

# Employment Law

## When H1N1 Hits Your Workplace, Will You Be Ready?

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# Commentary

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## When H1N1 Hits Your Workplace, Will You Be Ready?

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As 2009-2010 influenza season arrives in full, employers should plan to deal with both the practical and the legal aspects of workplace decisions concerning preparation for an outbreak of the H1N1 "swine flu" virus. Different business sectors will, of course, require different levels of flu-preparedness. For example, most health care providers such as hospitals already have detailed preparedness plans in place on which their employees have been trained. All employers, however, would be wise to consider establishing an Influenza Pandemic Plan, coordinating with local and state public health partners, and clearly communicating expectations to the workforce on topics from simple hand-washing to policies on staying home with sick children.

### **General Plan**

Authorities such as the U.S. Department of Health

and Human Services' Centers for Disease Control and Prevention (CDC) caution employers to consider two potential scenarios when planning for the upcoming flu season. The first assumes a low-severity outbreak of H1N1 similar to that which occurred this past spring. Even if this season's H1N1 is relatively mild, however, employers can still expect greater absenteeism this year than in the past because the seasonal flu and H1N1 will hit at the same time. The second scenario assumes an outbreak of greater severity than that experienced this past spring, meaning more people with more debilitating symptoms that create the risk of extensive absenteeism and even death.

Given that any increased levels of absenteeism pose a corresponding risk of disruption to business operations, employers should consider taking the following steps in advance of an outbreak in order to be prepared:

- Review or establish a flexible influenza pandemic plan and involve your employees in developing and reviewing your plan.
- Conduct a focused discussion or exercise using your plan, to find out before an outbreak whether the plan has gaps or problems that need to be corrected.
- Understand your organization's normal seasonal absenteeism rates and know how to monitor your personnel for any unusual increases in absenteeism through the fall and winter.

- Engage state and local health departments to confirm channels of communication and methods for dissemination of local outbreak information.
- Allow sick workers to stay home without fear of losing their jobs.
- Develop other flexible leave policies to allow workers to stay home to care for sick family members or for children if schools or child care programs close.
- Share your influenza pandemic plan with employees and explain what human resources policies, workplace and leave flexibilities, and pay and benefits will be available to them.
- Share best practices with other businesses in your communities (especially those in your supply chain), chambers of commerce and associations, in order to improve community response efforts.
- Add features to your Intranet or employee websites so employees can access the latest information on influenza and its impact on your organization.

Federal agencies such as the CDC, Occupational Health and Safety Administration (OSHA) and Equal Employment Opportunity Commission (EEOC) have issued guidance to help employers prepare for this year's flu season. Information from these agencies can be found at the following web sites:

- <http://www.cdc.gov/H1N1FLU/>
- [http://www.osha.gov/Publications/influenza\\_pandemic.html](http://www.osha.gov/Publications/influenza_pandemic.html)
- [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html)

### Specific Concerns

Do-it-yourself research is not the best solution when it comes to the legal issues that can be expected as part of H1N1 preparation. Employers should evaluate the competing considerations in their workplaces and craft lawful personnel policies that still meet business objectives, such as sick leave policies that have built-

in flexibility during a flu outbreak. The following are important issues about which general guidance can be offered, as background for more specific advice from legal counsel.

#### 1) Can We Require Our Employees To Get Flu Shots?

In most workplaces, no. In the absence of a specific law or regulation authorizing mandatory vaccinations, employers face the potential for substantial liability under several state and federal laws by requiring employees to get flu shots. These include laws prohibiting disability and religious discrimination, such as the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964. To institute a mandatory program and avoid liability under these laws, an employer must be able to show that a mandatory flu shot program is job-related and consistent with business necessity (for example, as in a hospital).

#### 2) Can We Offer Voluntary Flu Shots?

Voluntary programs are perfectly acceptable, but employers should be cautious when offering incentives to employees in order to entice them to participate in a voluntary program. The Equal Employment Opportunity Commission has said that in order to be truly voluntary, a wellness program must not penalize employees who do not participate. For this reason, any incentive program must be carefully designed to avoid imposing what amounts to a penalty against those who choose to opt-out.

#### 3) If Employees Exhibit Flu-Like Symptoms, Can They Be Sent Home?

In general, requiring employees with routine flu symptoms to go home before they infect others is not a disability-related action and therefore does not implicate the ADA. Employers intending to send employees who are sick home should follow a consistent practice with respect to all employees to avoid discrimination claims. Preparing and clearly communicating a policy to all employees in advance can help avoid claims of disparate treatment down the road.

#### 4) Can A Healthy Employee Refuse To Do A Job Because Of Fear Of Catching The Flu?

Under the Occupational Safety and Health Act employees have a legally protected right to refuse to

perform a job assignment only if (1) they have a reasonable and good faith belief, (2) that their work assignment would put them in real danger of death or serious injury, (3) they have asked their employer to address and eliminate the hazard and this has not occurred, and (4) there is insufficient time, due to the urgency of the situation, to have the hazard eliminated through OSHA inspection and enforcement. Where these criteria have not been met, the employer may lawfully discipline the employee for refusing to work, consistent with any applicable collective bargaining agreement or local laws.

**5) If An Employee Catches The Flu At Work, Is That Covered By Workers' Compensation?**

State laws vary, but an illness or injury typically is only

covered by workers' compensation if it arises out of and in the course of employment. Generally, infectious diseases such as the flu cannot be sufficiently traced to the workplace to qualify for coverage. However, some state laws actually mandate workers' compensation coverage for employees who contract infectious diseases where the hazard of contracting such diseases is inherent in the nature of the employment, as for health care workers — but such cases are often difficult to prove. If an employee claims that flu or related symptoms or complications are work-related, then the employer should follow standard practice for workplace illness claims and report the illness to its workers' compensation insurance carrier. In this, as in all other issues with legal ramifications, consult legal counsel to make sure of the specific compliance issues in each application. n

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