

Employers and H1N1: Where Are You on Your Preparations?

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Between August 30, 2009, and December 26, 2009, nearly 1,700 people in the U.S. died, and over 37,000 were hospitalized, as a result of the 2009 H1N1 virus, commonly known as “swine flu.”⁴ Not surprisingly, employers have many questions regarding how to handle the threat of swine flu in the workplace. The following are some suggestions you may wish to recommend in order to protect your clients’ employees and their businesses.

1. Policies and Procedures.

First, it may be necessary to update existing policies and procedures. Swine flu implicates several policies most employers already have in place, including the sick leave/paid time off, vacation, attendance, Family and Medical Leave Act (FMLA), and Americans with Disabilities Act (ADA)/reasonable accommodation policies. Some of these policies may need updating in order to comply with recent changes in state or federal laws or conform to the latest health recommendations. For example, employers with inflexible attendance and leave policies may want to amend them so that employees with influenza symptoms will stay at home rather than come to work for fear of losing their jobs.

Second, employers may wish to implement new policies and procedures to address issues such as telecommuting or sending sick employees home. Telecommuting, if possible, is one way to keep employees from being exposed to co-workers, clients, or customers who may have the H1N1 virus. It is also a solution for employees who are not sick themselves but must stay home with their children if schools or daycare centers are closed. Also, a procedure for sending sick employees home should be established to ensure that employees are being treated equally and that the ADA is not being violated as a result, as discussed in greater detail below.

Third, employees must be informed about any new or revised policies, and relevant existing policies should be reviewed with employees. One policy that should be reviewed is the FMLA policy. Swine flu in many instances will qualify as a “serious

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⁴ *Laboratory Confirmed Influenza-Associated Hospitalizations and Deaths from August 30 to December 26, 2009, at <http://www.cdc.gov/h1n1flu/updates/us/#totalcases>.*

health condition” covered by the FMLA,⁵ and it is important that employees understand what they must do to request FMLA leave. Your discrimination/harassment policy should be reviewed. Employees should not be targeted because they are from countries where swine flu originated or where large outbreaks have occurred. Similarly, employees should not be targeted because they are perceived as being susceptible to the H1N1 virus.⁶ One example is a situation where employees do not want to work with an HIV-positive employee because he/she is perceived as more susceptible to the swine flu, not because he/she has actually exhibited symptoms of the flu.

2. Precautions in the Workplace.

Employers have a duty of care to their employees under various federal and state laws. One such law, the Occupational Safety & Health Act (OSHA), requires employers to maintain a safe and healthful workplace and safeguard against recognized hazards.⁷ Employers may take a number of measures to minimize the risk of transmission of swine flu in the workplace. First and foremost, employers should ask employees to stay at home if they are ill. The Centers for Disease Control and Prevention (CDC) recommends that an employee with influenza-like illness stay at home until at least 24 hours after he/she no longer has fever (meaning that his/her temperature is below 100 degrees Fahrenheit) or signs of fever, such as chills, sweating, or a flushed appearance.⁸ The fever should cease without the use of fever reducing medications.⁹

If an employee becomes ill while at work, he/she should go home as soon as possible. If the employee cannot go home immediately, it is advisable that the employee should be separated from employees who are not ill. If an employee shows signs of swine flu but does not want to go home, an employer may ask that employee to submit to a medical examination. In doing so, the employer must be mindful of the ADA. To justify asking an employee to undergo a medical examination, the employer must establish that an employee, who is showing symptoms of swine flu, creates a direct threat of harm to other employees, customers, and clients, or that the employee is unable to perform his/her

⁵ To qualify for FMLA leave, the employee or employee’s family member must have a “serious health condition,” defined as an illness, injury, impairment or physical or mental condition that involves inpatient care (which is defined as an overnight stay in a hospital or residential medical care facility) or continuing treatment by a health care provider (the employee must be incapacitated for more than three consecutive, full calendar days and receive subsequent treatment for the condition or see a health care provider who then supervises a regimen of continuing treatment). 29 C.F.R. §§ 825.113-115.

⁶ The ADA prohibits discrimination against employees who are “regarded as” having disabilities even though they do not in fact have disabilities or their disabilities are not substantially limiting. 29 C.F.R. § 1630.2.

⁷ 29 U.S.C.A. § 651 *et. seq.*

⁸ CDC Guidance for Businesses and Employers To Plan and Respond to the 2009–2010 Influenza Season, at <http://www.cdc.gov/h1n1flu/business/guidance/>.

⁹ *Id.*

normal job duties and meet the essential functions of the job.¹⁰ Given the pandemic status of swine flu, it is likely that employers will be able to show a direct threat, but employers must be reasonable. One sniffle or sneeze does not necessarily give employers the right to demand medical testing.

For those employees who are still in the workplace, employers may limit contact among their employees by reducing the number of large in-person meetings and utilizing technologies such as teleconferencing or video conferencing instead. If a face-to-face group meeting is unavoidable, the meeting room should be well-ventilated. When possible, employers may wish to allow employees to telecommute. When it is necessary for employees to be present in the workplace, flexible work schedules may be an option to reduce the number of workers who must be present in the workplace at the same time or in the same facility.

Employers should also encourage proper sanitation and hygiene habits. Employees should be instructed to wash hands often with soap or, if soap is not available, an alcohol-based cleaner that is at least 60% alcohol. Employees should cough or sneeze into tissues, or if no tissues are available, into their upper sleeves. Employers should provide tissues, no-touch waste receptacles, soap, hand sanitizer, and cleaning supplies. Some employers have stockpiled or otherwise arranged for anti-viral influenza drugs to be available for their employees. Posters regarding cough and sneeze “etiquette” and hand washing are available on the CDC’s Web site at <http://www.cdc.gov/>. Any commonly touched surfaces such as doorknobs, telephones, and countertops should be cleaned and sanitized often, as the virus can live on hard objects for up to 8 hours.

Finally, employers can encourage employees to get vaccinated for both the seasonal flu and swine flu or to consult with their own doctors about getting vaccinated. Employers may consider offering vaccinations at the workplace or allowing employees to take time off work, without consequences, to get vaccinated. For employers who offer health benefits to their employees, they may want to talk to their insurance companies about covering the cost of vaccination against influenza.

3. Contingency Plans for Continued Business Operations.

Employers must know in advance how they are going to continue business operations in the event of absences and interrupted supply chains. Employers should identify essential business functions, essential jobs or roles, and critical elements within their supply chains (raw materials, suppliers, subcontractor services/products, and logistics). Employees should be cross-trained so that essential jobs are covered when the persons who hold those positions are absent. Employers should consider establishing relationships with contract or temporary employment agencies and alternate suppliers if they have not already done so. Employers should be prepared not only to temporarily suspend some operations if necessary but also to handle any increased demand for their

¹⁰ *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

services that may arise. Consumers and customers may want to shop or utilize an employer's services at off-peak times that decrease interaction with the public, or they may be interested in home delivery services, drive-through services, or other similar options. Employers should consider planning ahead for offering these types of services.

Employee travel is another issue that comes up with regard to continued operations. Employers whose employees travel frequently may need to assess which business trips are essential and consider canceling non-essential business travel, depending on the severity of the worldwide outbreak. As with in-office meetings, teleconferencing or video conferencing may be suitable alternatives. If international travel is necessary, it is important to ensure that employees' health insurance will cover them in other countries.

4. Conclusion.

This is just a brief overview of some of the actions employers may take in response to the swine flu pandemic. Different employers will have different needs depending on their organizations. Healthcare employees working with infected patients are at a much higher risk of contracting the H1N1 virus in the workplace than office employees who have little interaction with the public or their co-workers. As the disease spreads, governmental and health guidance is evolving and changing. Employers should maintain awareness of the disease through Web sites such as www.cdc.gov/h1n1flu, <http://www.flu.gov/> and <http://www.osha.gov/>, and through their local and state health departments. If employers need assistance with policies and procedures, issues arising from the FMLA, the ADA, or OSHA, or other legal situations arising from the H1N1 pandemic, they should contact their attorneys for assistance.