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LEGAL ALERT



## Legal Alert: Government Urges Employers to Encourage Sick Employees to Remain at Home During Influenza Season

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Three federal agencies recently issued a joint press release announcing the release of a new guidance to help businesses plan for and respond to the upcoming flu season. The [press release](#) issued by the Department of Commerce Secretary Gary Locke, Department of Health and Human Services Secretary Kathleen Sebelius, and Homeland Security Secretary Janet Napolitano urges employers to "set the right tone in the workplace" including implementing common sense measures to reduce the risk of spreading the flu and encouraging workers who are sick to stay home. The press release notes that the guidance will help employers prepare for the upcoming influenza season, which will help ensure business continuity necessary to keep the economy functioning. The Centers for Disease Control (CDC) issued the [guidance](#) and a [communication toolkit](#) to assist employers in preparing for influenza.

The guidance provides recommendations for two types of situations: 1) a continuation of the current severity level of influenza as was observed during the spring and summer of 2009; and 2) a more severe outbreak. The guidance notes that even if the severity of the virus does not change, planners should expect that there will be more people who are ill in the fall and winter as the 2009 H1N1 outbreaks coincide with seasonal influenza season. The second situation involves an outbreak of greater severity including more people with severe illness and thus, more people hospitalized for influenza complications; more deaths from influenza; and a probable escalation of absenteeism.

In both the press release and the guidance, the government urges employers to allow and encourage workers who have symptoms of influenza-like illness to stay at home without fear of losing their jobs. Other recommendations include hand washing, encouraging workers to cover coughs and sneezes and routine cleaning of commonly touched surfaces. If the severity of illness increases, employers should be ready to implement additional measures as called for by public health officials.

### ***How Long Should Employees With Influenza-Like Symptoms Stay Home?***

The CDC's new guidance shortened its recommended exclusion period for individuals with influenza-like symptoms. The revised guidance recommends

that such individuals stay away from others until at least **24 hours after they are free from fever** (100° F or 37.8° C) without the use of fever-reducing medication.

This is a change from the prior recommendation that such individuals **stay home for 7 days after the onset of the illness or until 24 hours after the resolution of symptoms**, whichever is longer. This new recommendation applies to general community settings where most people are not at increased risk for influenza complications, such as camps, schools, businesses and mass gatherings.

The guidance recommends that sick individuals stay at home until the end of the exclusion period, to the extent possible, except where necessary to seek required medical care. Additionally, the CDC recommends the exclusion period regardless of whether antiviral medications are used.

### ***Are There Special Considerations for Employees Working in Health Care Settings?***

**Yes**, the new guidance does not apply to health care settings. The CDC recommends the exclusion period in such settings continue to be 7 days from the onset of symptoms or 24 hours after the resolution of symptoms, whichever is longer. The CDC's recommendation for health care settings is available on the agency's web site at:  
[http://www.cdc.gov/h1n1flu/guidelines\\_infection\\_control.htm](http://www.cdc.gov/h1n1flu/guidelines_infection_control.htm).

### ***How Should Employers Account for Leave Taken by Employees with Influenza-Like Symptoms?***

Employers with FMLA policies should tentatively designate the leave taken by an employee with influenza-like symptoms as FLMA leave, pending receipt of required medical certification from a health care provider. If the employer does not have the required number of employees to come within FMLA or comparable state or local leave laws, the employer should provide the employee with accrued sick time if available. If the employee does not have any accrued sick time or FMLA leave available, employers should consult employment counsel and consider providing unpaid leave, in light of the public health risks associated with having employees report to work who may have influenza-like symptoms.

### **Employers' Bottom Line:**

Employers should take an approach that encourages employees to stay at home when they have influenza-like symptoms, rather than having employees report to work out of concern that they do not have any available leave.

If you have any questions regarding this issue, please contact the Ford & Harrison attorney with whom you usually work or Pedro Forment, a partner in our Miami office who works on workplace environmental, safety and health issues, at 305-808-2104 or [pforment@fordharrison.com](mailto:pforment@fordharrison.com).