

# insight

A LITTLER MENDELSON REPORT

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## An Analysis of Recent Developments & Trends

LITTLER MENDELSON, P.C.  
THE NATIONAL EMPLOYMENT & LABOR LAW FIRM™

### Tuberculosis In The Workplace

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Tuberculosis was once the leading cause of death in the United States but with advancements in medicine and public education efforts, TB rates in the U.S. steadily decreased from the 1950s to the 1970s. However, between 1970 and 1992, the country let its guard down, and the number of TB cases increased. Since 1992 with increased funding and attention to the TB problem, there has again been a steady decline in the number of new TB cases. However, TB is still a problem, more than 14,000 cases were reported in 2005, and employers have specific obligations when it comes to handling employees with TB in the workplace.

Employee enters your office, shakes your hand, coughs, and then sits in your chair to tell you that he needs time off because the doctor has informed him that he has "active tuberculosis" and will need some time away from work while undergoing treatment. What happens next?

#### What Is Tuberculosis?

Tuberculosis (TB) is a disease caused by bacteria called *Mycobacterium tuberculosis*. The bacteria usually attack the lungs. But, TB bacteria can attack any part of the body such as the kidney, spine, and brain, and if not treated properly, TB disease can be fatal. TB disease was once the leading cause of death in the United States.

TB is spread through the air from one person to another. The bacteria are put into the air when a person with active TB disease of the lungs or throat coughs or sneezes. People nearby may become infected by breathing in these bacteria.

However, not everyone infected with TB bacteria becomes sick. People who are not sick have what is called latent TB infection. People who have latent TB infection do not feel sick, do not have any symptoms, and cannot spread TB to others. But, some people with latent TB infection can later develop the active TB disease.

People with active TB disease can be treated if they seek medical help. Even better, most people with latent TB infection can take medicine so that they will not develop active TB disease.<sup>1</sup>

#### Why Is TB A Problem Today?

Starting in the 1940s, scientists discovered the first of several medicines now used to treat TB. As a result, TB slowly began to decrease in the United

States. But in the 1970s and early 1980s, the country let its guard down and TB control efforts were neglected. As a result, between 1985 and 1992, the number of TB cases increased. However, with increased funding and attention to the TB problem, there has been a steady decline in the number of persons with TB since 1992. But TB is still a problem; more than 14,000 cases were reported in 2005 in the United States.

In 2007, a total of 13,293 tuberculosis (TB) cases were reported in the United States. The TB rate in 2007 for foreign-born persons in the United States was 9.7 times higher than for U.S.-born persons. TB rates among Hispanics, blacks, and Asians were 7.4, 8.3, and 22.9 times higher than among non-Hispanic whites, respectively. Five states (California, Florida, Illinois, New York, and Texas) reported more than 500 cases each for 2007; combined, these five states accounted for more than half (52.0% [6,912]) of all TB cases. Twenty-nine states and DC had lower rates in 2007 than 2006; 21 states had higher rates. In 2007, foreign-born persons accounted for a majority of TB cases among Hispanics (77.2% [2,942 of 3,812]) and among Asians (96.1% [3,261 of 3,393]), whereas U.S.-born persons accounted for a majority of TB cases among blacks (71.2% [2,439 of 3,427]). Among U.S.-born racial and ethnic groups, the greatest disparity in TB rates was for U.S.-born blacks, whose rate remained nearly eight times that of U.S.-born Caucasians. The slowing decline in TB incidence and persistent disparities between U.S.-born and foreign-born persons and between whites and minorities threaten progress toward TB elimination in the United States.<sup>2</sup>

#### How Is TB Spread?

When a person breathes in TB bacteria, the bacteria

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can settle in the lungs and begin to grow. From there, the bacteria can move through the blood to other parts of the body, such as the kidney, spine, and brain.

TB in the lungs or throat can be infectious. TB in other parts of the body, such as the kidney or spine, is usually not infectious.

People with active TB disease are most likely to spread it to people they spend prolonged time with every day, such as family members, carpool riders, friends, and coworkers whose work stations are in close proximity.

## What Is Latent TB Infection?

For most people who breathe in TB bacteria and become infected, the body is able to fight the bacteria to retard and stop the bacteria from growing. The bacteria become inactive, but remain alive in the body and can later become active. This is called latent TB infection. People with latent TB infection:

- have no symptoms;
- do not feel sick;
- cannot spread TB to others;
- usually have a positive skin test reaction or QuantiFERON-TB Gold test (QFT-G); and
- may develop active TB disease if treatment for latent TB infection is not received.

Many people who have latent TB infection never develop active TB disease. In these people, the TB bacteria remain inactive for a lifetime without causing disease. But in other people, especially people who have weak immune systems, the bacteria become active and cause TB disease.

## What Is Active TB Disease?

TB bacteria become active if the immune system cannot stop them from growing.

The active bacteria begin to multiply in the body and cause active TB disease where the bacteria attack the body and destroy tissue. The bacteria can actually create a hole in the lung. Some people develop active TB disease soon after becoming infected, before their immune system can fight the TB bacteria. Other people may get sick later, when their immune system becomes weak for another reason.

Symptoms of TB depend on where in the body the TB bacteria are growing. TB bacteria usually grow in the lungs. TB in the lungs may cause symptoms such as:

- a bad cough that lasts 3 weeks or longer;
- pain in the chest; and/or
- coughing up blood or sputum (phlegm from deep inside the lungs).

Other symptoms of active TB disease may include:

- weakness or fatigue;
- weight loss;
- no appetite;
- chills;
- fever; and/or
- sweating at night.

Public health investigators have estimated that greater than 90% of persons reported to have clinically apparent disease are those who have harbored tuberculosis (TB) infection for at least a year or more; the remaining 10% have an immediate progression of a recently acquired infection (Centers for Disease Control (CDC), unpublished data). The number of persons with latent infection in the United States is estimated to range from 10 million to 15 million (CDC, unpublished data).

On the basis of published reports in the medical literature and CDC surveillance data, the Advisory Committee for Elimination of

Tuberculosis (ACET) recommends that the following groups be screened for tuberculosis and tuberculosis infection:

persons infected with the human immunodeficiency virus (HIV);

close contacts of persons known or suspected to have tuberculosis, sharing the same household or other enclosed environments;

persons with medical risk factors known to increase the risk of disease if infection has occurred;

foreign-born persons from countries with high TB prevalence;

medically underserved low-income populations, including high-risk racial or ethnic minority populations (e.g., some black, Hispanic, and Native American communities);

alcoholics and intravenous drug users;

residents of long-term-care facilities, mental institutions, nursing homes/facilities, and other long-term residential facilities; and

food handlers.<sup>3</sup>

The risk to hospital workers, other institutional health-care workers, and home health-care workers is lower today than in the pre-chemical treatment era. The principal contributors to reducing infectiousness are a lower incidence of tuberculosis in the population and the potency of modern antibiotic regimens. However, the risk to health-care workers may still be substantial. The main risk is exposure to patients with unsuspected tuberculosis. This poses a particular problem when the clinical presentation is atypical, as is often the case when elderly patients or patients with HIV infection are involved. Procedures that induce coughing, such as sputum induction and aerosolized pentamidine treatments, may present a particular hazard to health-care workers.

Mandatory Tuberculin skin testing upon

employment should be considered for all persons who work in these healthcare environments. Health administrators and infection control departments in hospitals are responsible for ensuring that these recommendations are implemented. Repeat screening of persons in risk groups should be part of an effective program.

## What Should Employers Do?

The employer put on notice that an employee has a communicable disease such as TB needs to consider several legal and employee relations issues. On the one hand, the employer must maintain the confidentiality of employee medical information about a sensitive yet dangerous disease. The employer must also be aware of any governmental reporting obligations and the need to provide a workplace free of known hazards under the General Duty clause of the Occupational Safety and Health Act.<sup>4</sup> The employer needs to chart a course of prompt and open responses that assure employees and others that the company is working with the appropriate public health authorities to address a public health concern while also respecting employee privacy and fulfilling its obligations to employees under the discrimination and leave laws and avoiding any liability risks for retaliation, harassment, slander or negligence.

Hopefully, there is already in place a Company "Communicable Disease Policy" that encourages employees to come forward and report any such diagnosis or exposure, assures the employee of confidentiality to the extent possible, and assures the employee of the Company's commitment to provide any qualifying leave benefits, and to respond to any alleged complaints of harassment or retaliation.

In most instances, after interviewing the diagnosed or exposed employee, the employer will next contact the local or state public health department to coordinate any needed investigation and response. The pub-

lic health authority will promptly send out an investigator to interview the diagnosed employee and gather the necessary medical information from the employee's physician thus removing the employer from such fact gathering and the duty to safeguard such information. The public health authority will then make recommendations about additional employees may need to be tested based on the physical proximity of employees in the workplace, carpool participation, shared living arrangements, etc. Further suggestions may also include follow-up tests for those who test positive, and additional tests for those employees who may have initially tested negative because the TB bacterium could have been incubating and not sufficiently present for an accurate first test. The employer will have decisions to make about allowing on-site interviews of its employees and cooperating in having its employees tested according to public health recommendations.

The employer should form a team for the appropriate level of management response and consult with counsel about the additional needed steps of: (1) informing supervisors with a need to know about who is to be tested, how to handle questions, and watch for retaliation or harassment risks; (2) communicating to current employees about the public health department's pending arrival, and any subsequent results and recommendations; (3) communicating to employees about the costs for testing, any required treatments, and worker's compensation questions; (4) communicating to customers, vendors or visitors who may have been exposed to an employee during working contacts; and (5) communicating to customers and the public. Every effort must be made to assure the privacy of the original contact and the medical results of additional employees tested, while at the same time promoting cooperation with governmental authorities and not creating a panic among employees and others. Employees can in most instances be

informed that "they may have been exposed in the workplace" without identifying the person who was first reported as contagious.

As the facts and investigation evolve, then the employer will be able to determine whether any such illness is required to be reported on the OSHA 300 log regarding workplace injuries and illnesses.<sup>5</sup> The employer can then deal with issues concerning requested leave or accommodation under federal or local versions of the Family and Medical Leave Act and the Americans With Disabilities Act. By closely working with Public Health authorities, employers should be able to avoid any significant liability risks based on the OSH Act, workers' compensation statutes, or general tort duties based on invasions of privacy and negligence.

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<sup>1</sup> Additional information on Tuberculosis may be found on the Centers for Disease Control (CDC) website, "Questions and Answers About Tuberculosis," at <http://www.cdc.gov/tb/faqs/default.htm>; CDC, Guidelines for the Investigation of Persons with Infectious Tuberculosis, at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5415a1.htm>.

<sup>2</sup> Trends in Tuberculosis—United States, 2007, MMWR, Mar. 21, 2008; 57(11) 281-285, Reported by: R Pratt, V Robison, T Navin, Div of TB Elimination, National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention; H Menzies, EIS Officer, CDC.

<sup>3</sup> Food handlers may also be an important group to screen for tuberculosis. Such screening is not done to protect customers of food establishments since M. tuberculosis is not transmitted through contaminated food and is unlikely to be spread in food establishments. However, many food handlers are from medically underserved low-income populations and/or foreign-born persons from countries with a high prevalence of tuberculosis.

<sup>4</sup> See U.S. Dep't of Labor, Occupational Safety & Health Admin., Tuberculosis OSHA Standards, at <http://www.osha.gov/SLTC/tuberculosis/standards.html>.

<sup>5</sup> "If any of your employees has been occupationally exposed to anyone with a known case of active tuberculosis (TB), and that employee subsequently develops a tuberculosis infection, as evidenced by a positive skin test or diagnosis by a physician or other licensed health care professional, you must record the case on the OSHA 300 Log by checking the "respiratory condition" column." See [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=STANDARDS&p\\_id=9642&p\\_text\\_version=FALSE](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=9642&p_text_version=FALSE). Citing, 29 C... § 1904.11(a).

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