostile Fire</b>	Limited coverage possible	Likely excluded	Cleanup excluded - time element possible	Likely excluded	Pollution coverage is all peril risk policy
<b>Business Interruption</b>	Likely excluded	Likely excluded	Cleanup excluded - time element possible	Likely excluded	Add optional loss of rents / extra expense
<b>Fuels/Chemical Storage</b>	Likely excluded	Limited coverage possible – named peril	Cleanup excluded - time element possible	Likely excluded	Liability coverage is provided for releases
<b>Onsite Cleanup Costs</b>	Likely excluded	Limited coverage possible, sub-limit of \$25 thousand	Cleanup excluded - time element possible	Likely excluded	Covered unless specifically excluded due to known liability
<b>Waste Storage Onsite</b>	Likely excluded	Likely excluded	Cleanup excluded - time element possible	Likely excluded	Liability coverage is provided for releases
<b>Viruses - Ebola</b>	Limited if any	Likely excluded	Limited if any	Likely excluded	Varies by Policy
<b>Mold and Legionella</b>	Limited, if any coverage	Limited, if any coverage	Limited, if any coverage	Likely excluded	Automatically covered



# Environmental Insurance Viruses, Bacteria, Infectious Diseases. . .

- *At least* five carriers have specimen forms or endorsements specifically for the healthcare industry.
- *At least* five carriers include some element of coverage for bacteria and viruses.
- Some include:
  - Coverage for “Disinfection Events,” which include “MRSA virus or other facility borne infectious *virus, bacteria or disease.*”
  - “Viruses and bacteria” in the definition of “pollutant.”
  - “Medical, infectious and pathological *wastes*” in the definition of “pollutant.”
- Regardless of their *specimen* policies and endorsements, all carriers are applying increased scrutiny to *every* placement.



# Sample Language in Healthcare Endorsements in Environmental Policies

- “**Disinfection Incident** means the discharge, dispersal, release, escape or **outbreak of any pathogen or infectious agent** that can cause disease or illness at any Covered Location.”
- “**Disinfection Expense** means reasonable and necessary costs incurred by the INSURED to clean and disinfect food and/or beverage processing equipment and storage areas after a **Disinfection Incident** where required by a government agency, which may include, but not be limited to the **Center for Disease Control (CDC)** . . .”
- “The following is added to the definition of “**Pollution Condition**”: Solely with respect to Cleanup Costs, the discharge, dispersal, release, **or escape of viruses or bacteria, as defined by the Center for Disease Control**, provided such discharge dispersal, release or escape commences on or after the retroactive date shown above.”
- **Pollution incident** means the discharge, emission, seepage, migration, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including, hazardous substances, microbial matter; legionella pneumophila; **medical, infectious and pathological waste** . . .”



# Texas Presbyterian Dallas Case Study – Lifecycle of Events & Insurance

- What types of claims/damages ?
- What Policies likely applicable?
- What will be some of the likely hurdles?
- What additional coverage or new solutions could be secured for similar case in future?





# Legal Issues Associated with Insurance Coverage

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# Insurance Policies: The Most Important Contracts You Never Read

- Four Main Parts to an Insurance Policy
  - Coverage Grants
    - What is covered?
  - Exclusions
    - What is not covered (e.g., pollution which can include communicable disease)?
  - Limits/Deductibles
    - How much insurance is available and when?
  - Other Terms and Conditions
    - Claim notice, protocol compliance, approval of defense counsel/contractors, etc.
  
- All should be considered to ensure appropriate coverage

# Ebola Specific Coverage Issues

- Current Policies May Not Be Adequate
- Ebola-Specific Issues
  - How are Ebola related losses covered?
  - What Ebola related losses are covered?
    - Business Interruption
      - What triggers loss?
      - Direct (damage to your property required) or contingent?
        - » If your conference has a 90% cancellation rate but no one catches Ebola, is it covered?
      - How are losses computed?
    - Are quarantine costs and related losses covered?
    - What about D&O claims?

# Ebola Specific Coverage Issues

- Ebola-Specific Issues (cont.)
  - What Ebola related losses are covered?
    - Decontamination costs
      - What triggers?
      - What locations?
      - To what standard?
    - Disease transmission on your property, to your employees or beyond
      - Needle stick
      - Failure of PPE
      - Misdiagnosis
      - Employee travel
  - Is adherence to protective protocols required?



# Questions and Answers

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