

Four more H1N1 issues: flu shots, FMLA, privacy, and Workers' Comp

More on that swine flu

Last month, *LOA* covered the impact H1N1 is expected to take on employee attendance (“Get ready to allow extra time off for H1N1, and watch out for OSHA”).

Now here's more: four questions about privacy, flu shot requirements, and how the new flu relates to the Family and Medical Leave Act and Workers' Compensation.

The answers are provided by labor and employment law attorney **HEATHER EGAN SUSSMAN**, a partner with McDermott Will & Emery in Boston.

H1N1 AND PRIVACY

Is it a privacy violation to discuss an employee's H1N1 infection?

It can be. Many states prohibit interference with employees' personal privacy, though to make a claim, an employee would have to show that the interference was both serious and unreasonable.

To be safe, don't discuss anybody's medical condition unless there is a legitimate business reason to do so, Sussman says. And share that information only on a need-to-know basis. No manager “should be talking in the lunch room about who has what flu strain.”

H1N1 AND MANDATORY VACCINATIONS

Can an employer require employees to get flu shots?

Not unless there is a law that allows mandatory vaccination on the grounds that it is a business necessity, Sussman says. Absent that, requiring flu shots can violate discrimination laws.

Under the Americans with Disabilities Act, for example, an employer can't ask questions that could force an employee to reveal a disability that's not job related. And requiring flu shots could do just that. It could possibly force someone to reveal that the vaccine will react with some medication that person is taking to control a disability.

There could also be religious discrimination, because taking the vaccine or even seeking medical care itself could violate someone's beliefs.

So when does business justify requiring flu shots?

Not often, Sussman says. It can be justified in a hospital because of the need to reduce exposure to patients. What's more, there's a risk to public health if a hospital can't treat people because its employees are

out sick with the flu. It is also justified for military personnel, because the military has been granted the right to require vaccinations.

But aside from those situations, don't expect to be able to justify it.

Can the firm get around that by offering incentives to get vaccinated, perhaps a bonus or time off?

Maybe. But be aware that the EEOC says incentives can actually be a penalty to the people who opt out.

The only thing the firm can do with surety is to encourage people to get vaccinated. And if it chooses, it can pay for the vaccinations and even provide them on-site.

H1N1 AND FMLA LEAVE

When is flu considered a serious health condition under the FMLA?

Seasonal flu has never been considered a serious health condition under FMLA. However, H1N1 may get serious enough to warrant FMLA protection.

Under the FMLA, a serious condition is one that involves an overnight hospital stay or one that causes incapacity for more than three consecutive days plus subsequent treatment.

H1N1 AND WORKERS' COMP

If an employee contracts the H1N1 virus at work, is the treatment covered by Workers' Compensation?

Workers' Compensation is triggered only when the injury or illness is work related. And in most instances, infectious diseases such as flu can't be traced to the workplace with enough certainty to qualify for coverage.

There are exceptions, however. In the medical field, for example, employees may well be able to prove that infection came from contact with patients, and they may qualify for Workers' Compensation coverage as a result.

The same could be true if an employee works in close proximity with someone who had the virus.

For that reason, firms should expect to see Workers' Comp claims arising from flu, Sussman says. “There are a lot of savvy employees out there who will seek out the best benefits they can get.”

When should the firm report it to the carrier as a Workers' Comp situation?

It's not necessary to report anything if an employee merely mentions that the flu came from a co-worker, she says. But if that employee goes further and tells the office that the flu or complications from it are “work related,” report it.

Do the same if a flu absence is long enough for Workers' Comp coverage to kick in – usually five days. Many states have taken specific steps to resolve Worker's Comp claims for flu.