



# HIRE PERSPECTIVES

Winter 2009/2010

A periodic newsletter from the Labor & Employment Law Group at Dickinson, Mackaman, Tyler & Hagen, P.C.

## Pandemic=Pandora's Box: Legal Implications of H1N1 and Other Pandemics in the Workplace

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A "pandemic" is, by definition, an outbreak of a contagious disease – *any* contagious disease – over a widespread geographic area. Rather than looking at the severity of the symptoms or of the consequences of contracting a particular disease, a pandemic is determined by numbers of individuals who have contracted it, and over how wide a geographic area.

The second wave of H1N1 has reportedly peaked; however, the virus continues to spread, and the Centers for Disease Control and Prevention expect a third wave later this winter. This ongoing situation presents challenges for employers. This article seeks to help employers identify and be prepared to address potential legal pitfalls as they face situations where large numbers of their employees or members of their employees' families are affected by a disease.

### Health-Related Inquiries

The Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA), require any and all health-related information which an employer obtains to be maintained as "confidential." (While "the public" may have been frustrated when the University of Iowa refused to provide any details following the surprise hospitalization and surgery of basketball coach Todd Lickliter, the ADA is clear in prohibiting disclosures of the sort "the press" thought it should have.) Further, the ADA prohibits questions and examinations of employees that would elicit information that would evidence a disability, except under limited circumstances.

This does not mean that employers' hands are completely tied. Even with the recent amendments to the ADA, a condition or impairment that is transitory (lasting or expected to last less than six months) *and* minor will not qualify as a protected impairment under the law. It follows that depending on the action or reaction of an employer, an employee who is perceived to have such a transitory condition would not meet the requirement for being "regarded as" having an impairment for which protection is provided under the law. Further, the EEOC has opined that asking an individual about symptoms of a cold or the seasonal flu is not likely to elicit information about a disability. Therefore, asking if an employee has a fever, or chills, or a cough or a sore throat would be acceptable. Taking an employee's temperature is not advisable, however, because the EEOC has also opined that this constitutes a "medical examination."

An employer may require employees in the workplace to use precautions such as hand-washing, coughing and sneezing etiquette, tissue usage and disposal, etc. While some Iowa employers (primarily in health care) have adopted a "modified" requirement that all employees be vaccinated, caution must be exercised. An employer needs to be mindful that there may be medical or religious reasons for an employee not meeting such a requirement. In addition:

- If an employee is displaying influenza-like symptoms, an employer may simply send the employee home.
- An employer can require employees to notify the employer (generally a designated manager — remember the confidentiality obligation) if the employee has been exposed to or contracted a pandemic illness, such as H1N1.
- If an employee is absent from work, an employer may always ask the reason for the absence without it being a disability-related inquiry. (Of course, this policy should be uniform in its application.)
- If an employee has been away from work during a pandemic, an employer may require a doctor's note stating the employee is fit to return to duty. (Again, this policy should be uniformly applied to all similarly situated individuals.)

All information about an employee's health should be kept confidential in a separate medical file created and maintained for that purpose.

Employers are reminded that asking individuals about “conditions” which may make them more susceptible to *complications* of the flu (e.g., a compromised immune system or some chronic health condition) is very problematic under current laws. Such questions not only may elicit information about a disability in violation of the ADA, but could also violate the Genetic Information Nondiscrimination Act of 2008 (GINA) if the line of questioning includes the employee’s family medical history.

### Leave Issues

In addition to the leave provided by employers under their written policies and unwritten practices, certain state and federal laws are also implicated in time off from work due to health issues. Those employers which are large enough to be covered by the FMLA are reminded of the fairly low threshold for there to be a “serious health condition.” Pandemic flu may result in a period of incapacity of more than three consecutive full calendar days, as well as an in-person visit to a health care provider and a directive for a continuing treatment regimen under the supervision of the health care provider. The DOL’s current standards for “continuing treatment” may be found on its web site at: [http://www.dol.gov/dol/allcfr/ESA/Title\\_29/Part\\_825/29CFR825.115.htm](http://www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/29CFR825.115.htm).

Leave time beyond what is offered under an employer’s policies and practices – and indeed beyond that required by the FMLA – may be considered a reasonable accommodation under the ADA and the Iowa Civil Rights Act (ICRA). Therefore, if a person with a disability contracts H1N1 and has complications because of the disability, he or she may need time beyond the leave normally allowed. That may be considered a reasonable accommodation, especially if the employer has provided additional leave to other non-disabled employees for various reasons. Occasionally (though rare), an employee may suffer long-term effects from H1N1, which condition may qualify as a disability and require reasonable accommodations.

An employer’s obligation to provide reasonable accommodations to the work space also continues during an influenza pandemic. For example, if an employee has a disability that puts him or her at high risk for complications of pandemic influenza, the employer may be presented with a request for a “reasonable accommodation” of not being required to report to the workplace. This may be a leave of absence, or perhaps a request to work from home. Please recall that any accommodations needed by that employee at the workplace may still need to be provided at the employee’s home for the telework. Generally, FMLA leave cannot be used to avoid exposure to the flu.

In extreme circumstances, it may be advisable for employers to have flexibility regarding their leave policies. This is allowable as long as the flexibility is applied consistently without regard to race, color, sex, age, religion, national origin, disability, sexual orientation, gender identity, genetic information, or any other status or condition protected by local, state or federal law. For example, an employer may decide to suspend a requirement that leave is approved only if a doctor’s note is provided.

### Actions Employers Can Take Now

As mentioned earlier in this article, the media are reporting the second wave of H1N1 has passed, with less impact than feared, but those same reports note that a third wave is anticipated. The suggestion for employers is to plan now, perhaps in anticipation of “the worst.” The following are actions employers can take now:

- Refresh your familiarity with the FMLA definition of “serious health condition.” Have the standards for a serious health condition firmly in mind before situations arise. Do not hesitate to double-check in specific situations.
- Develop specific guidelines about what health-related questions may and may not be asked of employees, as well as specific guidelines on how employees with flu symptoms are to be treated. Educate your managers and supervisors on those guidelines. Consider creating a “cheat sheet.”
- Consider in advance whether some changes in standard operating procedures may be warranted if the influenza pandemic becomes severe in the your workplace. Determine who has the authority to do what, when. Bear in mind that discrepancies in treatment create the potential for claims of unlawful discrimination.

### Additional Resources

For more information on pandemic planning in general and the H1N1 flu in particular, check out the following online resources from various local and national government agencies:

[http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html) (EEOC technical assistance document on ADA)

[http://www.dol.gov/whd/healthcare/flu\\_FMLA.pdf](http://www.dol.gov/whd/healthcare/flu_FMLA.pdf) (Department of Labor guidance on FMLA leave issues)

<http://www.flu.gov/> (one-stop access to US Government information on H1N1, avian and pandemic flu)

<http://answers.flu.gov/> (answers to frequently asked questions)

[http://www.cdc.gov/H1N1flu/business/toolkit/pdf/Business\\_Toolkit.pdf](http://www.cdc.gov/H1N1flu/business/toolkit/pdf/Business_Toolkit.pdf) (communication toolkit for businesses and employers)

<http://www.osha.gov/dsg/topics/pandemicflu/index.html> (OSHA's pandemic flu guide)

<http://www.polkcountyiowa.gov/health/PDFs/H1N1FAQs.pdf> (answers to frequently asked questions)

If you have questions regarding the potential legal implications of the flu in the workplace, please contact a member of the Firm's [Employment & Labor Law Group](#) or the Dickinson attorney with whom you normally work.

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