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SAFETY & HEALTH

Employers hit by an H1N1 pandemic could face complex or novel legal issues as employees who contract the illness—or those who seek to avoid it—stay home from work. Attorneys Heather Egan Sussman and Vanessa Gilbreth of McDermott Will & Emery analyze questions presented by state and federal laws, including workers' compensation statutes and the Family and Medical Leave Act.

Legal Issues Regarding Employee Leave in an H1N1 Pandemic

BY HEATHER EGAN SUSSMAN AND VANESSA GILBRETH*

* *Heather Egan Sussman is a partner in the law firm of McDermott Will & Emery LLP based in the Boston office, and a member of three practice groups within the firm, including the Labor and Employment Group, the OSHA Catastrophe Response Group, and the Electronic Data Management, Privacy & Discovery Group. Ms. Sussman can be reached at (617) 535-4177 or hsussman@mwe.com. Vanessa Gilbreth is an associate in the firm's Boston office law, a member of the Labor & Employment Practice Group, and can be reached at (617) 535-4477 or vgilbreth@mwe.com.*

Employers and employment lawyers have for years known that a pandemic outbreak of infectious disease could create major and unexpected new legal concerns in the workplace. Until now the only such outbreak of any significance was the 2002-2003 incidence of the respiratory disease Severe Acute Respiratory Syndrome (SARS). Within a matter of weeks in early 2003, SARS spread from China to rapidly infect individuals in more than 30 countries around the world. Despite its geographic reach, however, SARS infected fewer than 10,000 people worldwide and resulted in less than 1,000 deaths, and for the most part did not raise substantial employment law concerns in the United States.

A far different scenario potentially exists if there is a serious, widespread outbreak of H1N1 influenza—the much-publicized ''swine flu.'' Many questions will arise concerning applicable state and federal laws when employers in the U.S. must make personnel or policy deci-

sions in flu-related situations. One of the most complex areas concerns issues of employee leave: when employees have legal justification for not reporting to work for fear of infection, when employees can be covered by workers' compensation for an H1N1 infection contracted at work, when employees may seek leave under the Family and Medical Leave Act (FMLA), and when employers can themselves designate an employee absence to have occurred under FMLA. Although the answers are not yet definitive, an analysis of regulatory requirements to date suggests that the following considerations could apply.

Refusal to Work

Under the Occupational Safety and Health Act, the circumstances under which an employee has the right to refuse work because of perceived hazard to the employee are very limited. 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 imminent serious danger, (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 by contacting the Occupational Safety and Health Administration and initiating an OSHA inspection.

Having a ''good faith'' belief can be both subjective and objective. This means the employee must (1) personally perceive a serious imminent danger exists, and (2) have had reasonable grounds to believe that the danger existed at the time of refusal. Reasonableness is measured by what a reasonable person would have perceived given all the facts and circumstances known to the employee at the time. Where an employee does not have a reasonable good faith belief of imminent serious danger or has not sought to have the hazard addressed where there is sufficient time to do so, the employer may lawfully discipline the employee for refusing to work, following normal disciplinary procedures (as impacted by a collective bargaining agreement or local law).

In addition to the protection provided by the federal job safety law, the National Labor Relations Board has held that an employee's refusal to work in an unsafe working condition can be the exercise of a protected right under Section 7 of the National Labor Relations Act. Section 7 permits employees to ''engage in . . . concerted activities for the purpose of mutual aid or protection.'' In order to qualify as a protected Section 7 right, however, employees must act in a collective manner. This means that employees must be acting together in concert to try and remedy a workplace issue that mutually affects a group of workers. The only exception to the requirement of action by more than one employee is the case where a single employee acts alone to enforce a collectively bargained-for right. In that case, the single employee's refusal to do the work— so long as the refusal is consistent with a collectively bargaining right— may be deemed to be concerted and protected under Section 7.

The Labor Management Relations Act, which amended the NLRA, presents another circumstance in a unionized workplace where an employee may have the right to refuse work. Because most collective bargaining agreements contain grievance and arbitration provisions often coupled with corresponding no-strike clauses, these provisions taken together usually mean that bargaining unit members are required to obey the employer's work direction and grieve the direction later. But when it comes to abnormally dangerous conditions, this rule can put employees in a difficult position. Section 502 of the LMRA provides that ''the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act.'' There are several requirements for section 502 to apply, however, and a union must present ascertainable, objective evidence that an abnormally dangerous condition for work exists. This is a high hurdle, and in the context of influenza, workers may be hard pressed to establish that they are being exposed to the kind of immediate abnormal danger required to meet this standard.

Workers' Compensation and Related Leave

An issue related to unsafe workplace concerns is whether an employee who catches an H1N1 infection at work would be covered by the various state workers' compensation laws. Typically, an illness or injury 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. In most cases, this occurs in the health care industry where, for example, a health care worker contracts the flu from a patient. In such a case, the employee may be entitled to workers' compensation.

Similarly, in workplaces where employees work in close physical proximity, an employee who contracts the flu and can pinpoint his or her exposure to a co-worker may have a good argument that the illness is work-related. These cases are difficult to prove, however, so the regulatory authority that oversees a particular state's workers' compensation system may have a policy on how to resolve these claims. To determine what is the policy, employers can and should contact the local authority. For example, the Massachusetts Department of Industrial Accidents has taken the position that the issue of workers' compensation coverage for the flu must be resolved by an administrative law judge.

In general, employers are not required to report every case of the flu to a local workers' compensation authority. Similarly, if an employee is absent due to the flu and casually mentions that he believes he contracted the illness from a co-worker, the employer does not automatically have to treat the statement as a claim for workers' compensation. If, however, an employee claims that his flu or its related symptoms or complications are work-related, then the employer should treat the claim the same as all other claims of workplace illnesses and report the illness to the employer's workers' compensation insurance carrier. If the illness causes an absence from work for the applicable statutory period (typically five days), the employer should also report the illness to the appropriate local workers' compensation authority in order to address the issue of coverage.

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Employee Election of FMLA Leave

Although the issues are complex, an employee's absence from work due to influenza or its related complications may qualify as job-protected leave under the Family Medical Leave Act (FMLA) or similar state leave laws. Employers should first determine (1) whether the worksite is subject to FMLA, and then (2) whether the individual employee meets the FMLA qualification criteria described below. If both tests are satisfied, then the employee with the flu or its related symptoms does, in fact, qualify for FMLA leave.

1) Worksite Coverage. FMLA generally does not apply to worksites with fewer than 50 employees working within a 75-mile radius, regardless of the size of the company. This is important because many large employers mistakenly assume that all worksites are subject to FMLA, just because the employer has more than 50 employees aggregated among all of its worksites.

Large employers can, however, unwittingly invoke FMLA coverage at smaller worksites in certain circumstances. Federal courts have applied FMLA to worksites with less than 50 employees where the employer failed to make clear that a corporate FMLA policy published in a company handbook did not apply to its smaller worksites and further ''misled'' employees by sending paperwork characterizing an employee's leave as FMLA leave. In these cases, even though FMLA did not apply according to the letter of the law, the courts nevertheless subjected the employers to the requirements of FMLA—including the requirement of job restoration upon return from leave—given the employer's ''misleading'' conduct.

In light of these federal cases, employers who do not wish to subject smaller workplaces to FMLA should evaluate existing policies to ensure that they make clear that FMLA does not apply to workplaces with less than 50 employees working within a 75-mile radius *and* that their communications to employees taking leave are consistent with these policies.

2) Employee Coverage. If a worksite is subject to FMLA, the particular employee's eligibility depends upon two factors. First, the employee must have worked at least 1,250 hours in the previous 12 months. Second, the flu-related symptoms suffered by the employee or the immediate family member must rise to the level of a ''serious health condition.''

Typically, the flu does not qualify as a ''serious health condition'' under FMLA. The flu may qualify as a serious health condition eligible for unpaid, job-protected leave under FMLA, however, if an employee's flu-related symptoms (or that of the employee's immediate family member) are more severe and involve (1) an overnight stay in the hospital or (2) an incapacity of more than three consecutive days *plus* subsequent treatment or period of incapacity relating to that condition that also involves either of the following:

- treatment two or more times, within a 30-day period, by a healthcare provider with the first visit occurring within seven days of the onset of the condition; or,

- treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the provider.

Employer Designation of FMLA Leave

There may be instances where an employer wishes to designate an employee's flu-related leave as FMLA leave despite an employee's unwillingness or objections to such a designation.

Employers may make this designation only if the flu-related condition qualifies as a ''serious health condition'' under FMLA. Determining whether the condition qualifies as a serious health condition can be a challenge if an employee is not cooperative.

Under FMLA and its regulations, however, it is always the employer's responsibility to designate a qualifying absence as FMLA leave and the designation may only be made based on information provided by the employee or the employee's spokesperson, such a spouse or treating physician.

If an employer does not have enough information to make the determination (for example, if the employee suspects the employer is trying to designate the leave as FMLA leave and as a result is not cooperative), the employer can and should ask the employee for more information.

For example, if the employer knows that the employee is out of work reportedly due to a severe flu and the absence extends beyond a certain period of time, the employer may want to send a letter to the employee seeking further information.

For relatively short absences, the benefit to the employer in designating an employee's leave as FMLA leave may not outweigh the resulting administrative burden. In addition, there are strict rules about what an employer may ask an employee in these situations, so employers should consider having legal counsel prepare a standard form letter that complies with FMLA.

Once the employer has sufficient information to know that the employee's leave may be for an FMLA-qualifying reason, the employer must also follow the procedural requirements of FMLA in order to designate the leave as FMLA leave.

First, the employer must provide a Notice of Eligibility and Rights & Responsibilities within five business days of learning the information that leads the employer to believe the leave might qualify under the terms of FMLA. In the case of leave related to the flu, this might mean within five business days from the day the employer learns that the employee had an overnight stay at the hospital, or five business days from the day the employer has other reason to know that the employee's illness may qualify as a ''serious health condition'' as defined in the previous section on employee coverage.

For example, the employee might claim incapacity for five days, and then provide two doctors notes showing two separate doctors visits in that time span. This would indicate that the employee is suffering from a ''serious health condition'' as defined by FMLA, and the employer would be entitled to follow ordinary FMLA procedures for designating the leave as FMLA leave.

To avoid a haphazard approach in addressing the FMLA leave issue, employers would be wise to consider implementing a standard procedure for designating flu-related leave as FMLA leave. Such a procedure could involve following the usual FMLA procedures when it is the employee who requests the leave.

When the employee does not request FMLA leave, however, the employer may want to pick a standard

number of days of absence that will trigger a follow-up letter to the employee seeking more information. The employee will then have 15 days to respond to the letter, whereupon the employer may elect to designate the leave as FMLA leave if the information provided supports a conclusion that the leave qualifies as such. Retroactive designation is permissible in these circumstances.

Throughout this process, all of the usual FMLA procedures apply. For example, once the employer has enough information to designate the leave as FMLA qualifying leave, the employer must send a Designation Notice to the employee within five business days. Employers with questions about the procedural requirements of FMLA should consult with their employment attorney and review the comprehensive FMLA guidance on the Department of Labor's website (http://www.dol.gov/whd/fmla/index.htm). In addition, the Equal Employment Opportunity Commission (*http://www.eeoc.gov/facts/pandemic_flu.html*) and the Occupational Health and Safety Administration (*http://www.osha.gov/Publications/influenza_pandemic.html*) have web sites that offer guidance in addressing some of the novel legal issues an H1N1 outbreak may present.

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