

**Responding to the Swine Flu Outbreak**

On April 29, 2009, the World Health Organization raised its pandemic alert to 5, the second-highest level. The United States Department of Homeland Security has declared a public health emergency over increasing cases of swine flu.

As new cases of swine flu are reported, and media attention increases on the possibility of an epidemic, we recognize you may be grappling with how to address the situation. In an effort to assist, we offer the following general guidance on some of the more frequently asked questions on this subject, drawn from existing government publications and applicable case law and statutory provisions. Remember that this subject brings into play issues relating to the disclosure of health information, the FMLA, and the ADA, among other legal provisions, and can vary from state to state. It is important to consult legal counsel for advice before adopting any particular policies or taking any personnel actions.

**Q. What should an employer do if it suspects an employee may have the flu?**

- A. The employer can consider sending the employee home. The employer should not send any employee to a medical testing facility without first consulting legal counsel to ensure that federal and state laws are followed. Subject to confirmation with legal counsel, an employer may wish to condition return to work on medical clearance that the employee is not at risk for spreading any contagious flu virus.

**Q. If an employer sends an employee home because the employer has a reasonable suspicion the employee has the flu, how should that employee be compensated?**

- A. The employer should contact legal counsel as state law differs on how paid time off or sick leave can be utilized. The preferable practice is to compensate the employee for the time he or she is required to stay home at the employer's request.

**Q. Can employers discontinue nonessential business travel to Mexico and other locations the CDC identifies as having high illness transmission rates?**

- A. Yes.

**Q. Can an employer require an employee who has recently returned from Mexico (or any other location the Center for Disease Control has identified as having high illness transmission rates) to stay home for a period of time to ensure that the employee does not have swine flu?**

- A. Yes. An employer would be justified in such a circumstance to ask an employee to either work from home or simply to stay home for a period of time. Again, an employer should not send any employee to a medical testing facility without first consulting legal counsel to ensure that federal and state laws are followed. Subject to confirmation with legal counsel, an employer may wish to condition return to work on medical clearance that the employee is not at risk for spreading any contagious flu virus.

**Q. Can employers advise managers and supervisors to report to Human Resources if they believe an employee has contracted the flu?**

- A. Yes. Managers and supervisors can be advised to report immediately to Human Resources, in a confidential manner, if they believe that an employee has contracted the flu. And, the employer can request co-workers to make a similar confidential report to Human Resources.

**Q. If an employee advises the employer that he or she has the flu, should the employer disseminate this information to other employees so they are aware of the possible exposure?**

- A. There are specific restrictions on the disclosure of health information of employees that may limit the employer's ability to disclose this information. Employers should speak to legal counsel prior to disclosing this information to anyone other than those who have an absolute and identifiable need to know.

**Q. What should an employer do if an employee refuses to report to work for fear of contracting swine flu?**

- A. The employer should treat this situation as it would any other situation in which an employee refuses to work. If one or more employees decide as a group not to report to work due to such concerns, this could be concerted activity protected by the National Labor Relations Act, and employers should contact legal counsel before taking any specific personnel action. Likewise, in cases in which an individual refuses to work (or travel to a certain location) for fear of contracting swine flu, legal counsel should be consulted before taking any action because the employee may have rights under OSHA (or state health and safety laws) not to be compelled to work under unsafe conditions.

**Q. What other steps can employers take to be proactive?**

- A. Employers can advise their employees on workplace precautions to prevent the spread of the infection. This includes advising employees to wash their hands frequently and to engage in other infection control practices that will reduce the risk of infection. Employers can review their leave and telecommuting policies and adjust them, if necessary, to encourage employees to stay at home if they experience flu-like symptoms.

Several government websites provide helpful information regarding swine flu and how to deal with flu in the workplace. Links to those websites are below.

[http://www.osha.gov/Publications/influenza\\_pandemic.html](http://www.osha.gov/Publications/influenza_pandemic.html)

<http://www.pandemicflu.gov>

<http://www.cdc.gov/swineflu>

The members of our Practice Area are available to discuss any issues or concerns you may have about this subject.

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