

Employment Alert: H1N1 Flu Readiness: A Summary of Employment-Related Concerns

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The H1N1 Flu or Swine Flu is a respiratory disease caused by type A influenza. While its symptoms are similar to symptoms of the seasonal flu (fever, cough, body aches, chills, fatigue, etc.), H1N1 flu is more problematic than seasonal flu because people have not developed natural antibodies to H1N1 and vaccines are not readily available. Accordingly, employers will need to be prepared to address legal issues that may arise regarding employees who become sick with, or need to care for, family members with H1N1. This alert describes many of these issues, and provides a summary of an employer's rights and obligations regarding them.

Employees Who Request Leave

Employees who are exposed to H1N1 flu, or who have a family member who has been exposed to it, may seek a leave of absence from work. Accordingly, employers should review their policies and procedures to assess the scope of company-sponsored leave rights. For instance, an employee handbook, human resource policy, employment contract, or collective bargaining agreement may entitle employees to certain leave opportunities. In addition, while an employer is not required by federal law and most state laws to pay an employee who is absent from work for such a reason, an employer's paid leave policies or employment/labor contracts may create such an obligation.

Additionally, and importantly, H1N1 flu may qualify as a serious health condition for purposes of the federal Family and Medical Leave Act (FMLA) or analogous state law. Employees may be eligible to take FMLA leave for their own, or a family member's, health condition caused by the H1N1 flu. Similarly, an employer may designate such leave as FMLA leave—even in advance of confirmatory information from the employee's health care provider. Leave taken by an employee for the purpose of avoiding exposure to the flu, however, would not be protected under the FMLA.

Employees Who Refuse to Come to Work

An influenza pandemic affecting employees in the workplace also may implicate the Occupational Safety and Health Act of 1970 (the OSH Act), which requires employers to provide healthy and safe working conditions for employees. Employees may have a right to refuse to report to work if they believe in good faith that they are exposed to an imminent danger. Employees also have certain rights to refuse an assignment if they believe that working conditions are unsafe. Such employees are protected under the OSH Act if:

- where possible, the employee has asked the employer to eliminate the danger, and the employer failed to do so;
- the employee refused to work in “good faith” (*i.e.*, the employee genuinely believed that an imminent danger exists); and
- a reasonable person would agree that there is a real danger of death.

But, as a general rule, employees do not have the right to walk off the job because of unsafe or unhealthy conditions. Further, employment agreements and collective bargaining contracts may provide additional rights to refuse work.

Decisions on how to respond to an employee’s refusal to work must be made on a case-by-case basis. Importantly, if an employee’s refusal is due to a disability or condition that makes the employee vulnerable to the H1N1 flu, employers must consider the legality of their response under the Americans with Disabilities Act (ADA) and, in particular, must determine whether a reasonable accommodation may be required in the circumstances (see the section below regarding the ADA for more information).

Similar considerations arise where an employee refuses to travel out of fear of exposure to the H1N1 flu. Again, employers should consider each employee’s concern individually, and should be particularly mindful of any travel restrictions or advisories published by the United States Centers for Disease Control and Prevention.

Alternative Work Arrangements

Employers may consider addressing employee attendance issues through alternative work arrangements. For instance, telecommuting or flexible work schedules can allow employees to care for themselves and their families in light of H1N1 flu, while still performing their jobs. Employers should clearly document the terms and conditions of any such arrangement prior to offering it, including but not limited to hour requirements, reporting requirements, arrangement length, and responsibility for costs/expenses associated with the arrangement. Notably, unless a telecommuting option is provided as an accommodation under the ADA, an employer generally is not responsible for telecommuting costs. Additionally, an employer may require an employee to pay a portion of such costs, so long as these expenses do not reduce the employee’s earnings below the required minimum wage or overtime compensation under the Fair Labor Standards Act. Decisions regarding costs—in addition to other terms and conditions of an alternative work arrangement—should be made in light of existing employer policies, guidelines, contracts, and applicable collective bargaining agreements. Importantly, employers must remember that they are required to pay employees for all “hours worked,” whether such work is performed at the office, at home, or elsewhere.

In addition, under the OSH Act’s “General Duty Clause,” an employer must provide a place of employment that is free from recognized hazards that cause or are likely to cause death or serious physical harm. If employers do not take reasonable steps to prevent or abate recognized hazards, they may violate the General Duty Clause and face citations from OSHA. Allowing alternative work arrangements may be considered a reasonable step in preventing or abating any serious dangers arising from an outbreak of H1N1 flu in the workplace.

Employees Showing Symptoms

Employers may direct an employee exhibiting symptoms of H1N1 flu to leave the workplace and remain absent until a health care provider certifies their fitness to return to work. Alternatively, the employer may require that the employee remain symptom-free for a specified amount of time before returning to work—a particularly relevant option where access to medical care is scarce. In preparation for this situation, employers should create and distribute a plan of action that states employees will be asked to leave the workplace if they exhibit symptoms of H1N1 flu. If state or local law or the terms of a collective bargaining agreement govern an employee's return to work, the employer's plan should comply with such terms. Further, employers should communicate any decisions about employee attendance made under this policy to any affected employees as soon as possible after a decision is made. Notably, depending on whether such leave implicates particular state or federal leave laws (for instance, the federal FMLA), an employer may be required to pay for required medical visits or testing, or to notify an employee in advance if the employer requires a fitness-for-duty certification to return to work.

Compliance with the Americans With Disabilities Act and Related Employment Discrimination Laws

Importantly, any adverse employment action an employer takes—such as requiring an employee to stay home from work—must comply with federal, state, and local discrimination laws. At a minimum, all such decisions must be made based on objective evidence that the employee poses a direct threat to the workplace, and cannot be made on the basis of any protected category.

The Equal Employment Opportunity Commission (EEOC) recently published guidance for employers on workplace preparation strategies for the H1N1 flu that are compliant with the ADA. The guidance states that during a pandemic, the ADA permits employers to require employees to disclose whether they have or have been exposed to pandemic influenza, and to ask about employees' family members and associates. Note, however, that treating an employee adversely because of a family member's or associate's disability is prohibited by the ADA.

The guidance also states that an employer is allowed to survey its workforce in an effort to gather personal information needed for pandemic flu preparation *only* if the employer asks broad questions that are *not* limited to disability-related inquiries. For example, an inquiry would not be disability-related if it identified non-medical reasons for an employee's absence during a pandemic (*e.g.*, mandatory school closures) on an "equal footing" with medical reasons (*e.g.*, chronic illnesses resulting in a weakened immunity).

In addition, the guidance confirms that the ADA permits an employer to require post-offer medical examinations to entering employees, in order to determine their exposure to the H1N1 flu virus before starting work, *provided* that all entering employees in the same job category undergo such an examination. The guidance also notes that employers may implement infection control measures in the workplace (such as regular hand washing, coughing and sneezing etiquette, and tissue usage) without running afoul of the ADA.

This guidance contains additional helpful information regarding the ADA, as well as a sample ADA-compliant survey that may be given to all employees in the wake of a pandemic. We are glad to provide you with such guidance upon request, or you can access it on the EEOC's website at http://www.eeoc.gov/facts/h1n1_flu.html.

Duty of Care, Dissemination of Information, and Privacy Issues

In the event of employee exposure to H1N1 in the workplace, an employer should contact employment counsel *immediately* to assess the appropriate method for meeting its duty of care, which may require that certain protective measures be taken. For example, an employer has a duty to warn employees if they have been exposed to a co-worker diagnosed with H1N1 flu, and may be required to notify state and/or local health officials regarding the same. In doing so, however, employers cannot violate state privacy laws, which generally require employers to balance an infected employee's privacy rights with health concerns of the employee's co-workers. If the risk of contagion in the workplace is high, an employer may have no choice but to immediately notify state and local health officials and inform employees of the infection. Again, however, employers should work with counsel to ensure that they meet their duty of care in this regard, without violating an employee's privacy rights under state and federal law.

Employers also should communicate with employees to provide education on the H1N1 flu and how to reduce the risk of infection. Such communications should educate employees on the fundamentals of pandemic influenza (such as symptoms of influenza, modes of transmission, etc.); personal and family response strategies (such as hand hygiene, coughing/sneezing etiquette, etc.); and community and workplace mitigation strategies (such as social distancing, provision of infection control supplies, proper hand washing techniques, etc.). Employers also may use these communications as an opportunity to remind employees of the resources available to them via employee assistance programs, benefits counseling, leave policies, and the like. In addition, an individual in management or human resources should be designated as a contact for further questions.

Finally, while workers compensation insurance generally covers claims against an employer for breach of the duty of care, non-employees may sue an employer in tort if they are harmed because an employer knew of health risks and failed to take appropriate action. Accordingly, employers must provide adequate guidance to their workforce about protecting themselves and others from H1N1 infection, and warning individuals who may have been exposed to the virus, whether such individuals are employees or not.

Conclusion

Planning for any pandemic disease outbreak in the workplace is essential to minimize its impact on the continued good health of employees and efficient conduct of business operations. As such, employers should consider taking the following steps in order to be prepared should such an outbreak occur:

- Carefully review existing handbooks, policies, and contracts to assess obligations regarding employees who may be affected by the H1N1 flu.
- Implement an H1N1 flu plan, making clear the procedures the organization will take when faced with pandemic flu issues.
- Stay abreast of information regarding the H1N1 flu by visiting the Pandemic Flu website, maintained by the U.S. Department of Health & Human Services, at <http://www.pandemicflu.gov>.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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