

# SWINE FLU PANDEMIC: LEGAL ASPECT

---

France  
10 rue Saint Marc  
75002 Paris  
Tel : 01 55 34 77 00  
Fax : 01 55 34 77 01

[contact@carpentier-avocats.com](mailto:contact@carpentier-avocats.com)

United Kingdom  
Berkeley Square House  
Berkeley Square  
London W1J 6BD  
Phone: 00 44 207 887 6086  
Fax: 00 44 207 887 600  
[www.carpentier-avocats.com](http://www.carpentier-avocats.com)

## SWINE FLU PANDEMIC: LEGAL ASPECT

On 1 May 2009 The UK Financial Services Authority (FSA) issued a statement for firms on swine flu and stated:

*“In light of the recent outbreak of influenza in Mexico and subsequent reports from the World Health Organisation, the FSA believes that regulated firms should be assessing their contingency plans to consider what steps they may need to take to address possible issues”.*

It is believed that the impact of the awaited pandemic could be severe for companies including:

- Employee sickness or death,
- Large scale absenteeism due to fear of going to work,
- Inability to meet product or service commitments,
- Failure to meet corporate contractual obligations,
- Potential of severely damaged reputation,
- Significant financial losses / loss of market-share.

Whereas the EU has not yet discussed a plan on the threat, the UK was the first European country to have a contingency plan in place for pandemic flu.

At both national and local levels the public sector is working on pre-prepared contingency plans to help fight swine flu.

We will therefore browse what the government is doing to help combat swine flu and protect everyone living in the UK and the impact of the flu on companies.

## **I – the British government and the swine influenza**

The British Government has taken drastic measures in terms of **Surveillance**

As soon as a potential pandemic is identified, control measures can be put in place and work on a vaccine can begin.

The UK government is part of an international network of flu surveillance, and helps to analyse over two thousand flu viruses each year.

Nevertheless there is no vaccine for the time being.

It is therefore necessary to **control the spread of a pandemic.**

### **Social gatherings are first of all concerned.**

The governments states that, although close contact with others, particularly in a crowded and confined space, speeds the spread of the virus, there is little evidence that cancelling public gatherings would help the community.

However, international gatherings held in the UK, with participants coming from infected areas, may be postponed.

### **Travel restrictions remain unlikely.**

Imposing general travel restrictions is unlikely to have a large impact on a pandemic. It is far more effective for people feeling the symptoms of flu to stay at home and rest.

The measures also concern **health**

In particular, the Department of Health will be in charge of the response to the swine flu (influenza A H1N1) outbreak.

It has already developed a contingency plans which includes:

- looking after patients in the community
- providing specialist care for those who need it
- making sure the appropriate infection control facilities are available
- helping to distribute antiviral drugs
- minimising the disruption to other NHS work
- providing arrangements to make sure enough health staff are available
- making arrangements for mass vaccination when required

All NHS organisations have pandemic plans in place and they continue to review and test those plans.

**Companies are also concerned with measures taken by the British government.**

The UK Financial Services Authority (FSA) has also released a statement saying **firms should be assessing their contingency plans in response to the arrival of swine flu** in the UK.

The regulator says UK firms should **reassess their business continuity planning** to consider what steps they might need to take to address possible issues arising from the spread of the swine flu.

The FSA says it is already contacting "high-impact firms", including infrastructure providers, to assess the impact of a more serious swine flu outbreak on any aspects of their businesses.

The FSA ran a market-wide business continuity exercise based on a pandemic risk scenario, in response to a previous pandemic scare surrounding the spread of the SARS and the bird flu virus.

The **2006 study** concluded that **absenteeism could peak at up to 49%**, with some clusters within business units of up to 60%.

Operational risk software and consultancy firm RiskBusiness has also released the results of its own global pandemic risk survey in response to fears over the swine flu virus - now given a 4 out of 5 alert rating from the World Health Organisation.

The firm says “72% of financial institutions surveyed have a pandemic-specific business continuity and resilience programme in place, but 30% of those programmes have either not been reviewed for more than 12 months or have never been reviewed, and 42% have either not been tested in over 12 months or have never been tested”.

According to the research, only 41% of participants from Europe, the Middle East and Africa have recently reviewed their pandemic-specific business continuity programmes, compared with 64% of Asia-Pacific participants and 75% of firms taking part in the Americas.

## **II – Measures to be taken by companies**

As the swine spreads, the British Government is informing the general public as well as companies.

The slogan is “***keep informed and review your business readiness***”.

The government is tracking confirmed cases of influenza A H1N1 (also known as swine flu) in the UK, which include transmission from person to person inside the UK and publishes many information on its Directgov website.

The government recommends that companies look at the website to keep updated on the most important business issues arising from swine flu.

It proposes companies to sign up for immediate email alerts since the website is regularly reviewed against the current situation.

The government emphasizes that it is always good to assess risks and prepare for emergencies

In order to help companies cope, it has published, mostly online such as the “detailed NHS guidance for employers in the workplace” (appendix 1) or “advice for international business travellers” and even a “pandemic flu checklist” (appendix 2).

General guidance on business risks and continuity planning has been clearly expressed and cover:

- crisis management and business continuity planning.
- the risks of diseases, infections and allergies in the workplace.
- risk assessment
- the importance of health and safety controls in international trade.

The motto is **“the more your employees know about how to prevent infection, the more resilient your business will be”**.

The key prevention messages to be relayed by companies are:

- always carry tissues
- use clean tissues to cover your mouth and nose when you sneeze
- bin the tissues after one use
- wash your hands with soap and hot water or a sanitizer gel often.

Special Advice exists for pig keepers and animal importers.

If a company’s workers are routinely in contact with the general public, it will not usually be necessary for them to wear masks. In some special settings, masks can be advisable depending on the duration and frequency of contact with the public.

In terms of masks, the government advises companies to review the following questions:

- “Are your workers likely to encounter members of the public who are displaying symptoms, for example, in a healthcare setting?
- If so, what other steps could you take to minimise contact? “

Also, currently the government is not advising avoidance of mass gatherings or social events and there are no restrictions in place.

This includes sporting events, concerts and other public events.

Nevertheless, the WHO (World Health Organisation) is closely monitoring cases of the swine flu virus and keeps people advised on the internet.

### **III – the responsibilities of employees**

In the event of a pandemic, **employees do have responsibilities to their employers.**

Sections 7 and 8 of the Health and Safety at work Act 1974 call upon employees to take reasonable care for the health and safety of themselves and others who may be affected by their acts and omissions.

If it is obvious that Authorities should provide whatever reasonable support they can to employees to enable them to continue to provide service, to minimise the risk of infection and absence, employees have a responsibility too.

They have to attend work if well, unless instructed to do otherwise.

The government advises them to “Be open and honest if they feel that they are unwell with flu, contact their GP by phone or seek advice from NHS Direct (0845 4647), and report back to their line manager as appropriate”.

The employees must be flexible in assisting in the delivery of the authority's services.

They must follow general infection control practices and good respiratory hand hygiene which can help to reduce transmission of all viruses.

The Health Protection Agency has provided advice on measures which can be taken to prevent infection.

This includes:

- *“covering the nose and mouth when coughing or sneezing, using a tissue when possible;*
- *disposing of dirty tissues promptly and carefully;*
- *maintaining good basic hygiene, for example washing hands frequently with soap and water to reduce the spread of the virus from their hands to face or to other people; and*
- *Cleaning hard surfaces (e.g. door handles) frequently using a normal cleaning product.*
- *Follow any national guidelines issued at the time on reporting flu symptoms, treatment, use of public transport, attendance at public gatherings, etc*
- *Keep their department informed about any new or continuing absence and the reason for it, in line with the published reporting procedure, and keep any absence to a safe minimum to make it easier to maintain services*
- *Keep their manager up to date with contact details for themselves and next of kin, and help the authority to help them and maintain services by sharing information on travel arrangements and caring responsibilities*
- *Keep themselves abreast of information issued by their employers on how it intends to handle flu pandemic.”*

But employers have to be aware that staffs, who do not receive contractual sick pay may have no qualms about taking time off sick, but employees who receive SSP only may think twice before taking a day off work and struggle in regardless.

Swine flu does present the perfect opportunity for anyone who wants to take a few days off work, as they can claim they erred on the side of caution by staying at home rather than risk infecting their colleagues.

Employers would be wise to think now about how to deal with this problem before it becomes more wide spread, both in terms of whether to risk someone coming in to work and whether to give discretionary sick pay if you ask them to stay at home. The first step for employers and affected staff alike though will be to get up-to-date medical advice.

#### IV - Legal responsibilities of employers

Health and safety law states that organisations must:

- provide a written health and safety policy (if they employ five or more people);
- assess risks to employees, customers, partners and any other people who could be affected by their activities;
- arrange for the effective planning, organisation, control, monitoring and review of preventive and protective measures;
- ensure they have access to competent health and safety advice;
- consult employees about their risks at work and current preventive and protective measures.
- 

Failure to comply with these requirements can have serious consequences – for both organisations and individuals.

Sanctions include fines, imprisonment and disqualification.

The Health and Safety at work Act 1974 as amended by the Consumer Protection Act sets out the responsibilities of employers, employees and self-employed people.

Section 2(2) requires employers to:

- provide and maintain safe plants and system of work
- ensure safety and absence of risks to health in connection with the use, handling, transport and storage of articles and substances,
- provide information, instruction, training and supervision
- maintain conditions of places of work, and provide and maintain safe means of access to and egress from them
- provide and maintain a safe working environment and adequate facilities and arrangements for employees' welfare.

Section 2(3) obliges employers to provide, and revise as necessary, a written statement on their policy on health and safety.

Section 2(6) calls upon employers to consult with employees' representatives.

Sections 3 and 4 impose general duties with regard to the safety of persons other than employees upon employers and self-employed and on persons having control of non-domestic premises.

Section 5 requires persons in control of certain premises to prevent the emission of harmful substances in the atmosphere.

Section 6 lays down specific duties on designers, manufacturers, importers, suppliers in relation to the articles (including fairground equipments) and substances for the use at work.

Section 21 requires persons served with an improvement notice by HM Inspectors of health and safety to remedy the contravention of one or more of the relevant statutory provisions specified on the notice.

Section 22 requires persons served with a prohibition notice by HM Inspectors of health and safety to cease the activity until the matters specified in the notice and any associated contraventions have been remedied.

Thereupon shall derive the **legal liability of individual board members for health and safety failures**

If a health and safety offence is committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the organisation, then that person (as well as the organisation) can be prosecuted under section 37 of the Health and Safety at Work etc Act 1974.

Recent case law has confirmed that directors cannot avoid a charge of neglect under section 37 by arranging their organisation's business so as to leave them ignorant of circumstances which would trigger their obligation to address health and safety breaches.

Those found guilty are liable for fines and, in some cases, imprisonment.

In addition, the Company Directors Disqualification Act 1986, section 2(1), empowers the court to disqualify an individual convicted of an offence in connection with the management of a company.

This includes health and safety offences.

This power is exercised at the discretion of the court; it requires no additional investigation or evidence.

Individual directors are also potentially liable for other related offences, such as the common law offence of gross negligence manslaughter.

Under the common law, gross negligence manslaughter is proved when individual officers of a company (directors or business owners) by their own grossly negligent behaviour cause death.

This offence is punishable by a maximum of life imprisonment.

Equivalent legislation exists in Northern Ireland, i.e. article 34A of the Health and Safety at Work (Northern Ireland) Order 1978 and article 3(1) of the Company Directors Disqualification (Northern Ireland) Order 2002.

**Corporate Manslaughter and Corporate Homicide Act 2007 has completed the legal dispositions.**

Under the Corporate Manslaughter and Homicide Act 2007, an offence will be committed where failings by an organisation's senior management are a substantial element in any gross breach of the duty of care owed to the organisation's employees or members of the public, which results in death.

The maximum penalty is an unlimited fine and the court can additionally make a publicity order requiring the organisation to publish details of its conviction and fine.

In considering the liability of an organisation under the Act, a jury must consider any breaches of health and safety legislation and may have regard to any health and safety guidance.

In addition to other health and safety guidance, this guidance could be a relevant consideration for a jury depending on the circumstances of the particular case.

## **SWINE FLU : A key strategic issue for companies**

When the EU has not yet taken steps and measures against the Pandemic threat, The United Kingdom as well as other countries such as France have a contingency plan already in place.

The individual and the protection of his health are in the very heart of all these plans.

Nevertheless companies may well be sued and in certain occasions liable which means they must get ready to face the threat and make sure that they have taken all the necessary measures to comply with the various applicable laws.

This problem might become one of the key issues for companies if the swine flu becomes pandemic.