



# HDHHS Pandemic Influenza Conference: Legal Issues

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# Legal Issues Raised by Pandemic

- Business continuity: absenteeism; emergency powers
  - Fiduciary duties: officers and directors
- Contracts
  - *Force majeure*
  - Acts of God
- Insurance
- Communications



# Legal Issues Raised by Pandemic

- HR/L&E
  - Wage and hour
  - Travel
  - Preparation
  - Communication
  - Benefits
  - Leaves
  - Workplace Safety
  - Discrimination



# Business Continuity



# Absenteeism

- 30-40% attack rate anticipated
  - Unpredictable mortality rate
- Caring for sick relatives
- Closed schools and day care centers
- Refusals to work?
- Effects on both entity itself and suppliers and customers
  - Disruption nearly inevitable



# Sources of Emergency Governmental Powers

- U.S. Constitution, Article 1, § 8, Clause 3 (commerce)
- States: primary legal authority and responsibility for public health. U.S. Constitution, Amend. 10
- State's inherent "police powers" *McSween v. Bd. School Trustees*, 129 S.W. 206 (Tex. Civ. App. 1910) (vaccination); *People ex rel. Baker v. Strautz*, 386 Ill. 360, 365, 54 N.E.2d 441, 443 (1944)
- Emergency powers (clear public threat). *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)(vaccination)



# Quarantine: Federal Powers

- CDC may “detain...examine, or conditionally release individuals suspected of carrying a communicable disease.” *See*, 42 U.S.C. § 264.
- HHS may establish quarantine stations, provide treatment, and enforce quarantine by DHS and cooperating State and local entities. Title III, Public Health Service Act (PHSA), 42 U.S.C. § 300x-2
- HHS may also engage in international activities. § 307, PHSA.
- Secretary, HHS may request that Customs, Coast Guard, and military officers aid in execution of state-imposed quarantines. 42 U.S.C. § 97



# Quarantine: Federal Powers

- Ports: Customs, Coast Guard may assist w/ enforcement.
- U.S. Marshals Service:
  - with other DOJ agencies (FBI, DEA, ATF), can enforce quarantines
  - Can deputize other officers with enforcement powers (Katrina)
- Insurrection Act, 10 U.S.C. §§ 332-334: President may direct military to:
  - enforce quarantines
  - conduct security functions (guard pharmaceuticals, e.g.)



# Border Authorities and Travelers

- Detain aliens to diagnose a listed communicable disease.
- Exclude aliens “determined to have a communicable disease of public health significance.”
- “Whenever the President finds that the entry of any aliens...into the U.S. would be detrimental to the interests of the U.S., he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens...as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.”



## State Powers

- Governors may restrict travel within and access to their states
- States also may impose quarantine
- But: state can resort to quarantine via confinement only when it can not achieve its objectives through less drastic means. *City of New York v. Doe*, 614 N.Y.Supp.2d 8 App. Div. (1994).



# Emergency Powers that Local Authorities Commonly Invoke

- Impose curfews
- Control movement of persons
- Close access to buildings, streets, or other public or private places
- Issue evacuation orders: buildings, streets, neighborhoods, cities
- Close businesses
- Restrict routes of transportation
- Order continuation, termination, or limitation of public utilities
- Suspend sale or dispensing of alcohol
- Provide that any decision governing body must make be valid



# Emergency Powers that Authorities Commonly Invoke

- Control or regulate use, sale, production, and distribution of food, fuel, clothing, and other commodities or services
- Suspend or limit sale or transportation of firearms, explosives, or combustibles
- Suspend or limit the burning of any items or property
- Transfer agencies' personnel or functions to perform emergency services
- Delegate authority among city officials
- Call a meeting of governing body anywhere, inside or outside city limits



# Business Disruption

- Absenteeism
- Supply chain problems
  - Alternative sources for critical goods, services?
- Governmental actions:
  - Federal
  - State
  - Local



# Are Businesses Under a Duty to Plan?



## Duty of Reasonable Care: Learned Hand's "BPL" Analysis

- “[I]f the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether  $B < PL$ .”
  - *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)
- *See also*, Restatement (3d), Torts: Liability for Physical Harm § 9 (Proposed Final Draft No. 1, 2001). "Reasonable care in conduct and not the actor's mere good faith remains the ultimate criterion for non-negligence, but the inquiry into reasonableness acknowledges the reality of the emergency situation." *Id.* at cmt. a.



# Duty of Reasonable Care: Flu and BPL Analysis

- Flu:
  - Probability, P: 50/50?
  - Burden, B: significant
  - Injury, L: potentially enormous



## Negligence Theory: BPL Trumps the Standard of Care

- *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932): Tugboat owner liable for failing to have radio that would have warned boat's operators of impending storm, though owners did not usually so equip tugboats
- *Gleason v. Title Guarantee Co.*, 300 F.2d 813 (5th Cir. 1962): Lawyer preparing title examination liable in relying on information abstract company gave over phone, even though lawyers customarily did
- *Helling v. Carey*, 519 P.2d 981 (Wash. 1974): Ophthalmologist liable for failing to perform glaucoma test in pt <40 despite uncontroverted expert testimony that standard of care did not then so require



# Claims Arising from Natural Disasters

- 1989 San Francisco Bay area earthquake: drivers filed  $\geq 330$  lawsuits.
  - Cal. settled all but 1 for a total of \$69 million.
  - Potentially liable: architects, brokers, contractors, subs, developers, engineers, financiers, government licensing authorities and regulators, inspectors, owners, tenants, anyone who modified existing structure
- Floods from a February 1986 levee failure on the Yuba River in California drove 24,000 residents from homes and killed two. After years of litigation, the state reached a settlement in spring 2005 for \$400 million divided among 3,000 plaintiffs.



## Claims Arising from Natural Disasters: Class Actions

- Post-Katrina: several thousand people filed 27 suits for damages from an oil spill from a 250,000 barrel tank
  - Commonality (Rule 23): whether company failed to maintain oil tank, whether area will experience long-term contamination, and whether company had adequate hurricane safety plans.



# What will Plaintiffs Invoke to Establish a Duty?



# Pandemic Flu Business Letter, 12/6/05, HHS, DHS, Department of Commerce



- “Companies that provide critical infrastructure services, such as power and telecommunications, also have a **special responsibility** to plan for continued operation in a crisis and should plan accordingly. As with any catastrophe, having a contingency plan is essential.” (emphasis added)



NATIONAL STRATEGY FOR  
**PANDEMIC  
INFLUENZA**



HOMELAND SECURITY COUNCIL

NOVEMBER 2005

- National Strategy
- November 2005



## US National Strategy for Pandemic November 2005

- Goals of Federal Government Response:
  - Stop, slow or limit spread of pandemic to the US
  - Limit domestic spread and mitigate disease, suffering and death
  - *Sustain infrastructure and mitigate impact to economy and the functioning of society (emphasis added)*



# Critical Infrastructure (DHS)

- Agriculture and Food
- Defense Industrial base
- Energy
- Public Health and Healthcare
- National Monuments and Icons
- Banking and Finance
- Drinking Water and Waste Treatment Facilities
- Chemical
- Commercial Facilities
- Dams
- Emergency Services
- Commercial Nuclear Reactors, Materials and Waste
- Information Technology
- Telecommunications
- Postal and Shipping
- Transportation Systems
- Government Facilities



## Other Possible Sources of Duty

- Statutes, regs. *Henry v. Britt*, 220 So. 2d 917, 920 (Fla. Dist. Ct. App. 1969)
- Ordinances. *See, e.g., Tex-Jersey Oil Corp. v. Beck*, 292 S.W.2d 803 (Tex. Civ. App. -- Texarkana 1956, writ granted) (violation of valid ordinance is negligence *per se*), *modified*, 305 S.W.2d 162 (Tex. 1957)
- Building codes. *See, e.g., Burran v. Dambold*, 422 F.2d 133, 135-36 (10th Cir. 1970) (under New Mexico law, a violation of a statute, including a building code, is negligence *per se*)
- Contracts, custom, or professional codes. *See, e.g., Arkansas Valley Elec. Coop. Corp. v. Davis*, 800 S.W.2d 420, 422 (Ark. 1990) (violation of National Electric Safety Code is evidence of negligence).



## Theories of Liability: Preparedness Plans

- 1) absence of an emergency action plan
- 2) inadequacy of the plan
- 3) failure to follow the plan
- Standard: reasonable care under the circumstances



# Defenses to Contract Claims



# Impossibility Defense

- Meaning varies with jurisdiction
- Governs only if parties have not specified assignment of the risk. *Commonwealth Edison Company v. Allied-General Nuclear Services*, 731 F. Supp. 850, 855-56 (N.D. Ill. 1990) (*force majeure* clause excused defendant from having to accept delivery of spent nuclear fuel delivered after date of Nuclear Regulatory Commission's moratorium on nuclear reprocessing)



## UCC 2-615: Excuse by Failure of Presupposed Conditions

- 1) a contingency has occurred
- (2) the contingency has made performance impracticable; and
- (3) the nonoccurrence of that contingency was a basic assumption upon which the contract was made.
- E.g: complete cut-off of supplies



# Impracticability

- Extreme, unanticipated cost increases on fixed price Ks: D contracts to remove all gravel. It turns out that there was gravel underwater, which would cost 30 times the amount D was to be paid to remove it.



## *Force majeure* (“greater force”)

- No uniform set of events defines
- Clauses created to excuse party from K’s terms when performance becomes impossible or impracticable, as the result of events that parties could not foresee **or** control
  - *Phillips Puerto Rico Core, Inc. v. Tradex Petroleum*, 782 F.2d 314, 319 (2d Cir. 1985)
- When clause unclear or absent, or when boilerplate is used, law of jurisdiction prevails. *Thompson v. State*, 22 Ill. Ct.Cl. 441 (1957).



## *Force majeure, 2: Events Typically Listed*

- Acts of God
- War or hostilities (with declaration of war or not)
- Terrorist acts
- Act of any civil or military authority
- Governmental or regulatory decisions; refusal of licenses
- Riot, civic commotion, vandalism
- Strike
- Fire, flood, earthquake, and extreme weather conditions.



## *Force majeure, 3: State law*

- Some states: *force majeure* event must be both
  - (1) unforeseeable **and**
  - (2) beyond human control
- Other states forego the unforeseeability requirement
  - *force majeure* events must simply be beyond human control
- Other states (especially those that do not expressly define the term): foreseeability requirement is unclear



## *Force majeure*: Statutes

- 27 states mention *force majeure* in their state codes; only 7 define it
  - Ala., Alaska, Ariz., Ark., Col., Conn., Del., D.C., Fla., Ga., Ha., Ill., Ind., Kan., La., Miss., N.J., N.M., N.C., Ore., Pa., S.D., Tenn., **Tex.**, Ut., Va., and Wash.
- Of the seven, most do so within the context of the statute in which the term appears, which often has little to do with commercial K breaches
  - See Wm. Cary Wright, *Contracting in the Age of Bird Flu, Terrorism and Katrina: Tips for Allocating and Transferring Force Majeure Risks*, ABA Continuing Legal Education (June 2006).



## *Force majeure* in Texas: V.T.C.A., Utilities Code § 39.055

- For purposes of this section, "**force majeure**" means a major event or combination of major events, including new or expanded state or federal statutory or regulatory requirements; hurricanes, tornadoes, ice storms, or other natural disasters; or acts of war, terrorism, or civil disturbance, beyond the control of an electric utility that the regulatory authority finds increases the utility's total reasonable and necessary nonfuel costs or decreases the utility's total nonfuel revenues related to the generation and delivery of electricity by more than 10 percent for any calendar year during the freeze period. The term does not include any changes in general economic conditions such as inflation, interest rates, or other factors of general application.



## *Force majeure: Proximate Cause*

- “To relieve one of liability because [an event] is, in law, an ‘act of God,’ it must appear that the act of God was the sole proximate cause of the injury.” *Cooper v. Horn*, 248 Va. 417 (1994) (Ds allowed trees to grow in earthen dam, so even though dam failed during 3 d storm, human agency contributed to flood damage. Defense inapplicable).
- Lightning strike was act of God, but failure to ground line was not “free of human agency,” so liability lay. *Central Ga. Elec. Membership Corp. v. Heath*, 4 S.E.2d 700 (Ga. Ct. App. 1939).



## *Force majeure: Pandemic*

- If effects of the event are not properly enumerated, *force majeure* may not be a viable defense
  - Pandemic itself might not cause nonperformance; instead, the effect of pandemic – fear – might cause nonperformance
  - Party may not be protected if “fear of contracting illness” is not listed in contract as a *force majeure* event
- Economic force majeure disfavored. *In re Millers Cove Energy Co.*, 62 F.3d 155, 158 (6th Cir. 1995)



## Limitations to Act of God Defense

- D has burden of proof. *Naxera v. Wathan*, 159 N.W.2d 513, 517 (Iowa 1968)
- Question of fact for the jury. *Lee v. Mobil Oil Corp.*, 452 P.2d 857, 861 (Kan. 1969)



## Limitations to Act of God Defense

- Defense available only where event is so extraordinary that “the history of climatic variations in the locality affords no reasonable warning of their coming” and event is not “humanized” by man’s participation.
  - *Lane v. G&M Statuary, Inc.*, 156 S.W.3d 498 (Mo. Ct. App. 2005)



## Limitations to Act of God Defense

- N/A: "gradual subsidence of soil caused by...wear and tear of heavy traffic," *Charing Cross Co. v. London Hydraulic Co.*, 3 K.B. 442 (1913)
- Rats gnawing hole in ship's pipes, letting in sea water, damaging cargo (rice). *Pandorf v. Hamilton*, 17 Q.B.D. 670, 675 (1886); *Laverdoni v. Drury*, 8 Ex. 166 (1852) (similar)
- Governmental duty to warn of 100-year flood. *Ducey v. United States*, 523 F. Supp. 225, 227-28 (D. Nev. 1981).



## Drafting Your Clause

- Parties may define “*force majeure*” in a manner different from that set forth in the common law or by statute
- Language of K itself governs construction of its *force majeure* provisions
  - Trumps generalized legal principals of *force majeure*. *Commonwealth Edison Company v. Allied-General Nuclear Services*, 731 F. Supp. 850, 855-56 (N.D. Ill. 1990)



# Drafting Your Clause

- Clauses construed narrowly to encompass enumerated events only
- Clause may include a “catchall” provision.
  - But most jurisdictions invoke *ejusdem generis* (“of the same kind”)
    - if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, "vehicles" would not include airplanes. *See, Seitz v. Mark-O-Lite Contractors, Inc.*, 210 N.J.Super.646, 510 A.2d 319.



# Apportionment of Damages

- Where dam breaks, damaging P's land and crops, but stream would have overflowed even if dam had not broken, party responsible for dam is liable only for that portion of damage caused by dam's breaking. *Anderson v. Highland Lake Co.*, 258 S.W. 218 (Tex. Civ. App. 1924)
- Where flooding is concurrently caused by extraordinary rainfall and wrongfully directed flood water, irrigation district is liable only for portion caused by wrongful diversion. *Webb v. Platte Valley Pub. Power & Irrigation Dist.*, 18 N.W.2d 563 (Neb. 1945)



# Are You Insured Against Pandemic-Related Losses?



# Insurance

- Business income insurance: for income losses suffered as a result of destruction or damage to the insured's place of business
- Business income civil authority coverage: for income losses resulting from denial of access to the premises by civil authorities
  - May not apply if underlying disaster not covered
- Contingent business income coverage: for losses suffered by business as a result of its dependence on another business whose premises have been damaged
  - Example: Katrina's effect on Cargill's barges



# Business Interruption Coverage

- Replaces normal business income when insured losses interrupt cash flow
  - Most business owner's policies (BOPs) contain
  - Usually, payments are based on previous sales volumes
  - But may be limited to physical damage
- Extra expense coverage
  - moving to a temporary location
  - contracting out work
  - overtime



# Insurance: Hijackings of Airliners

- Pan Am was covered by an "all risk" policy, where all risks not excluded are automatically included. Should insurance company attempt to assert an exclusion, it generally has the burden to show why coverage should not apply. *Pan American World Airways v. Aetna Casualty & Surety Co.*, 505 F.2d 989 (2d Cir. 1974)(losses from hijacking covered because not excluded).



## Insurance: Finer Points

- At what point does coverage begin?
  - Can business be operated remotely?
- How long is your loss period likely to be?
  - How quickly can you get back to business as usual?



# Communications

- Employees
- Customers
- Suppliers
- Stockholders
- Regulators
- Media

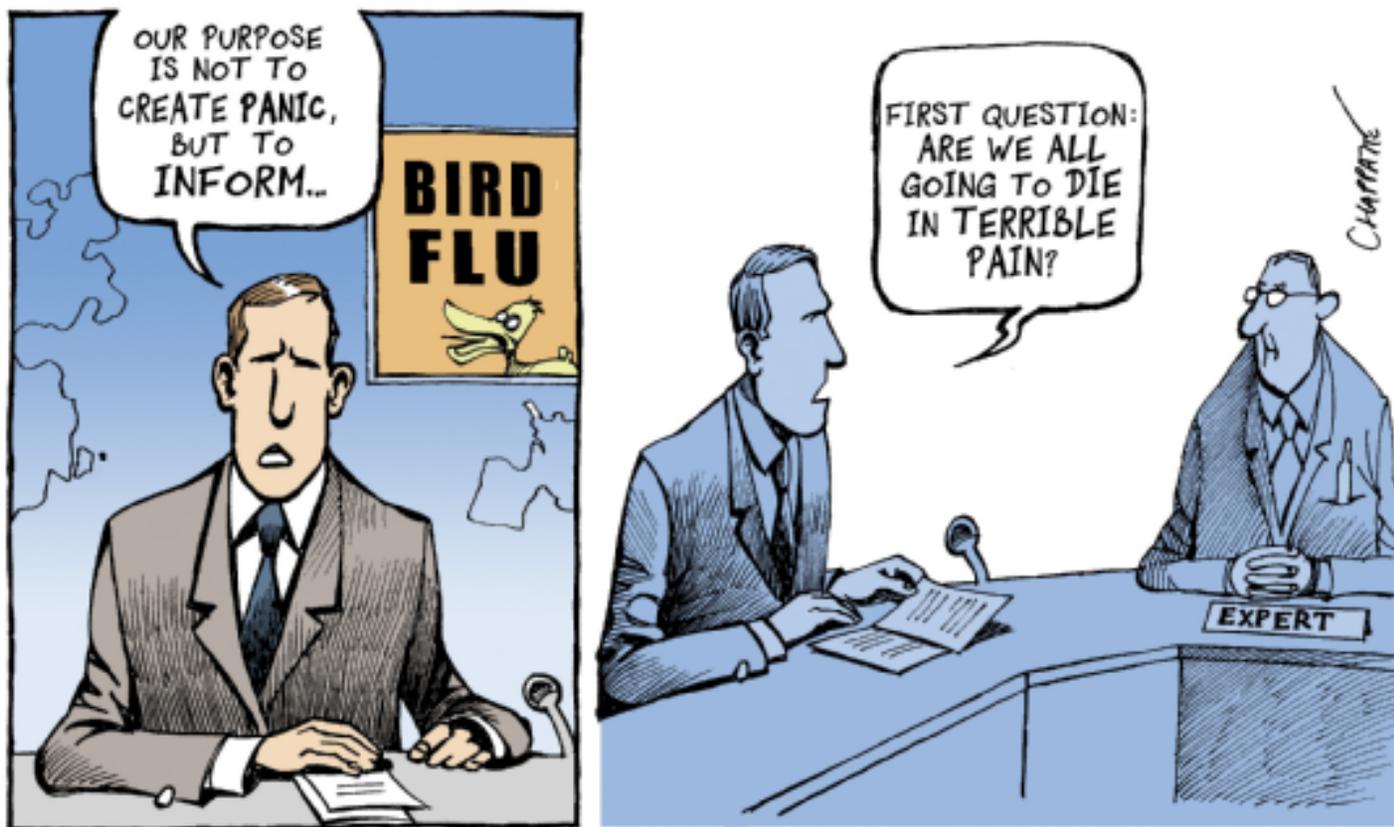


# Communications: Some Basics

- Prepare content in advance; test
- Clarity
- Accuracy
- Timing
- Adapt for audience
- Avoid message overload



# Avian Flu Coverage





# Labor and Employment



# OSH Act

- General duty clause: employer to “furnish to each of his employees 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 to his employees.” 29 U.S.C. § 654(a)(1)
- Possible requirements:
  - emergency action plan
  - respiratory protection
  - sanitation materials and practices
  - employee training



# Refusing a Work Assignment for Safety Reasons

- Under limited circumstances, employees may refuse work exposing them to hazards. 29 C.F.R. § 1977.12(a)(2).
- Employee may not be disciplined for walking off job if:
  - (1) a reasonable employee believes in good faith
  - (2) that performing assigned work involves real danger of death or serious injury
  - (3) employee is unable to get employer to correct the condition; and
  - (4) there is insufficient time to eliminate the danger through resort to regular statutory enforcement channels.
    - *See, Whirlpool Corp. v. Marshall*, 445 U.S. 1 (1980).



# Workers' Comp

- If one is injured following administration of a vaccine or antiviral medication, in connection with his employment, compensation may be available under workers' comp.
  - Federal employees: Federal Employees' Compensation Act.



# Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601-2654

- $\leq$  12 weeks of unpaid leave in any 12-month period for employee's serious health condition that makes him or her unable to perform job.
  - “Serious health condition”: an illness or...physical or mental condition that involves inpatient care or continuing treatment by a health care provider.” 29 U.S.C. § 2611(11)
    - Would an asymptomatic person in quarantine be protected under the FMLA?
- $>$  1/2 the states also have their own family and medical leave acts
  - Some apply to public employees only
  - A few laws go beyond the federal law (covering smaller employers, e.g.)
  - Cal.: employees entitled to up to six weeks of *paid* leave. Cal. Unempl. Ins. Code §§ 3300-3305.



## Americans with Disabilities Act, 42 U.S.C. § 12131-13165, 12181-12189

- Coverage: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2)
  - May not apply to all infectious diseases, though it did to TB.  
*School Board of Nassau County v. Arline*, 480 U.S. 273 (1987)  
(Sec. 504, Rehab Act)
  - Flu is either fatal or temporary



# ADA

- Discharge while under quarantine: possible violation of Title I of ADA, 42 U.S.C. § 12101-12213 or an analogous state disability law.
- Disability discrimination claim: would probably fail. ADA is unlikely to cover an individual in quarantine.
  - A quarantined individual lacks physical or mental impairment constituting a substantial limitation of a major life activity. 42 U.S.C. § 12102(2)
  - Temporary and minor impairments are not covered. 29 C.F.R. § 1630.2(j).
  - Individuals “regarded as” having a substantially limiting impairment: because condition must be substantially limiting, so probably no help to P. *See, Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).



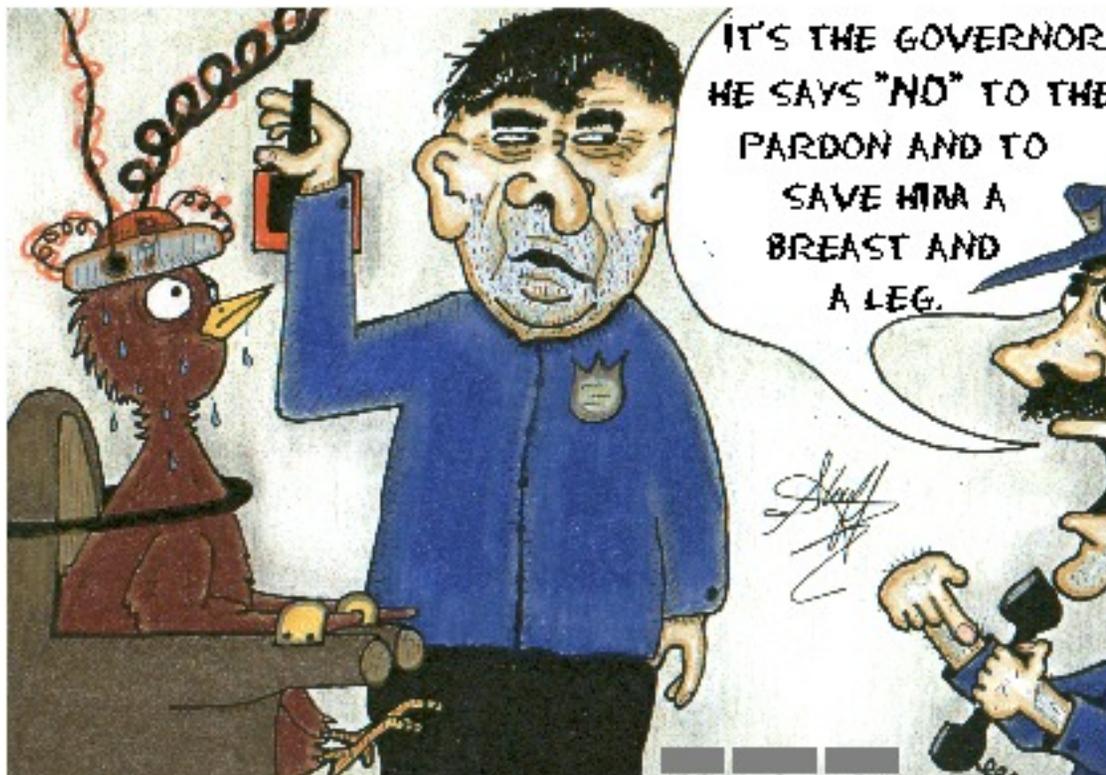
## ADA, Title III

- Prohibits discrimination against individuals who “associate” with individuals with disabilities. 42 U.S.C. § 12182(e)(1)
- Provision prohibits discrimination against individuals because of the known infection of a family member or other associate



## Y-Flu-K Act of 2006 (Sen. Craig)

- Prods HCPs and businesses to plan
  - Plan certification; privileged; stockpiles off-limits
- Removes barriers to care by HCPs
  - Certified plan is defense to claims; notice; 90-d post-pandemic wait; punitives limited; proportionate liability
- Encourages resolution of claims



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# THE END

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