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10 | 2 | 2009 Posted By

H1N1 Virus and the Workplace: Will this Year's Flu Cause a Headache for Employers Too?

Flu season is upon us. With the recent outbreak of the H1N1 Virus ("Swine Flu") as well as the ever-present seasonal flu, employers must face increased absenteeism by their employees. Much like the regular flu, H1N1 causes fever, sore throat, nausea and fatigue. However, this particular strain of illness is predicted to be particularly dangerous not only for those with preexisting medical conditions such as asthma or diabetes, but also for those under the age of 25, as opposed to the elderly who are normally at highest risk of severe injury or death from the seasonal flu. This means that employers will likely see more of their younger employees affected by the H1N1 virus than from the regular flu.

So how should employers handle this season's flu outbreak? Can sick employees be considered disabled? Can they be sent home without pay to protect healthy employees and a safe workplace? What precautions can employers take to keep their employees healthy?

The Americans with Disabilities Act defines "disability" as a physical or mental impairment that substantially limits one or more of the major life activities of an individual. A substantial limitation requires both severity and duration of impairment. According to the EEOC, relatively brief and transitory illnesses that have no permanent or long-term effects on the individual's major life activities do not constitute disabilities. Therefore, under the ADA, an employee suffering from a one or two week bout with H1N1 would not normally be considered disabled.

However, California's Fair Employment and Housing Act (FEHA) affords employees broader protections although it defines physical disability similarly to the ADA. Under the FEHA, the disease must just "limit" the employee's major life activities; it need not "substantially limit" them. Further, a major life activity can be the act of employment itself. With these broad definitions in place, it may be argued that a particularly severe case of the flu which would prevent an individual from coming in to work would be considered a disability in California and thus warrant additional protections under the law. Both the FEHA and its legislative history are silent on any durational requirements to the physical limitation, and no case law has definitively answered the question aside from analyzing each illness individually for the particular limitations it places on an individual. Because of uncertainty surrounding the FEHA's application to short-term illnesses, the California Department of Fair Employment and Housing encourages anyone facing this issue to consult with their staff.

Regardless of disability status, employers must prepare to accommodate sick employees. Employers should examine their current sick leave policies, and encourage employees to do the

same. Be flexible and accommodate whatever potential problems may arise. If the company does not have a sick leave policy, non-exempt affected employees may be sent home without pay, but cannot be required to use their vacation or personal time to cover their absence.

Under both the Family Medical Leave Act (FMLA) and the California Family Rights Act (CFRA), sick employees may be eligible to take unpaid time off to deal with their illness if their flu rises to the level of a "serious health condition." The FMLA defines a "serious health condition" as an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. Even comparatively minor ailments such as the flu may constitute "serious health conditions" if the employee can show incapacity coupled with subsequent treatment. See Miller v. AT&T Corp. (4th Cir. 2001) 250 F.3d 820. Under the CFRA, a "serious health condition" is any illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment or continuing supervision by a health care professional as referenced in FMLA regulations. According to Gibbs v. American Airlines (Cal. Ct. App. 1999) 74 Cal. App. 4th 1, 8, the CFRA will not recognize the flu as a "serious health condition" absent unusual circumstances.

Ultimately, all employers should look first to prevention. Employers should consider offering both influenza and H1N1 shots at the office, providing hand sanitizers and tissues, encouraging workers to cover their coughs and sneezes, and minimizing non-essential travel and face time. Each workplace should establish an influenza plan coordinated by a responsible employee, which would include community updates on the local impact of the virus, school closures for employees with ill children, creation of flexible worksites or work schedules to isolate sick employees, and cross-training personnel to cover the functions performed by those who are out sick.

For more information on how to prepare your workplace and tips on keeping healthy, visit:
www.cdc.gov/h1n1flu/business/guidance or
www.osha.gov/Publications/OSHA3327pandemic.pdf