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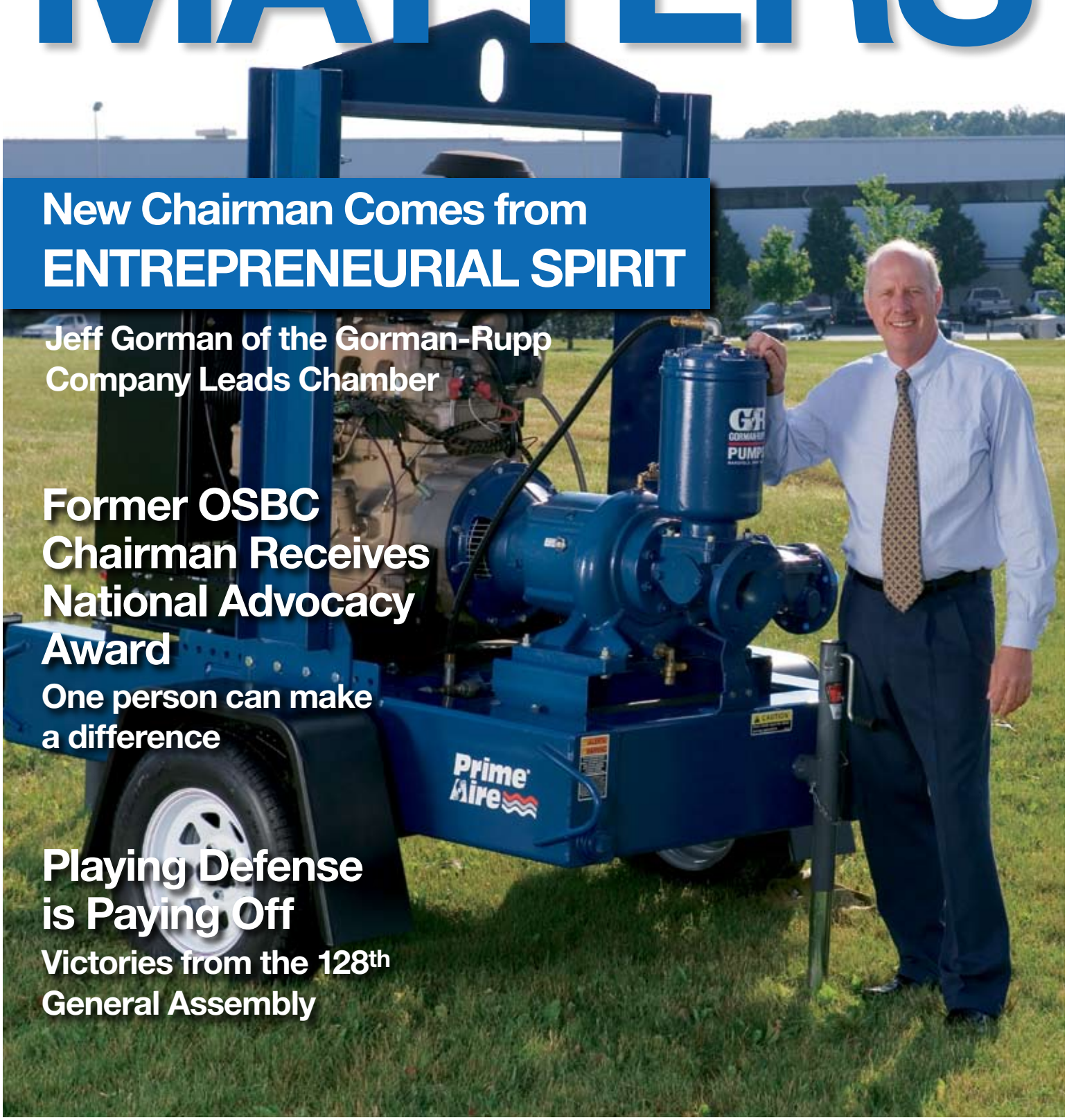

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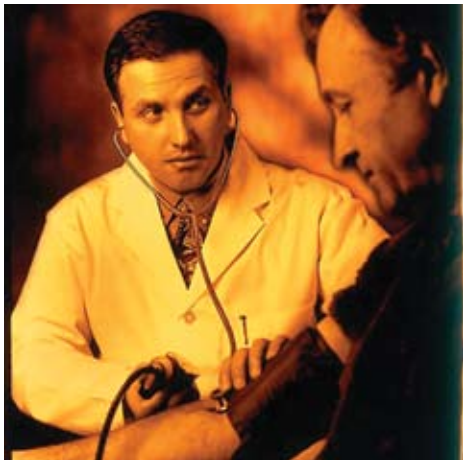

YOU AND THE FLU
BE PREPARED WHEN THE REAL THING HITS

By Jackie Ford, Vorys, Sater, Seymour and Pease LLP

The passing of the recent swine flu "crisis" has been greeted in most quarters with considerable relief. Nervous tourists and locals in Mexico are finally taking off their protective masks, and Egyptian farmers have stopped the horrifying (and pointless) process of massacring their pigs. Even the World Health Organization has emphasized that its designation of the H1N1 virus as a "pandemic" referred not to the severity of the illness but to its global reach.

Ironically, the collective sigh of relief regarding the crisis-that-wasn't has the potential to distract businesses from the crisis-that-is-inevitable: that at some point, whether it is an epidemiological crisis or a natural disaster, many companies will eventually face some sort of disaster that will curtail their ability to do business. Common sense and expert opinion both tell us that it is nearly inevitable that a real crisis – either a truly paralyzing pandemic or a devastating flood, tornado, hurricane or other disaster – will, at some point, occur. Consequently, instead of merely heaving a sigh of relief for the flu that wasn't, it is time to prepare for "The Next Big Thing." And in doing so, it is important that businesses pay particular attention to the potential employment law issues that can arise in a crisis. Stocking up on Tamiflu or hoarding bottled water may turn out to be less important than knowing, and planning for, your legal obligations.

KNOW THE PRIVACY LAWS AND YOUR RIGHTS.

Compliance with the Americans with Disabilities Act (ADA) is critically important in a health crisis. The ADA protects employees from certain kinds of intrusive medical inquiries, but also allows employers to ask health questions that are job-related and "consistent with business necessity." Questions also can be asked of employees who may pose a "direct threat" to themselves or their co-workers – due to an infectious disease, for example. Last spring, the Equal Employment Opportunity Commission (EEOC) went so far as to issue a guidance to employers related to preparing for, and questioning employees about, possible swine flu exposure. (The guidance is available at http://www.eeoc.gov/facts/h1n1_flu.html.) The brief guidance includes tips on safety-related measures and permissible medical inquiries.

Even if the medical questions being asked of employees are permissible, employers must remember to share the resulting information on a "business need to know" basis only and to share only that information which is minimally necessary to achieve the business purpose. In addition, employee medical information should be stored separately from the personnel file and treated as confidential. The Family and Medical Leave Act (FMLA) contains similar privacy provisions.

One of the tough questions employers may face in a flu crisis is whether to inform their work force when an employee tests positive for the flu. On the one hand, the infected employee may not want to share such personal health information with others and may not want his employer to do so either. On the other hand, there may be circumstances in which a potential threat to employees can override the privacy interest of the infected individual. The ADA recognizes such a possible scenario in its "direct threat" language, indicating that when a medical situation poses a "direct threat" to others, the employer may be able to override certain ADA principles that would otherwise apply. The Centers for Disease Control (CDC) recommends that co-workers be informed of positive flu diagnoses so that the workers can consult with their own physicians to determine whether they are at any medical risk or should take precautions specific to conditions such as pregnancy, auto-immune disorders and others which might produce particular vulnerability to the virus. (For the CDC's guidance on employment issues related to the flu, see http://www.cdc.gov/h1n1flu/guidance/workplace.htm)

Whether it's swine flu or some other communicable disease that threatens a workplace, there also may be local or national public health standards that include employer-related requirements. And, of course, industries that provide health care or food services may be independently required to share information, inform local authorities or take other steps required to protect the public from further spread of the disease.

MAKE SURE YOUR LEAVE POLICIES ARE UP TO DATE.

In addition to company-specific sick leave policies, your leave program should account for all the forms of illness-related leave that may be legally required. As a starter, the Family and Medical Leave Act (FMLA) provides eligible employees with up to 12 weeks of job-protected leave if they need time off because of their own or a family member's "serious health condition." "Job protected" means that the employee has a job to return to at the end of the leave period – unless, of course, the job, or the

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particular individual's employment, has been eliminated for unrelated reasons. Employee benefits continue during the leave period – assuming that the employee continues to pay the premiums. And leaves of absence, including some that go beyond what your company policy would otherwise allow, may be required forms of "reasonable accommodation" for disabled employees, whether during a pandemic or otherwise.

Other state and federal leave laws also apply during a crisis. For example, an obscure provision of the Uniform Services Employment and Reemployment Rights Act (USERRA) gives job protections to certain designated "first responders" who need time off to help in a local or national emergency. Like members of the armed services, these emergency workers also have enhanced re-employment rights and benefits protections.

EVALUATE WHETHER TELECOMMUTING MAKES SENSE FOR YOUR BUSINESS.

Some of the Gulf Coast businesses wiped out by Hurricane Katrina could have survived – and kept more people employed in the process – if more of their employees could have worked from remote locations. The same will be true not only in the next natural disaster, but also in the next public health crisis. In a full-blown infectious pandemic, for example, employees may feel safer touching their Blackberries than touching the doorknobs and keyboards in their offices.

Of course, any work-at-home policy needs to comply with applicable state and federal employment laws. First and foremost, employees need to keep track of, and be paid for, the hours that they work, regardless of whether the work is performed at the office or at home. Hourly and other "non-exempt" workers who spend extra hours responding to e-mails and text messages from the boss may be eligible for overtime.

The list of employment issues that can arise during a business disruption can be long and complex. The time to be reviewing and updating workplace policies is now – before, and not during, a crisis.

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with employees often results in expensive requirements that affect both an employer's efficiency and flexibility. Although the goal of such regulation may be understandable, the "one size fits all" approach rarely accomplishes it in the most reasonable manner. A number of bills are pending in the Ohio House that fit this description.

The first one to get serious consideration is House Bill 176, introduced by Rep. Dan Stewart (D-Columbus). It prohibits an employer with 15 or more employees from discriminating on the basis of "sexual orientation" and "gender identity."

The Ohio Chamber won important amendments to the bill during committee deliberations that simplify the requirements and make compliance easier. The Chamber is also urging lawmakers to add a number of other provisions to the bill that will make Ohio's civil rights laws more consistent with federal laws. To date those provisions have not been added and the bill is still awaiting House floor action.

WORKERS' COMPENSATION

Participation in a workers' compensation group rating program, like the one sponsored by the Ohio Chamber, is the best way for employers to achieve savings on their premium. That's why the Ohio Chamber is fighting hard to preserve this and other important cost-saving programs.

The Chamber is leading a coalition aimed at protecting premium discounts for group and non-group eligible employers and finding new ways to help companies control their workers' compensation costs. As a result of the coalition's efforts, group rating and other discount programs are still intact, but the battle to preserve these significant cost-saving measures is far from over. The coalition is heading into a new round of discussions with the Bureau of Workers' Compensation on employer rates and discounts for 2010 with a goal of finalizing a plan by this fall. Early resolution will help employers budget and plan for future workers' compensation costs.

REGULATORY REFORM

It is well-documented that states with reasonable regulatory climates are more competitive. At the urging of the Ohio Chamber's Small Business Council (OSBC), Ohio has recently taken several steps toward an improved regulatory climate.

Last year, Gov. Strickland signed an executive order to ensure the implementation of "common sense" business regulations. Shortly after, the legislature convened a bi-partisan task force that traveled around Ohio taking testimony on ways to streamline business regulations. As a result of the work of the task force, two bills have been introduced that reflect different regulatory reform approaches.

Senate Bill 3, introduced by Sen. Keith Faber (R-Celina) gives a joint House-Senate body the ability to invalidate state agency rules if they adversely impact small businesses. It was passed by the Senate and is pending in the House.

House Bill 230 introduced by Rep. Mike Moran (D-Hudson) places much of the governor's executive order in statute. It also expands an Ohio EPA program that helps businesses comply with regulations without being penalized for violations found during operational reviews.

OSBC is strongly urging lawmakers to pass these bills and take other actions to help improve Ohio's regulatory climate.

WHAT YOU CAN DO

Whether mounting an aggressive offense or a strong defense, the Ohio Chamber's success relies on an active membership. Lawmakers need to hear from their constituents. When they hear from business leaders in their communities, they have more complete information upon which to make important decisions that affect our state's business climate. Writing letters, making phone calls, sending e-mails and participating in face-to-face meetings are all good ways to get involved.

To be an advocate for your business, join an Ohio Chamber committee. Or, at the very least, log onto www.ohiobusinessvotes.org, today, and let your legislators know the actions they take affect your business and the jobs you have created. Together, we can ensure our voice is heard at the Ohio Statehouse.