



Ebola: Selected Legal Issues

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Summary

Several West African countries are currently grappling with an unprecedented outbreak of Ebola virus disease (EVD). Here in the United States, where Ebola is not endemic, a handful of EVD cases have been diagnosed, and domestic transmission of the virus has occurred in only two cases to date. This report provides a brief overview of selected legal issues regarding measures to prevent transmission of Ebola virus and the civil rights of individuals affected by the disease.

Quarantine and isolation are restrictions on a person's movement, imposed to prevent the spread of contagious disease. The federal government has jurisdiction over interstate and border quarantine, carried out by the Centers for Disease Control and Prevention (CDC). However, primary quarantine authority typically resides with state health departments and health officials. Every state has the authority to pass and enforce quarantine laws as an exercise of its police powers, but these laws may vary widely by state. State and federal quarantine or isolation orders may be subject to suits alleging inadequate due process or violations of equal protection, but modern legal challenges to quarantine and isolation orders are not extensive.

In addition to the quarantine and isolation of persons within the United States, some have proposed limiting the entry of persons traveling to the United States from countries experiencing high rates of EVD transmission. Federal agencies' authority to restrict or regulate the entry into the United States of persons who are suspected of carrying Ebola virus or other communicable diseases depends largely upon whether the person is a foreign or U.S. national. Aliens who have been determined to carry Ebola virus may be denied entry, but the health-related grounds for exclusion do not apply to most lawful permanent residents who briefly travel abroad. U.S. citizens abroad may enjoy a constitutional right to reenter the country, in which case the government would be required, at a minimum, to overcome a heavier burden to justify a reentry restriction.

Proposals to restrict air travel to and from affected countries—regardless of citizenship—have also been discussed. The Federal Aviation Administration (FAA) has acknowledged its authority to restrict the use of U.S. airspace, but has cautioned that decisions made on a public health basis would involve other federal agencies. Additionally, the Do Not Board (DNB) list provides a mechanism for U.S. and international health officials to request that specific persons be restricted from boarding commercial aircraft to the United States, on the basis that those persons present a public health risk. Independently, airlines may reserve the right to deny transportation to passengers who may pose a safety risk, but must act consistent with federal nondiscrimination laws.

The use of these measures to contain the spread of Ebola may raise a classic civil rights issue: to what extent can an individual's liberty be curtailed to advance the common good? In addition to the constitutional issues noted above, discrimination against individuals with an infectious disease may be covered by Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (ADA), or the Air Carrier Access Act (ACAA). While quarantine and isolation effectively minimize Ebola exposure, they may also raise various employment concerns, particularly for those workers who fear losing their jobs or wages if they are forced to comply with a quarantine or isolation order. Infected workers may also be protected under the Family and Medical Leave Act (FMLA) if it can be established that they have a serious health condition, and employers whose employees could face workplace exposure to Ebola virus may be obligated to comply with applicable Occupational Safety and Health Administration (OSHA) requirements.

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Introduction

Ebola virus disease (EVD), also known as Ebola hemorrhagic fever, is a deadly communicable disease typically found only in parts of Africa.¹ Once contracted by a human, the virus can be transmitted to others through direct contact with the bodily fluids of an infected individual. An individual who has contracted Ebola virus is not thought to be contagious before symptoms of EVD (such as fever, diarrhea, or vomiting) are observed.

Several West African countries are currently grappling with an unprecedented outbreak of EVD. Here in the United States, where Ebola is not endemic, two undiagnosed EVD cases have been imported from the West African outbreak.² In one of these cases, two nurses were infected by the virus while caring for the patient, representing the first instances of Ebola transmission within the United States.³

State and federal governments have significant experience dealing with communicable diseases generally, and both levels of government have taken measures to respond to the domestic EVD cases and minimize the further spread of the virus. The federal government has also taken measures to prevent further entry of persons who may have contracted Ebola virus. However, the high fatality rate of EVD may raise questions regarding the sufficiency of state and federal governments' responses to protect against this particular public health threat. Further, the responses to the current Ebola outbreak raise a classic civil rights issue: to what extent can an individual's liberty be curtailed to advance the common good?⁴

In order to help policy makers evaluate these questions, this report provides a brief overview of the scope of state and federal authorities that have been employed, or may be employed in the future, to prevent transmission of Ebola virus, as well as potential limits on these authorities under current law.

Preventing Spread of the Disease

Efforts to prevent further spread of Ebola have focused on restricting the movement of persons who have been exposed to the virus or who are known to have contracted the virus. Actual and proposed measures to accomplish this include using quarantine or isolation orders under federal or state authority, imposing entry restrictions at the U.S. border, and limiting international air travel to the United States.

¹ For more detailed information on EVD, see CRS Report R43750, *Ebola: Basics About the Disease*, by (name red acted).

² Centers for Disease Control and Prevention, *Cases of Ebola Diagnosed in the United States*, available at <http://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/united-states-imported-case.html>.

³ *Id.*

⁴ For a discussion of balancing individual legal rights and responsibility and communal objectives, see Institute of Medicine, *Guidance for Establishing Crisis Standards of Care for Use in Disaster Situations* (September 2009).

Quarantine and Isolation Authority⁵

Federal Quarantine Authority

Although the terms are often used interchangeably, quarantine and isolation are two distinct concepts. Quarantine typically refers to separating or restricting the movement of individuals who have been exposed to a contagious disease but are not sick.⁶ Isolation refers to separating infected individuals from those who are not sick.⁷ Primary quarantine authority typically resides with state health departments and health officials; however, the federal government has jurisdiction over interstate and border quarantine.

Federal quarantine and isolation authority derives from the Commerce Clause of the U.S. Constitution, which states that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several states.”⁸ Section 361 of the Public Health Service Act (PHS Act) grants the Secretary of Health and Human Services (Secretary) the authority to make and enforce regulations necessary “to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession.”⁹ The law provides the Secretary with broad authority to apprehend, detain, or conditionally release a person. However, the Secretary may only exercise this authority in relation to communicable diseases published in an executive order issued by the President.¹⁰ Executive Order 13295¹¹ lists the communicable diseases for which this quarantine authority may be exercised.¹² In 2000, the Secretary transferred certain authorities related to persons, including quarantine authority, to the Director of the Centers for Disease Control and Prevention (CDC).¹³ Both interstate and foreign quarantine measures are now carried out by CDC’s Division of Global Migration and Quarantine.¹⁴ The CDC maintains quarantine stations at 20 ports of entry and land-border crossings, including at international airports in the following areas: Atlanta (ATL), Chicago (ORD), Detroit (DTW), Honolulu (HNL), Houston (IAH), Los Angeles (LAX), Miami (MIA), Minneapolis-St. Paul (MSP), New York City (JFK), Philadelphia (PHL), San Francisco (SFO), San Juan (SJU), Seattle (SEA), and Washington, DC (IAD).¹⁵

⁵ This section was written by (name redacted), Legislative Attorney. For a detailed discussion of quarantine and isolation, see CRS Report RL33201, *Federal and State Quarantine and Isolation Authority*, by (name redacted).

⁶ See Centers for Disease Control and Prevention, Quarantine and Isolation, <http://www.cdc.gov/quarantine/>.

⁷ *Id.*

⁸ U.S. CONST. art. I, § 8, cl. 3.

⁹ 42 U.S.C. § 264(a).

¹⁰ 42 U.S.C. § 264(b).

¹¹ See Exec. Order No. 13674, 79 Fed. Reg. 45671 (Aug. 6, 2014); Exec. Order No. 13375, 70 Fed. Reg. 17299 (April 1, 2005).

¹² Exec. Order No. 13295, 68 Fed. Reg. 17255 (April 4, 2003) (as amended by Exec. Order No. 13674, 79 Fed. Reg. 45671 (Aug. 6, 2014)). The diseases currently listed are cholera, diphtheria, infectious tuberculosis, plague, smallpox, yellow fever, viral hemorrhagic fevers (including Ebola), severe acute respiratory syndromes, and influenza viruses which have the potential to cause a pandemic.

¹³ Control of Communicable Diseases; Apprehension and Detention of Persons With Specific Diseases; Transfer of Regulations, 65 Fed. Reg. 49906. Regulations regarding quarantine upon entry into the United States from foreign countries are also administered by the CDC, see 42 C.F.R. Part 71.

¹⁴ See CDC Division of Global Migration and Quarantine home page at <http://www.cdc.gov/ncpcid/dgmq/index.html>.

¹⁵ CDC, “Quarantine Station Contact List, Map, and Fact Sheets,” <http://www.cdc.gov/quarantine/> (continued...)

Generally, federal regulations authorizing the apprehension, detention, examination, or conditional release of individuals are applicable only to individuals coming into a state or possession from a foreign country or possession.¹⁶ But Section 361 of the PHS Act also authorizes the apprehension and examination of

any individual reasonably believed to be infected with a communicable disease in a qualifying stage¹⁷ and

(A) to be moving or about to move from a State to another State; or

(B) to be a probable source of infection to individuals who, while infected with such disease in a qualifying stage, will be moving from a State to another State.¹⁸

If found to be infected, such individuals may be detained for such time and in such manner as may be reasonably necessary.¹⁹ Regulations promulgated pursuant to quarantine authority under the PHS Act may be found in Parts 70 and 71 of Title 42 of the *Code of Federal Regulations*. Part 70 applies to interstate travel, Part 71 to foreign arrivals.²⁰

In addition, the Director of the CDC is also authorized to take measures as may be necessary to prevent the spread of a communicable disease from one state or possession to any other state or possession if he determines that measures taken by local health authorities are inadequate to prevent the spread of the disease.²¹ To prevent the spread of diseases between states, the regulations prohibit infected persons from traveling from one state to another without a permit from the health officer of the state, possession, or locality of destination, if such a permit is required under the law applicable to the place of destination.²²

Section 311 of the PHS Act²³ provides for federal-state cooperative activities to enforce quarantines. The federal government may assist states and localities in enforcing their quarantines and other health regulations and, in turn, may accept state and local assistance in enforcing federal quarantines.

State Quarantine Authority

While the federal government has authority to authorize quarantine and isolation under certain circumstances, the primary authority for quarantine and isolation exists at the state level as an

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¹⁶ 42 U.S.C. § 264(c).

¹⁷ “Qualifying stage” means that such a disease is (1) in a communicable stage or (2) in a precommunicable state, if the disease would likely cause a public health emergency if transmitted to other individuals. 42 U.S.C. § 264(d)(2).

¹⁸ 42 U.S.C. § 264(d)(1).

¹⁹ *Id.*

²⁰ In response to the SARS epidemic, the Secretary of HHS in 2003 amended 42 C.F.R. §§ 70.6 and 71.3 to incorporate by reference Executive Order 13295, thus eliminating rulemaking delays for the publication of new diseases.

²¹ 42 C.F.R. § 70.2.

²² 42 C.F.R. § 70.3.

²³ 42 U.S.C. § 243.

exercise of the state’s police power. The CDC acknowledges this deference to state authority as follows:

In general, CDC defers to the state and local health authorities in their primary use of their own separate quarantine powers. Based upon long experience and collaborative working relationships with our state and local partners, CDC continues to anticipate the need to use this federal authority to quarantine an exposed person only in rare situations, such as events at ports of entry or in similar time-sensitive settings.²⁴

Although every state has the authority to pass and enforce quarantine laws as an exercise of its police powers, these laws vary widely by state. Generally, state and local quarantines are authorized through public health orders, though some states may require a court order before an individual is detained.²⁵ For example, in Louisiana, the state health officer is not authorized to “confine [a person] in any institution unless directed or authorized to do so by the judge of the parish in which the person is located.”²⁶ Diseases subject to quarantine may be defined by statute, with some statutes addressing only a single disease, or the state health department may be granted the authority to decide which diseases are communicable and therefore subject to quarantine.²⁷ States also employ different methods for determining the duration of the quarantine or isolation period. Generally, “release is accomplished when a determination is made that the person is no longer a threat to the public health, or no longer infectious.”²⁸

Federal authority over interstate and foreign travel is clearly delineated under constitutional and statutory provisions. However, in a public health emergency, federal, state, and local authorities may overlap. For example, both federal and state agencies may have quarantine authority over an aircraft arriving in a large city from a foreign country. Thus, coordination between the various levels of government would be essential during a widespread public health emergency.

Legal Challenges to Quarantine

Constitutional rights to due process and equal protection may be implicated by the imposition of a quarantine or isolation order. Modern legal challenges to quarantine and isolation orders are not extensive, although a few cases can provide some basic insights about potential issues. In 1963, a federal district court in *United States v. Shinnick* upheld the U.S. Public Health Service’s medical isolation of an arriving passenger because she had been in Stockholm, Sweden, while the city had been declared by the World Health Organization to be a smallpox-infected area, and she could not

²⁴ CDC, “Questions and Answers on the Executive Order Adding Potentially Pandemic Influenza Viruses to the List of Quarantinable Diseases,” May 30, 2014, available at <http://www.cdc.gov/quarantine/qa-executive-order-pandemic-list-quarantinable-diseases.html>.

²⁵ Paula Mindes, Note, *Tuberculosis Quarantine: A Review of Legal Issues in Ohio and Other States*, 10 J.L. & HEALTH 403, 409 (1995).

²⁶ LA. REV. STAT. ANN. § 40:17(A). Exceptions are provided for certain diseases, including smallpox, cholera, yellow fever, bubonic plague, and tuberculosis. See La. Rev. Stat. Ann. § 40:17(B).

²⁷ Mindes, *supra* note 25, at 409. See, e.g., MD. CODE ANN., [Health] § 18-324, which formerly addressed only quarantine in tuberculosis cases. The governor may now exercise quarantine power during a “catastrophic health emergency” involving “deadly agents,” which include “anthrax, ebola, plague, smallpox, tularemia, or other bacterial, fungal, rickettsial, or viral agent, biological toxin, or other biological agent capable of causing extensive loss of life or serious disability.” MD. CODE ANN., [Public Safety] § 14-3A.

²⁸ Mindes, *supra* note 25, at 410.

show proof of vaccination.²⁹ The court declined to substitute its own judgment as to whether the plaintiff had been exposed to infection and capable of spreading the disease.

However, at least one state court has ruled that when a state confines an individual in order to prevent the spread of disease, the state must provide the individual with procedural due process protections, such as, *inter alia*, notice explaining the grounds for confinement, the right to counsel, and the right to engage in cross-examination.³⁰ This requirement would presumably apply to a federal government quarantine order as well. Quarantines may also be subject to equal protection challenges. In *Jew Ho v. Williamson*, for example, a court invalidated a quarantine whose requirements applied only to Chinese residents because it was “unreasonable, unjust and oppressive” and constituted discrimination in violation of the Fourteenth Amendment.³¹

Border Entry Issues ³²

Federal law confers executive agencies with significant authority to restrict or regulate the entry into the United States of persons who are suspected of carrying Ebola virus or other communicable diseases. However, the stringency of the available restrictions depends upon whether the person is a foreign or U.S. national.

Inadmissibility of Infected Aliens

Foreign nationals do not have a constitutional right to be admitted into the United States.³³ The Immigration and Nationality Act (INA) provides various grounds under which a foreign national may be denied admission, including when he or she is determined to have a “communicable disease of public health significance.”³⁴ The Secretary of the Department of Health and Human Services (HHS) is responsible for defining illnesses constituting a “communicable disease of public health significance” for INA purposes. Current HHS regulations define the term to include diseases, such as EVD, that are listed in a relevant executive order³⁵ and/or are subject to specified requirements under the rules of the World Health Organization.³⁶ Accordingly, aliens who have been determined to carry Ebola virus may be denied entry into the United States.³⁷

²⁹ 219 F. Supp. 789 (E.D.N.Y. 1963).

³⁰ *Greene v. Edwards*, 164 W. Va. 326, 329 (1980).

³¹ *Jew Ho v. Williamson*, 103 F. 10, 26 (C.C.N.D. Cal. 1900).

³² This section was written by (name redacted), Legislative Attorney.

³³ *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“an alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative”).

³⁴ Immigration and Nationality Act (INA) § 212(a)(1), 8 U.S.C. § 1182(a)(1).

³⁵ 42 C.F.R. § 34.2(b)(2) (defining a communicable disease of public health significance to include, *inter alia*, those diseases “listed in a Presidential Executive Order, as provided under Section 361(b) of the Public Health Service Act”). Ebola has been expressly listed by a relevant executive order since 1983. *See* Exec. Order No. 12452, Revised List of Quarantinable Communicable Diseases, December 22, 1983 (listing Ebola and other “Viral Hemorrhagic Fevers” as communicable diseases), *revoked and replaced by* Exec. Order No. 13295, Apr. 4, 2003 (continuing to specify Ebola as a communicable disease for purposes of Section 361(b) of the Public Health Service Act), *amended by* Exec. Order 13375, Apr. 1, 2005, and Exec. Order No. 13674, July 31, 2014.

³⁶ 42 C.F.R. § 34.2(b)(3)(i)-(ii) (including those diseases for which “a single case requires notification to the World Health Organization (WHO) as an event that may constitute a public health emergency of international concern, or ... [other diseases for which] the occurrence of which requires notification to the WHO as an event that may constitute a (continued...)”).

The health-related grounds for exclusion do not apply to most lawful permanent resident aliens (sometimes described as immigrants) who briefly travel abroad.³⁸ Moreover, assessing whether a foreign national is inadmissible on health-related grounds is an individualized determination of the person's condition, rather than a more general bar applicable to persons who might have had contact with a person carrying a communicable disease. It is also not assured that a foreign national carrying Ebola virus will be identified as such either when applying for a visa to come to the United States (e.g., if the foreign national only became infected after obtaining a visa) or when processed upon arrival at a U.S. port of entry (e.g., if the infected person did not show symptoms of EVD at the time of arrival into the United States).

Blanket Restrictions on Entry of Travelers from Ebola-Stricken Countries

Although the government enjoys authority under federal immigration law to bar the entry of many foreign nationals on specific health-related grounds, as noted above, application of these grounds might not be wholly effective in preventing foreign travelers carrying Ebola from being admitted into the United States. Several Members of Congress have gone further and suggested a blanket ban on the admission into the United States of foreign nationals who reside in or have recently traveled to Ebola-stricken countries³⁹—a suggestion that the Obama Administration has thus far opposed.⁴⁰

Section 212(f) of the INA provides that the President, pursuant to a proclamation, may direct the denial of entry to any alien or class of aliens whose entry into the country “would be detrimental to the interests of the United States,” including potentially those foreign travelers who have already been issued a visa to travel to the United States.⁴¹ Although this provision seems to have never been employed so broadly,⁴² it could potentially be used to restrict the entry of foreign nationals traveling from a particular country or region where there has been an Ebola outbreak. If

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public health emergency of international concern.”). For discussion of WHO requirements concerning notification of Ebola infection, see *infra* at “Public Health Emergency of International Concern.”

³⁷ Because of practical concerns, a foreign national arriving at a U.S. port of entry who is believed to have Ebola virus would be placed in isolation and given medical treatment, rather than immediately being placed in removal proceedings or given the option of promptly leaving the United States. For discussion of the isolation of arriving persons suspected of Ebola infection, see *supra* at “Federal Quarantine Authority.”

³⁸ See INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (exempting most lawful permanent residents returning to the United States after briefly departing the country from being considered applicants for admission).

³⁹ See Jonathan Weisman, *On Ebola Response, Congressional Republicans Put New Focus on Visa Suspensions*, N.Y. TIMES, Oct. 20, 2014, available at http://www.nytimes.com/2014/10/21/us/on-ebola-response-congressional-republicans-put-new-focus-on-visa-suspensions.html?hp&action=click&pgtype=Homepage&version=HpSum&module=first-column-region®ion=top-news&WT.nav=top-news&_r=1.

⁴⁰ See Jaime Fuller, *The Ebola Travel Ban Is Really Politically Popular. Here's Why It's Not Happening*, The Fix Blog, WASH. POST, Oct. 20, 2014, at <http://www.washingtonpost.com/blogs/the-fix/wp/2014/10/20/the-ebola-travel-ban-is-really-popular-heres-why-its-not-happening/>.

⁴¹ INA § 212(f), 8 U.S.C. § 1182(f) (broadly permitting the President to “suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate”).

⁴² A list of presidential proclamations pursuant to INA § 212(f) that are currently in effect can be viewed at <http://travel.state.gov/content/visas/english/fees/presidential-proclamations.html>. For further discussion regarding the potential use of INA § 212(f) to restrict the travel of foreign nationals from Ebola-stricken countries, see CRS Legal Sidebar WSLG1094, *Can the President Bar Foreign Travelers from Ebola-Stricken Countries from Entering the United States?*, by (name redacted).

the President deems the entry of such persons into the country to be contrary to U.S. interests, such a restriction would obviate the need to determine if an individual had actually been infected by Ebola virus.

These immigration-related restrictions apply exclusively to foreign nationals, not U.S. citizens. Indeed, U.S. citizens abroad may enjoy a constitutional right to reenter the country, in which case the government would be required, at a minimum, to overcome a heavier burden to justify a reentry restriction than would be required in situations where a person's constitutional rights were not implicated.⁴³ However, various travel restrictions discussed elsewhere in this report may impede the ability of any person—regardless of citizenship—from traveling to the United States in a manner that potentially exposes others to a communicable disease.⁴⁴

Airlines and Travel Restrictions⁴⁵

There are currently no scheduled nonstop flights on commercial airlines between the West African countries with widespread Ebola transmission—Guinea, Liberia, and Sierra Leone—and the United States.⁴⁶ On average, about 150 passengers travel from the three affected countries to the United States daily.⁴⁷ The majority of these passengers travel to the United States via connecting flights in Europe.⁴⁸

On October 21, 2014, the Department of Homeland Security (DHS) announced that all passengers arriving in the United States whose travel originates in one of the affected countries will be required to fly into one of the following airports with enhanced screening procedures in place: John F. Kennedy International Airport (JFK); Newark Liberty International Airport (EWR); Washington Dulles International Airport (IAD); Hartsfield-Jackson Atlanta International Airport (ATL); and Chicago O'Hare International Airport (ORD).⁴⁹ Effective November 17, 2014, these

⁴³ Some federal courts have found that the right of an American citizen to return to the United States from abroad is a substantive due process right. *See* *Fikre v. F.B.I.*, 3:13-CV-00899-BR, 2014 WL 2335343 (D. Or. May 29, 2014); *Tarhuni v. Holder*, 3:13-CV-00001-BR, 2014 WL 1269655 (D. Or. Mar. 26, 2014); *see also* *Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 67 (2001) (discussing privileges of U.S. citizenship, including “the absolute right to enter [the] borders” of the United States); *Perez v. United States*, 502 F. Supp. 2d 301, 306 (N.D.N.Y. 2006) (“a United States citizen cannot be barred from reentering the country”).

⁴⁴ *See infra* at “Airlines and Travel Restrictions.”

⁴⁵ This section was written by (name redacted), Legislative Attorney.

⁴⁶ Press Release, “Statement by Secretary Johnson on Travel Restrictions and Protective Measures to Prevent the Spread of Ebola to the United States,” *available at* <http://www.dhs.gov/news/2014/10/21/statement-secretary-johnson-travel-restrictions-and-protective-measures-prevent> [hereinafter DHS Ebola Press Release].

⁴⁷ Andrew Grossman, Carol E. Lee, and Jack Nicas, “U.S. to Check Temperatures of West Africa Passengers at Five Airports,” *WALL STREET JOURNAL*, Oct. 8, 2014, *available at* <http://online.wsj.com/articles/u-s-to-check-temperatures-of-west-africa-passengers-at-five-airports-1412788163>.

⁴⁸ The only nonstop flights out of Guinea, Liberia, and Sierra Leone to Europe are operated by Air France (to Paris, France) and Brussels Airlines (to Brussels, Belgium). “Brussels Becomes Latest EU Airport to Screen for Ebola,” *Agence France Presse*, Oct. 20, 2014. Both airlines are members of an airline alliance that includes a U.S. carrier; members of an alliance often coordinate their services and have codeshare agreements. Brussels Airlines is a member of the Star Alliance network, along with U.S. carrier United Airlines. Star Alliance, “Travel the World with the Star Alliance Network,” http://www.staralliance.com/en/about/member_airlines/. Air France is a member of the SkyTeam network, along with U.S. carrier Delta Airlines. SkyTeam, “SkyTeam Members,” <https://www.skyteam.com/en/About-us/Our-members/>.

⁴⁹ DHS Ebola Press Release, *supra* note 46; White House Blog, “Five U.S. Airports Are Enacting New Screening Measures to Protect Against Ebola,” *available at* <http://www.whitehouse.gov/blog/2014/10/08/five-us-airports-are> (continued...)

restrictions were extended to passengers whose travel originates in Mali, as a precaution in light of a number of new confirmed EVD cases there.⁵⁰

Federal Airspace Authority

The notion that each nation has complete and exclusive sovereignty over the airspace above its territory has been incorporated into international agreements dating back to the initial rise of international aviation.⁵¹ In 1958, Congress enshrined this principle in federal law by declaring that “The United States Government has exclusive sovereignty of airspace of the United States.”⁵² Congress delegated the authority to regulate U.S. airspace to the administrator of the Federal Aviation Administration (FAA).⁵³ The FAA has the authority to restrict the use of U.S. airspace and prevent the entry of aircraft into U.S. airspace.⁵⁴ Additionally, the FAA has the authority to prevent U.S. carriers and operators from flying to or within the airspace of other countries.⁵⁵ In regulating the use of airspace for the benefit of the public interest, the FAA must consider several factors as being in the public interest, including “assigning, maintaining, and enhancing safety and security as the highest priorities in air commerce” and “regulating air commerce in a way that best promotes safety and fulfills national defense requirements.”⁵⁶

During the current Ebola outbreak, the FAA has acknowledged its authority to restrict the use of U.S. airspace, but has cautioned that decisions made on a public health basis would involve other federal agencies.⁵⁷ The FAA has stated:

While the FAA has the authority to direct flight operations in United States airspace, any decision to restrict flights between the United States and other countries due to public health and disease concerns would be an interagency decision that would engage the Departments of Health and Human Services/CDC, State, Homeland Security, and Transportation.⁵⁸

CRS has been unable to identify any instances in which the FAA has restricted the use of U.S. airspace by incoming or outgoing flights purely on the basis of a public health concern.

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enacting-new-screening-measures-protect-against-ebola.

⁵⁰ Press Release, “Enhanced Airport Entry Screening to Begin for Travelers to the United States From Mali,” available at <http://www.dhs.gov/news/2014/11/16/enhanced-airport-entry-screening-begin-travelers-united-states-mali>. There are no direct flights from Mali to the United States. *Id.* Approximately 15 to 20 passengers whose travel originated in Mali arrive in the United States daily. *Id.*

⁵¹ See, e.g., Convention for the Regulation of Aerial Navigation (Paris Convention), Oct. 13, 1919, Art. 1; Convention on International Civil Aviation (Chicago Convention), Dec. 7, 1944, Art. 1.

⁵² 49 U.S.C. § 40103(a).

⁵³ 49 U.S.C. § 40103(b).

⁵⁴ See 49 U.S.C. §§ 40103(b), 44701. FAA issues Notice to Airmen (NOTAM) to announce temporary flight restrictions in U.S. airspace according to FAA regulation. See 14 C.F.R. §§ 91.137-138, 91.141, 91.143-145.

⁵⁵ See 49 U.S.C. §§ 40101(d)(1), 44701(a)(5). For an example of such a restriction, see “Prohibition Against Certain Flights Within the Territory and Airspace of Somalia,” 72 Fed. Reg. 16710 (April 5, 2007).

⁵⁶ 49 U.S.C. § 40101(d)(1).

⁵⁷ Press Release, “FAA Statement on Ebola,” Oct. 3, 2014, available at http://www.faa.gov/news/press_releases/news_story.cfm?newsId=17375.

⁵⁸ *Id.*

Preventing Specific Passengers from Boarding Flights to the United States

*The “Do Not Board” List*⁵⁹

In recent years, federal agencies have developed a travel restriction tool to prevent the spread of communicable diseases of public health significance.⁶⁰ The public health Do Not Board (DNB) list was developed by the DHS and the CDC, and made operational in June 2007.⁶¹ The DNB list enables domestic and international health officials to request that persons with communicable diseases who meet specific criteria and pose a serious threat to the public be restricted from boarding commercial aircraft departing from or arriving in the United States.⁶² The list provides a tool for management of emerging public health threats when local public health efforts are not sufficient to keep certain contagious individuals from boarding commercial flights.⁶³

In order to place a person on the DNB list, state and local health officials contact their local CDC quarantine station. The CDC determines if the person is (1) likely contagious with a communicable disease that presents a serious public health threat, (2) unaware of or likely not to comply with public health recommendations and medical treatment, and (3) likely to try boarding a commercial aircraft.⁶⁴ Once a person is placed on the DNB list,⁶⁵ airlines are instructed not to issue a boarding pass to the person for any commercial domestic flight or for a commercial international flight arriving in or departing from the United States. Other forms of transportation, such as buses and trains, are not covered by the DNB list. Once a patient is determined to be noncontagious, the CDC and the DHS must remove the person from the list, usually within 24 hours.⁶⁶

*Airline Corporate Policies*⁶⁷

Generally, airlines are under no legal obligation to provide transportation simply because a person has a valid ticket. As a matter of corporate policy, airlines have inserted clauses into their contracts of carriage reserving the right to deny transportation to any ticketed passenger under a

⁵⁹ This section was written by (name redacted), Legislative Attorney.

⁶⁰ For a summary of actions taken by DHS and the CDC to improve procedures to restrict persons with serious communicable diseases who intend to travel despite medical advice, see *Public Health and Border Security: HHS and DHS Should Further Strengthen Their Ability to Respond to TB Incidents*. GAO-09-58, October, 2008 [hereinafter *GAO Public Health and Border Security Report*].

⁶¹ CDC, “Federal Air Travel Restrictions for Public Health Purposes—United States, June 2007-May 2008,” *Morbidity and Mortality Weekly Report*, Sep. 19, 2008, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5737a1.htm> [hereinafter *MMWR Report*].

⁶² Airlines also have general authority to refuse to board passengers with communicable diseases under certain circumstances pursuant to Air Carrier Access Act of 1986 (ACAA) and its implementing regulations. See 49 U.S.C. § 41705; 14 C.F.R. §§ 382.19, 382.21.

⁶³ The list, which applies to all citizens and foreign nationals, appears to have been developed under the general authority of the Aviation and Transportation Security Act of 2001, at 49 U.S.C. § 114(f) and (h).

⁶⁴ *MMWR Report*, *supra* note 61, at 1009.

⁶⁵ The Transportation Security Administration maintains the DNB list, which is separate from the No Fly List used to prevent known terrorists from boarding airplanes, but it serves a similar purpose. *GAO Public Health and Border Security Report*, *supra* note 60, at 29.

⁶⁶ *MMWR Report*, *supra* note 61, at 1010.

⁶⁷ This section was written by (name redacted), Legislative Attorney.

number of circumstances, including passengers who may pose a safety risk to themselves, other passengers, or crew members. For example, United Airlines contract of carriage states the right to refuse transport to

Passengers who are incapable of completing a flight safely, without requiring extraordinary medical assistance during the flight, as well as Passengers who appear to have symptoms of or have a communicable disease or condition that could pose a direct threat to the health or safety of others on the flight, or who refuse a screening for such disease or condition. (NOTE: UA requires a medical certificate for Passengers who wish to travel under such circumstances....)⁶⁸

Despite the existence of these contracts of carriage, in refusing to transport customers, air carriers must still abide by federal nondiscrimination laws, such as the Air Carrier Access Act (ACAA),⁶⁹ or risk civil penalties.⁷⁰ For more on these laws, see “Federal Nondiscrimination Laws.”

The CDC has issued guidance to assist airline crew in identifying passengers who may be infected with Ebola before they board an aircraft.⁷¹ This guidance provides that any passengers with certain symptoms and a history of recent travel in Guinea, Liberia, or Sierra Leone should be reported immediately to the CDC.⁷²

Reporting Sick Persons Aboard U.S.-Bound Flights⁷³

Federal law requires an aircraft commander to immediately report to a CDC quarantine station nearest the port or airport of arrival if there is (1) a death on board or (2) any ill person among the passengers and crew.⁷⁴ These required reports are to be made to air traffic control and “[o]nce the FAA receives [the] report, it promptly communicates it to the CDC Emergency Operations Center.”⁷⁵ Therefore, if the flight crew of a commercial aircraft arriving in the United States becomes aware of an ill person on board, which could include a person with EVD symptoms, federal law requires the flight’s commander to notify the nearest quarantine station.⁷⁶

The CDC has also issued guidance to instruct airline crews on managing ill passengers on board if Ebola infection is suspected.⁷⁷ It also provides guidance on cleaning aircraft to reduce the risk

⁶⁸ United Airlines, “United Airlines, Inc. Contract of Carriage (Revised Nov. 7, 2014)” at 19, *available at* http://www.united.com/web/format/pdf/Contract_of_Carriage.pdf.

⁶⁹ P.L. 99-435 (1986), *codified at* 49 U.S.C. § 41705.

⁷⁰ *See* 49 U.S.C. § 46301(a)(1)(A).

⁷¹ CDC, “Ebola Guidance for Airlines: Interim Guidance about Ebola Infection for Airline Crews, Cleaning Personnel, and Cargo Personnel,” <http://www.cdc.gov/quarantine/air/managing-sick-travelers/ebola-guidance-airlines.html> [hereinafter CDC Guidance to Airlines].

⁷² *Id.*

⁷³ This section was written by (name redacted), Legislative Attorney.

⁷⁴ 42 C.F.R. § 71.21. For ships, the reporting requirement covers a death or illness that occurs within 15 days prior to the date of expected arrival or since departure from a U.S. port, whichever time period is shorter.

⁷⁵ Press Release, “FAA Statement on Ebola,” Oct. 3, 2014, *available at* http://www.faa.gov/news/press_releases/news_story.cfm?newsId=17375.

⁷⁶ CDC, “Quarantine Station Contact List, Map, and Fact Sheets,” <http://www.cdc.gov/quarantine/quarantinestationcontactlistfull.html>.

⁷⁷ CDC Guidance to Airlines, *supra* note 71.

of spreading the disease, including recommending the use of personal protective equipment by cleaning crews.⁷⁸

International Health Regulations (IHR)⁷⁹

Overview of the IHR

In May 2005, the World Health Assembly adopted a revision of its 1969 International Health Regulations, giving a new mandate to the World Health Organization (WHO) and member states to increase their respective roles and responsibilities for the protection of international public health.⁸⁰ The IHR(1969) had focused on just three diseases (cholera, plague, and yellow fever). The IHR(2005) have broadened the scope of the 1969 regulations by addressing existing, new, and re-emergent diseases, as well as emergencies caused by non-infectious disease agents.⁸¹ The IHR(2005) also include provisions regarding designated national points of contact, definitions of core public health capacities, disease control measures (such as quarantine and border controls), and others. The IHR(2005) require the WHO to recommend, and State Parties to use, control measures that are no more restrictive than necessary to achieve the desired level of health protection.

The IHR were agreed upon by a consensus process among the member states, and represent a balance between sovereign rights and a commitment to work together to prevent the international spread of disease. The IHR(2005) are binding on all WHO member states as of June 15, 2007, except for those that have rejected the regulations or submitted reservations.⁸² While the IHR(2005) contain mechanisms, such as negotiation and arbitration, to assist States Parties in reaching mutually acceptable solutions where disputes arise, ultimately the IHR(2005) do not provide an enforcement mechanism to compel compliance with WHO provisions.⁸³ The United States accepted the IHR(2005) with three reservations, including the reservation that it will implement the IHR(2005) in line with U.S. principles of federalism.⁸⁴ Within five years of the entry into force date, State Parties must complete development of public health infrastructure that ensures full compliance with the regulations.

Public Health Emergency of International Concern

Article 6 of the IHR(2005) requires member states to assess public health events within their jurisdiction and notify the WHO of any events that may constitute a Public Health Emergency of International Concern (PHEIC). Article 1 of the IHR(2005) defines a “Public Health Emergency of International Concern” as “an extraordinary event which is determined ... (i) to constitute a

⁷⁸ *Id.*

⁷⁹ This section was written by (name redacted), Legislative Attorney.

⁸⁰ Fifty-Eighth World Health Assembly, agenda item 13.1, Revision of the International Health Regulations, May 23, 2005, at <http://www.who.int/csr/ihr/en/>.

⁸¹ The full text of the IHR(2005) may be found at http://www.who.int/csr/ihr/IHR_2005_en.pdf.

⁸² IHR(2005), Article 59.2.

⁸³ IHR, Article 56.

⁸⁴ HHS Secretary Michael Leavitt announced the acceptance of the IHR(2005) by the United States on December 13, 2006. *See* News Release at <http://archive.hhs.gov/news/press/2006pres/20061213.html>.

public health risk to other States through the international spread of disease and (ii) to potentially require a coordinated international response.” Cases involving certain diseases, such as smallpox and severe acute respiratory syndrome (SARS), automatically trigger mandatory WHO notification.⁸⁵ Whether reporting is required in the case of other diseases, including EVD, depends upon the seriousness of the public health impact, the unusualness or unexpectedness of the event, the risk of international spread, and the risk of international travel or trade restrictions.⁸⁶ On August 8, 2014, WHO Director-General Dr. Margaret Chan, upon the advice of the Emergency Committee, declared that the Ebola outbreak constituted a PHEIC.⁸⁷

WHO Recommendations

Under the IHR(2005), if the WHO director-general declares a “Public Health Emergency of International Concern,” then the director-general must issue temporary recommendations, defined as “non-binding advice,” which will depend upon the nature of the threat.⁸⁸ The IHR(2005) do not preclude State Parties from implementing measures that achieve a greater level of health protection than WHO temporary recommendations, provided that such measures are (1) otherwise consistent with the IHR(2005), and (2) not more restrictive of international trade and travel, and not more invasive or intrusive to persons, than reasonably available alternatives that would achieve the appropriate level of health protection.⁸⁹

In the context of international travel during the current Ebola outbreak, the director-general recommended that in countries *with Ebola transmission*:

There should be no international travel of Ebola contacts or cases, unless the travel is part of an appropriate medical evacuation.

Confirmed cases should immediately be isolated and treated in an Ebola Treatment Centre with no national or international travel until 2 Ebola-specific diagnostic tests conducted at least 48 hours apart are negative;

Contacts (which do not include properly protected health workers and laboratory staff who have had no unprotected exposure) should be monitored daily, with restricted national travel and no international travel until 21 days after exposure;

Probable and suspect cases should immediately be isolated and their travel should be restricted in accordance with their classification as either a confirmed case or contact.⁹⁰

⁸⁵ IHR(2005), Annex 2.

⁸⁶ *Id.*

⁸⁷ WHO, “Statement on the 1st Meeting of the IHR Emergency Committee on the 2014 Ebola Outbreak in West Africa,” August 8, 2014, available at <http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/>. The continued existence of a PHEIC has been reaffirmed twice, on September 22, 2014, and on October 23, 2014. WHO, *IHR Emergency Committee Regarding Ebola*, http://www.who.int/ihr/ihr_cc_ebola/en/.

⁸⁸ IHR, Articles 1(1), 15(1).

⁸⁹ IHR, Article 43(1).

⁹⁰ WHO, “Statement on the 1st Meeting of the IHR Emergency Committee on the 2014 Ebola Outbreak in West Africa,” August 8, 2014, available at <http://www.who.int/mediacentre/news/statements/2014/ebola-20140808/en/>.

For all other countries, the director-general recommended that “[t]here should be no general ban on international travel or trade.”⁹¹ Subsequent recommendations from the director-general provided that in countries with intense Ebola transmission:

Exit screening in Guinea, Liberia and Sierra Leone remains critical for reducing the exportation of Ebola cases. States should maintain and reinforce high-quality exit screening of all persons at international airports, seaport, and major land crossings, for unexplained febrile illness consistent with potential Ebola infection. The exit screening should consist of, at a minimum, a questionnaire, a temperature measurement and, if fever is discovered, an assessment of the risk that the fever is caused by Ebola virus disease (EVD).⁹²

Civil Rights

Governmental responses to infectious diseases, such as the current Ebola outbreak, may raise a classic civil rights issue: to what extent can an individual’s liberty be curtailed to advance the common good?⁹³ As discussed above in the context of quarantine and isolation,⁹⁴ the United States Constitution provides for individual due process and equal protection rights, though these rights are not absolute and may shrink as the needs of the community grow. Aside from these constitutional issues, to what extent do federal nondiscrimination statutes protect individuals that may have been exposed to or diagnosed with Ebola in places of public accommodation and the workplace? Separate from the rights of sick individuals, may employers assert their right to dismiss individuals who are unable to report for work due to illness under an “employment at will” contract? Do certain employers, such as hospitals, have unique obligations under the Occupational Safety and Health Act to ensure that employees treating Ebola patients have a safe workplace? These questions are discussed in the sections below.

Federal Nondiscrimination Laws⁹⁵

Discrimination against individuals with an infectious disease may be covered by Section 504 of the Rehabilitation Act,⁹⁶ the Americans with Disabilities Act (ADA),⁹⁷ or the Air Carrier Access Act (ACAA).⁹⁸ The following sections discuss the status of individuals in three classes: individuals who may have been exposed to Ebola virus but are not sick; individuals who are sick with EVD; and individuals who have recovered from the disease.

⁹¹ *Id.*

⁹² WHO, “Statement on the 3rd Meeting of the IHR Emergency Committee on the 2014 Ebola Outbreak in West Africa,” October 23, 2014, available at <http://www.who.int/mediacentre/news/statements/2014/ebola-3rd-ihc-meeting/en/>.

⁹³ For a discussion of balancing individual legal rights and responsibility and communal objectives, see Institute of Medicine, *Guidance for Establishing Crisis Standards of Care for Use in Disaster Situations* (September 2009).

⁹⁴ *See supra* at “Legal Challenges to Quarantine.”

⁹⁵ This section was written by Jane Smith, Legislative Attorney.

⁹⁶ 29 U.S.C. § 794.

⁹⁷ 42 U.S.C. §§ 12101 *et seq.*

⁹⁸ 42 U.S.C. § 1374(c).

Section 504 of the Rehabilitation Act and the Americans with Disabilities Act

Section 504 of the Rehabilitation Act prohibits entities receiving federal funds from discriminating on the basis of disability. The ADA prohibits discrimination against individuals with disabilities in employment, state and local programs, public accommodations, and other areas.⁹⁹ Both acts use the same definition of an *individual with a disability*.¹⁰⁰ An *individual with a disability* is “[any] person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life’s activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.”

Qualifying as an “Individual with a Disability”

It appears that the Rehabilitation Act and the ADA would most likely afford protection to two classes of individuals: ones sick from Ebola virus and those who have recovered from EVD. It is unclear whether the acts would protect individuals who may have been exposed to the virus but are not sick.

A symptomatic individual suffering from EVD would most likely qualify as an individual with a disability because EVD is limiting the major life activity of normal bodily functions. An individual who has recovered from Ebola would appear to qualify as an individual with a disability because he or she would be an individual with a history of EVD. It is not clear whether an individual who may have been exposed to Ebola virus, but is asymptomatic, would be covered by Section 504 or the ADA. It could be argued that such an individual qualifies because he or she is perceived as having Ebola. On the other hand it could be argued that he or she does not qualify because he or she is not perceived as having Ebola but is perceived to be a vector for the virus. Because there are no reported court decisions on whether an individual who is contagious but has no impairment qualifies as an individual with a disability, it is not possible to know whether an individual who is regarded as being contagious, but is not, would qualify as an “individual with a disability” or as an individual “regarded as” having a disability.

The Rehabilitation Act and Contagious Diseases

Neither the Rehabilitation Act nor the ADA specifically discusses contagious diseases. The Supreme Court dealt with the issue in the context of Section 504 in *School Board of Nassau County v. Arline*.¹⁰¹ The Court considered the case of an elementary school teacher with recurrent tuberculosis who was terminated from her employment. She claimed she was dismissed because of a disability in violation of Section 504. The school district claimed she was terminated not because of her disability, but because she was contagious and posed a risk to others.

The Court first held that a contagious disease can qualify as a disability under the Rehabilitation Act, but noted that in most cases, a court must undertake an individualized inquiry into whether the plaintiff was otherwise qualified for her job to protect individuals with disabilities from “deprivation based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns ... as avoiding exposing others to significant health and safety

⁹⁹ 42 U.S.C. §§ 12101 *et seq.*

¹⁰⁰ The Rehabilitation Act explicitly refers to the definition in the ADA. 29 U.S.C. § 705(B).

¹⁰¹ 480 U.S. 273 (1987).

risks.”¹⁰² The Court adopted the test proposed by the American Medical Association to determine whether an employee presents a significant risk to others. The Court held that the factors which must be considered include

findings of facts, based on reasonable medical judgments given the state of medical knowledge about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.¹⁰³

The Court emphasized that courts “normally should defer to the reasonable medical judgments of public health officials.”¹⁰⁴

The ADA and Contagious Diseases

The ADA does not specifically address individuals with contagious diseases, but it addresses individuals with disabilities who pose a “direct threat” to others. Under Title I, an employer may take otherwise prohibited actions against an individual with a disability if the individual poses a “direct threat.” The term *direct threat* means “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”¹⁰⁵ Equal Employment Opportunity Commission regulations determine “direct threat” considering the following factors, based on reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.¹⁰⁶ Under Title III, which prohibits discrimination in public accommodations and services operated by private entities, a business may deny accommodations or services to an individual with a disability who presents a “direct threat to the health or safety of others.”¹⁰⁷ *Direct threat* is defined here to mean “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”¹⁰⁸ Although Title II, governing state and local programs, contains no “direct threat” language, the Department of Justice has interpreted language in Title II to provide the same “direct threat” allowances and requirements as Title III.¹⁰⁹

An individual sick with EVD who is symptomatic and contagious would probably be found to represent a direct threat to others in close proximity. Therefore, under the ADA, an employer, a business, or a state or local program could take steps to protect others from the contagious individual. However, individuals who are not contagious would probably not represent a direct threat to others. Accordingly, it appears that employers could not act adversely against such individuals, and businesses and state and local programs would need to give such individuals full access under the ADA.

¹⁰² *Id.* at 287.

¹⁰³ *Id.* at 288.

¹⁰⁴ *Id.*

¹⁰⁵ 42 U.S.C. § 12111(3).

¹⁰⁶ 29 C.F.R. § 1630.2(r).

¹⁰⁷ 42 U.S.C. § 12182(3).

¹⁰⁸ *Id.*

¹⁰⁹ 28 C.F.R. Part 35, Appx. A.

The Air Carrier Access Act¹¹⁰

The Air Carrier Access Act (ACAA) prohibits discrimination by air carriers against “otherwise qualified individual[s]” on the basis of disability.¹¹¹ Enacted in 1986, prior to the ADA, the law currently applies to foreign carriers, with respect to flights that begin or end at a U.S. airport, and U.S. carriers, with some exceptions.¹¹² Generally, the law prohibits the exclusion of qualified individuals with a disability from air transportation or related services, except when specifically permitted under the regulations.¹¹³ The regulations specifically address when it is permissible to exclude a passenger with a communicable disease.¹¹⁴ Under the regulations, carriers are prohibited from taking the following actions on the basis that a passenger has a communicable disease, *unless* the passenger’s condition poses a direct threat:

- refusing to provide transportation;
- delaying the passenger’s transportation, for example, by requiring the passenger to take a later flight;
- imposing any condition, restriction, or requirement not imposed on other passengers; or
- requiring the passenger to provide a medical certificate.¹¹⁵

The passenger’s condition is a direct threat if it poses a “significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”¹¹⁶ In determining whether a direct threat exists, the carrier is required to make an individualized assessment, “based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence.”¹¹⁷ In making this individualized assessment, the carrier may rely on “directives issued by public health authorities,” including the CDC.¹¹⁸ If a carrier determines that a passenger poses a direct threat, the carrier must select the “least restrictive response from the point of view of the passenger, consistent with protecting the health and safety of others.”¹¹⁹ Carriers that violate the ACAA may be subject to

¹¹⁰ This subsection was written by (name redacted), Legislative Attorney.

¹¹¹ P.L. 99-435, 100 Stat. 1080 (1986), *codified at* 49 U.S.C. § 41705.

¹¹² 14 C.F.R. § 382.7.

¹¹³ 14 C.F.R. § 382.11. “Individual with a disability” is defined as “any individual who has a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.” 14 C.F.R. § 382.3. “Physical or mental impairment” is defined to include “any physiological disorder or condition... affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.” *Id.* While no federal court has directly addressed the issue, this definition of “individual with a disability” appears to include individuals with communicable diseases. Under the ADA, courts generally accept communicable diseases as falling within the scope of “disability” if the diseases meet the same parameters that other physical and mental impairments must satisfy. *See Bragdon v. Abbott*, 524 U.S. 624, 631-42 (1998).

¹¹⁴ 14 C.F.R. § 382.21.

¹¹⁵ 14 C.F.R. § 382.21(a).

¹¹⁶ 14 C.F.R. § 382.3.

¹¹⁷ *See* 14 C.F.R. §§ 382.21, 382.19(c)(1).

¹¹⁸ 14 C.F.R. § 382.11(b)(1).

¹¹⁹ *See* 14 C.F.R. §§ 382.21, 382.19(c)(2).

civil penalty, levied by the Department of Transportation after notice and an opportunity for a hearing.¹²⁰

Employment Issues¹²¹

As discussed above,¹²² the use of various infection control measures, such as quarantine and isolation, is a critical component of government efforts to minimize the possible spread of Ebola. In 2006, in response to the threat of pandemic influenza, the Homeland Security Council prepared an implementation plan that described more than 300 critical actions, including quarantine and isolation, that could be used to respond to a potential outbreak of contagious disease.¹²³

While quarantine and isolation could prove to be effective for minimizing Ebola exposure, they may also raise various employment concerns, particularly for those workers who fear losing their jobs or wages if they are forced to comply with a quarantine or isolation order. Tort law may provide some relief for workers who are terminated while they are quarantined or isolated. Infected workers may also be protected under the Family and Medical Leave Act if it can be established that they have a serious health condition. Finally, some jurisdictions have established employment protections for workers if a quarantine or isolation is ordered. The following sections review these topics in greater detail.

Wrongful Discharge in Violation of Public Policy

The employment-at-will doctrine governs the employment relationship between an employer and employee for most workers in the private sector. An employee who does not work pursuant to an employment contract, including a collective bargaining agreement that may permit termination only for cause or identify a procedure for dismissals, may be terminated for any reason at any time.

Although the employment-at-will doctrine provides the default rule for most employees, it has been eroded to some degree by the recognition of certain wrongful discharge claims brought against employers. In general, these wrongful discharge claims assert tort theories against the employer. A cause of action for wrongful discharge in violation of public policy is one such claim. If isolation or quarantine were used to attempt to limit the spread of Ebola and an employee were terminated because of absence from the workplace, a claim for wrongful discharge in violation of public policy might arise.

A claim for wrongful discharge in violation of public policy is grounded in the belief that the law should not allow an employee to be dismissed for engaging in an activity that is beneficial to the public welfare. In general, the claims encompass four categories of conduct:

- refusing to commit unlawful acts (e.g., refusing to commit perjury when the government is investigating the employer for wrongdoing);

¹²⁰ 49 U.S.C. § 463015.

¹²¹ This section was written by (name redacted), Legislative Attorney.

¹²² See *supra* at “Quarantine and Isolation Authority.”

¹²³ Homeland Security Council, *National Strategy for Pandemic Influenza: Implementation Plan* (GPO May 2006), available at <http://www.flu.gov/planning-preparedness/federal/pandemic-influenza-implementation.pdf>.

- exercising a statutory right (e.g., filing a claim for workers' compensation, reporting unfair labor practices);
- fulfilling a public obligation (e.g., serving on jury duty); and
- whistleblowing.¹²⁴

Although most states appear to recognize a claim for wrongful discharge in violation of public policy, it is possible that a state may allow a claim only under certain circumstances. For example, Texas recognizes such a claim only if an employee is terminated for refusing to perform an illegal act or inquiring into the legality of an instruction from the employer.¹²⁵

While the four categories of conduct identified above represent the classic fact patterns for a claim of wrongful discharge in violation of public policy, other actions could be deemed beneficial to the public welfare and result in a wrongful discharge claim if an employee is terminated for engaging in such actions. Some courts have broadly defined what constitutes "public policy." For example, in *Palmateer v. International Harvester Co.*, the Illinois Supreme Court indicated that

[t]here is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions.¹²⁶

Similarly, in *Boyle v. Vista Eyewear, Inc.*, the Missouri Court of Appeals stated that public policy "is that principle of law which holds that no one can lawfully do that which tends to be injurious to the public or against the public good."¹²⁷ These broad definitions suggest that an employee's isolation or quarantine during a pandemic in some states could possibly provide a public policy exception to the at-will rule of employment. It would seem possible for a court to conclude that the isolation or quarantine of individuals during a pandemic serves the public good and that the termination of individuals who are isolated or quarantined violates public policy. Some observers insist, however, that no court has ever held that it violates public policy to discharge an individual because he or she missed work because of a quarantine.¹²⁸

If the government were to mandate individuals to isolate or quarantine themselves either because they were infected or because of the risk of infection, it would seem possible that such an action might constitute a strong argument for the public policy exception to the at-will rule of employment. In such case, the government would appear to be identifying a significant policy that would benefit the public good. Even if the government merely recommended isolation or quarantine rather than mandated such actions, an argument for a public policy exception to the at-will rule would still seem possible.

¹²⁴ See Steven L. Willborn et al., *Employment Law: Cases and Materials* 82 (1993); John F. Buckley and Ronald M. Green, 2010 *State by State Guide to Human Resources Law* 5-46 (2010).

¹²⁵ See Buckley and Green at 5-60.

¹²⁶ 421 N.E.2d 876, 878 (Ill. 1981).

¹²⁷ 700 S.W.2d 859, 871 (Mo. Ct. App. 1985).

¹²⁸ See Mark A. Rothstein and Meghan K. Talbott, *Job Security and Income Replacement for Individuals in Quarantine: The Need for Legislation*, 10 *J. Health Care L. & Pol'y* 239 (2007).

The Family and Medical Leave Act

The Family and Medical Leave Act (FMLA)¹²⁹ guarantees an eligible employee 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- the birth of a son or daughter of the employee and to care for such son or daughter;
- the placement of a son or daughter with the employee for adoption or foster care;
- to care for a spouse or a son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition;
- a serious health condition that makes the employee unable to perform the functions of the position of such employee; and
- any qualifying exigency arising out of the fact that the spouse or a son, daughter, or parent of the employee is on covered active duty in the Armed Forces or has been notified of an impending call or order to covered active duty in the Armed Forces.¹³⁰

The FMLA applies to any employer in the private sector that engages in commerce, or in any industry or activity affecting commerce, and that has at least 50 employees who are employed for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.¹³¹ To be eligible for family and medical leave benefits, an individual must have been employed for at least 12 months by the employer from whom leave is requested, and must have been employed for at least 1,250 hours of service with such employer during the previous 12-month period.¹³²

The FMLA also covers public agencies, including federal, state, and local governments.¹³³ Unlike employers in the private sector, public employers do not have to employ at least 50 employees to be subject to the FMLA. Employees of public agencies, however, must have worked, generally for a specified number of weeks, to be eligible for benefits.

It seems possible that the FMLA might provide infected employees and employees who care for certain infected relatives with the opportunity to be absent from the workplace. The FMLA defines a *serious health condition* to mean “an illness, injury, impairment, or physical or mental condition” that involves either “inpatient care in a hospital, hospice, or residential medical care facility; or ... continuing treatment by a health care provider.”¹³⁴ An employee who been exposed

¹²⁹ 29 U.S.C. §§ 2601-2654. *See also* 5 U.S.C. §§ 6381-6387 (providing family and medical leave for civil service employees). For additional discussion of the FMLA, see CRS Report RS22090, *The Family and Medical Leave Act: Background and U.S. Supreme Court Cases*, by (name redacted).

¹³⁰ 29 U.S.C. § 2612(a)(1). *See also* 29 U.S.C. § 2612(a)(3) (providing an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember with a total of 26 workweeks of leave during a 12-month period to care for the servicemember).

¹³¹ 29 U.S.C. § 2611(4)(I). *See also* 29 U.S.C. § 2611(2)(B)(ii) (employers who employ 50 or more employees within a 75-mile radius of an employee’s worksite are subject to the FMLA even if they may have fewer than 50 employees at a single worksite).

¹³² 29 U.S.C. § 2611(2).

¹³³ *See* 29 U.S.C. § 2611(4)(A)(iii) (defining the term “employer” to include any public agency in accordance with Section 3(x) of the Fair Labor Standards Act, 29 U.S.C. § 203(x)).

¹³⁴ 29 U.S.C. § 2611(11).

to Ebola may be found to have a serious health condition. If the FMLA's eligibility requirements were met, such an employee would likely be granted leave under the statute.

In addition, because the FMLA grants leave to an employee to care for a spouse, child, or parent with a serious health condition, an employee could be granted leave to care for a relative affected by Ebola if the employee met the statute's eligibility requirements. While on leave, the employee with the serious health condition or the employee caring for a spouse, child, or parent with a serious health condition could comply with a quarantine or isolation order without the fear of termination for at least 12 workweeks.¹³⁵

An employee who was not exposed or who was not responsible for the care of an exposed spouse, child, or parent would not be protected by the FMLA. If such an employee sought isolation or quarantine to avoid exposure and was absent from the workplace, the FMLA would not prohibit the employer from terminating the employee.

State and Federal Laws Providing Employment Protections

At least seven states, recognizing the lack of statutory protection for employees in a situation where isolation or quarantine may be necessary, have enacted legislation that explicitly prohibits the termination of an employee who is subject to isolation or quarantine. In Delaware, Iowa, Kansas, Maryland, Minnesota, New Mexico, and South Carolina, an employer is prohibited from terminating an employee who is under an order of isolation or quarantine, or has been directed to enter isolation or quarantine.¹³⁶ Under Minnesota law, an employee who has been terminated or otherwise penalized for being in isolation or quarantine may bring a civil action for reinstatement or for the recovery of lost wages or benefits.¹³⁷

Two additional states have enacted legislation that addresses the treatment of employees who are subject to quarantine or isolation. Under New Jersey law, an affected employee must be reinstated following the quarantine or isolation.¹³⁸ Under Maine law, an employer is required to grant leave to an employee who is subject to quarantine or isolation.¹³⁹ The leave granted by the employer may be paid or unpaid.¹⁴⁰

¹³⁵ Although the FMLA allows for at least 12 workweeks of leave, it does not guarantee the payment of wages during such leave. Under Section 102(d)(2)(B) of the act, 29 U.S.C. § 2612(d)(2)(B), an employer may require the employee to substitute paid vacation or sick leave for the leave granted under the act. If such a substitution is not made, however, the employee is likely to be granted unpaid leave.

¹³⁶ Del. Code Ann. tit. 20, § 3136(6)(d); Iowa Code § 139A.13A; Kan. Stat. Ann. § 65-129d; Md. Code Ann., Health-Gen. § 18-906; Minn. Stat. § 144.4196; N.M. Stat. Ann. § 12-10A-16; S.C. Code Ann. § 44-4-530.

¹³⁷ Minn. Stat. § 144.4196.

¹³⁸ N.J. Rev. Stat. § 26:13-16.

¹³⁹ Me. Rev. Stat. Ann. tit. 26, § 875.

¹⁴⁰ The availability of wage or income replacement because of quarantine or isolation has been addressed by some commentators. See, e.g., Nan D. Hunter, "Public-Private" Health Law: Multiple Directions in Public Health, 10 J. Health Care L. & Pol'y 89 (2007). Many commentators maintain that existing wage or income replacement programs, such as unemployment and workers compensation, would probably not provide compensation for most employees affected by quarantine or isolation. Replacement wages were, however, reportedly paid during at least one quarantine. During the 1916 polio epidemic, quarantined families in the village of Glen Cove, NY, received replacement wages. See Guenter B. Risse, *Revolt Against Quarantine: Community Responses to the 1916 Polio Epidemic, Oyster Bay, New York*, Transactions & Stud. of the College of Physicians of Philadelphia, Mar. 1992, at 34 ("Garbage cans were distributed free of charge, and quarantined families received replacement wages to compensate for loss of income"). (continued...)

Although federal law does not protect from termination employees who may be absent from the workplace because of isolation or quarantine, there are examples of employee protections that are arguably analogous. The FMLA, for example, does grant leave to an eligible employee who has a serious health condition or who provides care to a spouse, child, or parent with a serious health condition. Moreover, an expansion of the FMLA to allow paid leave because of a serious health condition or to care for a spouse, child, or parent with such a condition has been proposed.¹⁴¹ The availability of paid leave would likely minimize concerns about lost wages if an Ebola pandemic were to occur.¹⁴²

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides another example of employee protection.¹⁴³ USERRA requires the reemployment of an employee who has been absent from a position of employment because of service in the uniformed services. USERRA and the FMLA illustrate Congress's awareness of events that may necessitate an employee's absence from the workplace.

The Occupational Safety and Health Administration¹⁴⁴

Employers whose employees could face workplace exposure to Ebola virus may be obligated to comply with applicable Occupational Safety and Health Administration (OSHA) requirements. OSHA, through enforcement of the Occupational Safety and Health Act¹⁴⁵ (OSH Act), is generally responsible for protecting workplace safety.¹⁴⁶ To this end, the act authorizes OSHA to promulgate workplace safety standards.¹⁴⁷ Employers that fall within the scope of the OSH

(...continued)

With respect to the current Ebola outbreak, the governor of New York has also indicated that “any [quarantined] health care worker whose sponsoring organization does not [pay wages during quarantine], as well as adults who meet New York’s criteria for quarantine, ... would be provided financial assistance for 21 days by the state.” Governor Andrew M. Cuomo, *New York State Releases Fact Sheet on State Screening Protocols at JFK International Airport*, <http://www.governor.ny.gov/news/new-york-state-releases-fact-sheet-state-screening-protocols-jfk-international-airport>. Disaster unemployment assistance pursuant to the Stafford Act may also be a possibility if it is determined that the act is applicable to an Ebola pandemic. See Federal Emergency Management Agency, *Fact Sheet – Infectious Disease*, available at <https://www.fema.gov/media-library/assets/documents/99710>; and CRS Report RL34724, *Would an Influenza Pandemic Qualify as a Major Disaster Under the Stafford Act?*, by (name redacted).

¹⁴¹ See, e.g., Family and Medical Leave Insurance Act of 2013, H.R. 3712, 113th Cong. (2013).

¹⁴² Some states are exploring the availability of paid leave as part of their state disability insurance programs. In 2002, legislation that extends disability insurance benefits to individuals who are unable to perform their work because they are “caring for a seriously ill child, parent, spouse, or domestic partner” was enacted in California. See Cal. Unemp. Ins. Code §§ 3300-3306. Under the so-called Paid Family Leave Insurance Program, an individual who meets the program’s requirements is eligible for benefits equal to one-seventh of the individual’s weekly benefit amount on any day in which he or she is unable to perform the individual’s regular or customary work. Similar legislation has also been enacted in New Jersey. See A. 873, 213th Leg., Reg. Sess. (N.J. 2008).

¹⁴³ 38 U.S.C. §§ 4301-4333.

¹⁴⁴ This section was written by (name redacted), Legislative Attorney.

¹⁴⁵ P.L. 91-596, 84 Stat. 1590 (1970). For general information on the OSH Act and OSHA, see CRS Report R43768, *The OSH Act: A Legal Overview*, by (name redacted).

¹⁴⁶ It is important to note that the OSH Act expressly allows states to control occupational safety and health regulation in certain circumstances. See 29 U.S.C. § 667. If OSHA approves a state occupational safety and health plan, which requires, among other things, that the plan provide health and safety protection that is at least as adequate as the protections provided by OSHA, see 29 U.S.C. § 667(c)(2), then the state plan requirements generally apply in place of OSHA’s standards and regulations. 29 U.S.C. § 667(e).

¹⁴⁷ 29 U.S.C. § 655(b).

Act’s—and, thus, OSHA’s—jurisdiction¹⁴⁸ must comply with these standards.¹⁴⁹ It appears as though the three primary OSHA-created standards that could apply to employee exposure to Ebola in the workplace are (1) the Bloodborne Pathogens standard, (2) the Personal Protective Equipment standard, and (3) the Respiratory Protection standard.

When no OSHA standard applies to a workplace hazard, employers must comply with the OSH Act’s catchall provision, known as the “General Duty Clause.”¹⁵⁰ The General Duty Clause generally requires employers to provide workplaces that are free of recognized hazards.¹⁵¹ Thus, employers must comply with OSHA standards for minimizing a workplace hazard that could expose employees to Ebola virus. However, when such a hazard has no applicable OSHA standard, the General Duty Clause seemingly requires employers to minimize the chance that the hazard will cause employees to contract Ebola virus. Noncompliance with OSHA-created standards and the General Duty Clause can generally lead to penalties against employers.¹⁵² However, the OSH Act does not provide monetary relief to employees who are harmed by employer violations of OSHA standards or the General Duty Clause.

The Bloodborne Pathogens Standard

The Bloodborne Pathogens standard appears aimed at preventing disease-causing microorganisms that are present in the blood—which, according to OSHA,¹⁵³ includes Ebola virus—from spreading to employees. The standard generally applies to employers with employees who could reasonably anticipate coming into contact with “blood or other infectious materials” during the performance of their workplace duties (e.g., hospitals).¹⁵⁴

Among other things, employers that are subject to the Bloodborne Pathogens standard must have written plans for minimizing employee exposure to blood or other infectious materials, and such plans must be made accessible to employees.¹⁵⁵ Employers must review and update these plans at least once per year.¹⁵⁶ The Bloodborne Pathogens standard also contains “universal precautions,” which seemingly require covered employers to manage employee behavior to help minimize the odds of employees coming into contact with infectious diseases.¹⁵⁷ For example, these universal precautions include having employees wash their hands with soap and water in certain circumstances;¹⁵⁸ properly dispose of used needles and other sharp medical equipment that has come into contact with human blood,¹⁵⁹ and refrain from eating, drinking, smoking, applying

¹⁴⁸ The OSH Act expressly precludes its application to, and thus OSHA regulation of, certain employers. For example, the OSH Act does not apply to employment performed outside of U.S. states and territories, *see* 29 U.S.C. § 653(a); generally does not apply to federal, state, or local employment, *see* 29 U.S.C. § 652(5); and does not apply to self-employed individuals, *see id.*

¹⁴⁹ 29 U.S.C. § 654(a)(2).

¹⁵⁰ 29 U.S.C. § 654(a)(1).

¹⁵¹ *See* 29 U.S.C. § 654(a)(1).

¹⁵² *See* 29 U.S.C. § 666.

¹⁵³ “Ebola: Standards,” <https://www.osha.gov/SLTC/ebola/standards.html> (last visited November 18, 2014).

¹⁵⁴ 29 C.F.R. § 1910.1030(b).

¹⁵⁵ 29 C.F.R. § 1910.1030(c)(1)(i); 29 C.F.R. § 1910.1030(c)(1)(iii).

¹⁵⁶ *See* 29 C.F.R. § 1910.1030(c)(1)(iv).

¹⁵⁷ *See* 29 C.F.R. § 1910.1030(d)(1).

¹⁵⁸ 29 C.F.R. § 1910.1030(d)(2)(iii)-(vi).

¹⁵⁹ *See* 29 C.F.R. § 1910.1030(d)(4)(iii)(A)(1).

cosmetics, or handling contact lenses in areas where they can reasonably expect to come into contact with human blood.¹⁶⁰ The Bloodborne Pathogens standard further requires that employers provide “appropriate” protective equipment to employees that can be reasonably expected to come into contact with blood or other infectious materials.¹⁶¹ Appropriate protective equipment is equipment that does not permit blood or other infectious materials to reach an employee’s person or clothing.¹⁶² Employers must provide such equipment at no cost to employees.¹⁶³

The Personal Protective Equipment Standard

OSHA’s Personal Protective Equipment standard applies whenever personal protective equipment (PPE) is needed because of “hazards of . . . environment . . . capable of causing injury or impairment [to employees] in the function of any part of the body through absorption, inhalation, or physical contact.”¹⁶⁴ This seemingly would encompass potential exposure to Ebola in the workplace as contact with bodily fluids that are infected with Ebola virus could cause employees to contract the virus. The protective equipment standard requires employers to assess their workplaces to determine whether hazards necessitating PPE are, or are likely to be, present.¹⁶⁵ Employers are then required to have affected employees use PPE that will protect against hazards identified during the assessment.¹⁶⁶ If PPE is required, the employer must generally provide such equipment at no cost to its employees.¹⁶⁷ However, there are exceptions wherein employees can be required to purchase their own protective equipment.¹⁶⁸

The Respiratory Protection Standard

OSHA has stated that when employees could be exposed to bioaerosols that contain Ebola virus (for example, when cleaning an infected surface with pressurized water could cause infected droplets to become airborne), employers must comply with OSHA’s Respiratory Protection standard.¹⁶⁹ The Respiratory Protection standard requires, among other things, that employers provide affected employees with respirators when appropriate;¹⁷⁰ that covered employers develop and implement a written respiratory protection program containing worksite-specific procedures and requirements for employee respirator use;¹⁷¹ and the selection,¹⁷² fitting,¹⁷³ usage,¹⁷⁴ and maintenance¹⁷⁵ of appropriate respirators.

¹⁶⁰ 29 C.F.R. § 1910.1030(d)(2)(ix).

¹⁶¹ 29 C.F.R. § 1910.1030(d)(3)(i). Protective equipment includes, e.g., “gloves, gowns, laboratory coats, face shields or masks and eye protection, mouthpieces, resuscitation bags, pocket masks, or other ventilation devices.” *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 29 C.F.R. § 1910.132(a).

¹⁶⁵ 29 C.F.R. § 1910.132(d)(1).

¹⁶⁶ 29 C.F.R. § 1910.132(d)(1)(i).

¹⁶⁷ 29 C.F.R. § 1819,132(h)(1).

¹⁶⁸ *See* 29 C.F.R. § 1910.132(h)(2)-(h)(7).

¹⁶⁹ “Ebola: Standards,” <https://www.osha.gov/SLTC/ebola/standards.html> (last visited November 11, 2014); OSHA, “Cleaning and Decontamination of Ebola on Surfaces,” at 3 (2014), *available at* https://www.osha.gov/Publications/OSHA_FS-3756.pdf.

¹⁷⁰ *See* 29 C.F.R. § 1910.134(a)(2).

¹⁷¹ 29 C.F.R. § 1910.134(c).

¹⁷² 29 C.F.R. § 1910.134(d).

The General Duty Clause

Under the General Duty Clause, employers must provide employees with “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.” When no OSHA-created standard applies to a recognized workplace hazard but the hazard can cause employees to contract Ebola, the General Duty Clause may require employees to take precautions to reduce the likelihood that the hazard will cause employees to become infected with Ebola.

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¹⁷³ 29 C.F.R. § 1910.134(f).

¹⁷⁴ *See* 29 C.F.R. § 1910.134(g).

¹⁷⁵ 29 C.F.R. § 1910.134(h).

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