

Bird flu: businesses asleep at the wheel could wake up with a nasty headache

By **Marie-Claude Perreault and Vicky Lemelin**

with the assistance of *Sophie Prigent, student*

As the poultry farming crisis looms and countries are on the lookout for outbreaks of infection, scientists are closely following the evolution of the virus, which is moving to new sources of infection.

Before a crisis is on our doorstep, businesses should prepare themselves for the consequences of a high rate of absenteeism. Without exaggerating the risks, they should adopt preventive strategies and become aware of the legal ins and outs of their actions. In this article, we will give a brief overview of three particular aspects of the issue: preparation, managing absenteeism and closure due to superior force (*force majeure*).

Preparation

If a bird influenza pandemic occurs, the disruption of business activities will primarily affect the human resources sector¹. It is therefore critical that businesses develop a business continuity plan and examine their internal dependencies.



Business continuity plan²

According to the Public Health Agency of Canada³, if a pandemic occurs, from 15% to 35% of the population will not be able to go to work or school. Businesses could therefore find themselves in situations where they are unable to fill orders, where their suppliers or subcontractors cannot meet their obligations or where demand for their services is seriously affected.

Regardless of its size, a business should prepare to maintain its operations by drawing up a business continuity plan designed to keep operations at a viable level so that it will meet its contractual obligations and commitments to its customers, as well as legislative requirements, while limiting risk. In addition, a business which adopts a continuity plan shows that it has a proactive attitude, thereby improving its image.

¹ Canadian Manufacturers & Exporters, *Influenza Pandemic: Continuity Planning Guide for Canadian Business*, March 2006.

² *Keeping Canadians Safe (A guide to business continuity planning)*, Public Safety and Emergency Preparedness Canada, June 13, 2006, on-line: http://www.psepc-sppcc.gc.ca/prg/em/gds/bcp-en.asp?lang_update=1

³ *Frequently Asked Questions - Influenza Pandemic*, Public Health Agency of Canada, October 31, 2005, on-line: http://www.phac-aspc.gc.ca/influenza/pandemic_qa_e.html



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According to the Department of Public Safety and Emergency Preparedness Canada⁴, a business continuity plan is typically divided into five sections:

- Business continuity plan governance in the form of a committee that will “[...] ensure senior management commitments and define senior management roles and responsibilities.”⁵ Smaller businesses should appoint a pandemic coordinator.
- Business impact analysis, i.e. identifying the impacts of disruptions and examining internal (staff) and external (customers and suppliers) dependencies.
- Plans, measures and arrangements for business continuity to maintain operations at an acceptable level.
- Readiness procedures to provide advance training for staff, including practical exercises to maintain a high level of preparedness.
- The use of quality assurance techniques to ensure the plan’s relevance and effectiveness. Continuous appraisal of the plan is essential to maintaining its effectiveness.

Internal guidelines

Under sections 9 and 51 of the *Act respecting occupational health and safety*⁶, section 46 of the *Charter of Human Rights and Freedoms*⁷ and article 2087 of the Civil Code of Québec⁸, an employer has a legal obligation to protect the health and ensure the safety of its employees.

This is an obligation of means, not of result. Employers therefore need not achieve a specific result, such as guaranteeing employees that there will be no bird flu in the business. Instead, they must identify the risks inherent in their businesses and then take appropriate steps to protect the health of their employees and ensure their safety.⁹

This obligation may be fulfilled by setting up guidelines which will be useful or even essential in the case of a bird flu pandemic. The intensity of such guidelines will vary depending on the seriousness of the situation. They should begin with hygiene and controlling the spread of the virus. They should also modify the frequency and nature of contact between employees.

Employee absenteeism

Absence due to illness

Employees will not be able to perform their duties if they contract the bird flu virus.

Unless there is a relevant provision in the collective agreement or a negotiated term in his or her employment contract, an employee is entitled, under section 79.1 of the *Act respecting labour standards*¹⁰, to be off work without pay for a period of not more than 26 weeks over a 12 month period, provided that he or she has three months of continuous service and that the absence is not due to an employment injury within the meaning of the *Act respecting industrial accidents and occupational diseases*¹¹.

Absence or leave for family or parental reasons

Some employees might have to be absent to look after a relative or their children, especially if schools are closed.

Section 79.7 of the LSA provides that an employee may be absent from work, without pay, for 10 days per year to fulfil obligations relating to the care, health or education of the employee’s child or the child of the employee’s spouse, or because of the state of health of the employee’s spouse, father, mother, brother, sister or grandparent.

Furthermore, under section 79.8 of the LSA, an employee who is credited with three months of uninterrupted service may be absent from work, without pay, for a period of not more than 12 weeks over a period of 12 months where he must stay with his child, spouse, the child of his spouse, his father, his mother, the spouse of his father or mother, his brother, his sister or one of his grandparents because of a serious illness. However, if a minor child of the employee has a serious and potentially mortal illness, attested by a medical certificate, the employee is entitled to an extension of the absence, which shall end at the latest 104 weeks after the beginning thereof.

⁴ *Keeping Canadians Safe (A guide to business continuity planning)*, *supra*, note 2.

⁵ *Keeping Canadians Safe (A guide to business continuity planning)*, *supra*, note 2.

⁶ *Act respecting occupational health and safety*, R.S.Q., Ch. S-2.1, hereinafter the “OHSA”.

⁷ *Charter of Human Rights and Freedoms*, R.S.Q., Ch. C-12.

⁸ *Civil Code of Québec*, L.Q. 1991, Ch. 64, hereinafter “CCQ”.

⁹ *C.S.S.T. v. GTE Sylvania Canada Ltée*, [1984] T.T. 382.

¹⁰ *Act respecting labour standards*, R.S.Q., Ch. N-1.1, hereinafter the “LSA”.

¹¹ *Act respecting industrial accidents and occupational diseases*, R.S.Q., Ch. A-3.001.

¹² The government is currently conducting a voluntary recruitment campaign for nurses who are not in the public network. However, such nurses are reticent about volunteering. See *Les infirmières se dérobent à l’appel*, *radio-canada.ca*, June 22, 2006, on-line: <http://www.radio-canada.ca/nouvelles/regional/modele.asp?page=/regions/ottawa/2006/06/22/001-infirmieres-influenza.shtml>

¹³ *Emergency Preparedness Act*, R.S., 1985, Ch.22 (4th Suppl.).

¹⁴ *Public Health Act*, R.S.Q., Ch. S-2.2; see in particular sections 2, 3 and 4.

Special laws

Some employees could be forced to be absent following the adoption of a special law requiring that individuals with the necessary training provide hospital care, for example.¹² Like the federal *Emergency Preparedness Act*¹³, Quebec's *Public Health Act*¹⁴ gives the power to intervene when the health of the population is in jeopardy. Note also that the *Quarantine Act*¹⁵ is intended to prevent the introduction into Canada of epidemic diseases. An employer could therefore find itself in a situation where some employees are forced to be absent from work.

Also, the legislature may adopt a special law to provide for leave relating to the bird flu. This is what occurred in Ontario in 2003 during the outbreak of severe acute respiratory syndrome (SARS).¹⁶

Right to refuse to work

Employees may refuse to go to work for fear of contamination. The right to refuse to work is prescribed by sections 12 and following of the OHSA. To be entitled to refuse to work, the person must be a worker within the meaning of the Act and have:

"[...] reasonable grounds to believe that the performance of that work would expose him to danger to his health, safety or physical well-being, or would expose another person to a similar danger."¹⁷

In the case of bird flu, this means being faced with a serious, real and imminent danger of contagion.

As the Labour Tribunal stated in *Villeneuve v. Gouvernement du Québec (ministère des Transports)*:

[Translation] "By qualifying the grounds as reasonable, the legislature wanted to indicate that the grounds should not be compared to capriciousness, pretexts or pressure tactics, but rather to reasonable grounds according to the standard of the reasonable man."¹⁸

Furthermore, section 13 of the OHSA states that a person may not exercise his right to refuse to work if:

"[...] his refusal to perform the work puts the life, health, safety or physical well-being of another person in immediate danger or if the conditions under which the work is to be performed are ordinary conditions in his kind of work."

We assume that this provision is intended to prevent the mass departure of health professionals, such as nurses.

Closing of business and superior force

If the pandemic affects most of its staff, an employer may decide to close its business. It may also be released from its obligation to continue to pay its employees if it proves the presence of superior force as defined in article 1470 CCQ:

"A person may free himself from his liability for injury caused to another by proving that the injury results from superior force, unless he has undertaken to make reparation for it."

A superior force is an unforeseeable and irresistible event, including external causes with the same characteristics."

To constitute superior force,¹⁹ the event must therefore be unforeseeable, irresistible and not imputable to the person relying on it.²⁰ The employer will thus have to prove that it could not have foreseen the occurrence of the pandemic and that it could not have prevented it. We believe that, even if the criteria of irresistibility and imputability are met, it would be difficult to prove unforeseeability, as a diligent business cannot be completely unaware of an impending pandemic and the possibility of setting up various measures to limit the risks.

Conclusion

Finally, as mentioned, it is critical for all businesses to consider the possibility that a pandemic could occur and the effects a pandemic would have on their staff and activities. We recommend that a business continuity plan be prepared and that all possible avenues to mitigate the effects of a high absenteeism rate be examined.

This type of situation demonstrates the importance of communication with employees, customers and suppliers. We suggest that you tackle the subject with a positive frame of mind and emphasize what has been done rather than what remains to be done.

Adequate preparation and communication are excellent tools which will help any business to recover from this pandemic as quickly as possible.

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¹⁵ *Quarantine Act*, R.S., 1985, Ch. Q-1.

Note that this statute will be repealed by the *Quarantine Act*, S.C., 2005, Ch. 20 when it comes into force, which has essentially the same purposes, i.e. preventing the introduction and spread of communicable diseases.

¹⁶ *SARS Assistance and Recovery Strategy Act*, 2003, S.O. 2003, Ch.1.

¹⁷ OHSA, s. 12.

¹⁸ *Villeneuve v. Gouvernement du Québec (ministère des Transports)* [1986] T.T. 274, at p. 278, AZ-86147066.

¹⁹ Certain events have been recognized as constituting superior force, such as the September 11, 2001 attacks (see in particular *Boulé v. Vacances Esprit*, AZ-50178800, *Jarry v. 9009-2297 Québec inc.*, AZ-50155312) and the ice storm which hit Quebec in 1998 (see in particular *2750-0552 Québec inc. v. St-Charles-de-Drummond (Municipalité de)*, AZ-50085312).

²⁰ See *Vandry vs. Quebec Railway, Light, Heat and Power Co.*, 53 S.C.R. 72, AZ-50292984.

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