



HENNESSY & ROACH, P.C. LEGAL ISSUES UPDATE
NOVEMBER 2, 2009

H1N1 Flu In the Workplace
Frequently Asked Questions by Employers

Q: How do the symptoms of H1N1 compare to the “regular” flu?

A: Seasonal flu and H1N1 present symptoms that are very similar. H1N1 symptoms, though, may present in a more severe form. Symptoms to be aware of include:

- √ Fever
- √ Coughing and/or sore throat
- √ Runny or stuffy nose
- √ Headaches and/or body aches
- √ Chills
- √ Fatigue

In addition to the above symptoms, a number of H1N1 flu cases have reported vomiting and diarrhea.

Q: Should employers be concerned about the H1N1 Virus, also referred to as “Swine Flu”?

A: Employers are advised to take precaution with respect to the H1N1 for several reasons: (a) it is contagious, being spread mostly through the coughs and sneezes of people who have the flu or by touching things that infected persons have touched; (b) symptoms can be either mild or serious, and flu-related complications can lead to severe illness or even death among more vulnerable persons; and (c) the virus spreads among the workforce when persons are in close proximity to one another. Additionally, employers should be aware that a pandemic is not a short duration event; it is likely to last for weeks or months and come in multiple waves.



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Q: Does an employer have any responsibility under OSHA regarding the influenza pandemic?

A. The Occupational Safety and Health Administration has not issued any specific standards or regulations regarding seasonal influenza or H1N1 influenza. However, under Section 5(a)(1) of the Occupational Safety and Health Act, the so-called “General Duty Clause,” employers have a duty to provide their workers with a workplace that is free from recognized hazards that are likely to cause death or serious physical harm. Even in the absence of an applicable OSHA standard or regulation, OSHA can cite an employer for a violation of the General Duty Clause if there is a recognized hazard and the employer fails to take reasonable steps to prevent or abate the hazard. So prudent employers will take reasonable steps to minimize the flu exposure hazard.

Q: What are the World Health Organization and U.S. public health officials saying about the H1N1?

A: In June, 2009, the World Health Organization (“WHO”) raised its Pandemic Alert Level to 6, the highest level on its scale. This signals that the world is experiencing a “global pandemic.” As of mid-October, there have been over 400,000 confirmed cases of H1N1 influenza in the world, with 5,000 deaths. The U.S. Centers for Disease Control (CDC) anticipates that the 2009-2010 flu season will see an increase in flu cases, hospitalizations, and deaths.

Q: Are there legal considerations related to an employer taking action to address a H1N1 pandemic?

A: Employers should consider that a number of federal and state laws could impact their response plans and strategies. For example, as employers amend existing policies or implement strategies to manage extended employee absences, an employer with a represented workforce may be required to bargain over the changes under the National Labor Relations Act. Additionally, if there are changes to the employees’ work schedule necessitating overtime, employers must pay additional wages under the Fair Labor Standards Act to non-exempt employees. Other legal considerations include complying with any mandates by OSHA including pandemic preparedness guidelines or regulations. Other laws that may be impacted include workers’ compensation laws, the Health Insurance Portability and Accountability Act (“HIPAA”), the Americans with Disabilities Act, (“ADA”) and state disability laws.

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Q: What should employers be doing in response to a possible pandemic?

A: Employers are advised to immediately craft a **Pandemic Response Plan** that has a primary focus on continuity of operations for the organization. Although experts cannot predict exactly what the impact to a workforce may be, it is advised that employers should plan for up to 40% employee absenteeism during peak outbreak periods, with lower levels of absenteeism during the weeks before and after that peak.

The following steps should be taken as part of the Pandemic Response Plan to reduce disruptions to business operations:

- √ Establish procedures for reacting to significant absenteeism in the workforce and a communication plan as part of the Pandemic Response Plan.
- √ Identify key persons who will be responsible for employee communications and for monitoring and terminating the company's Pandemic Response Plan.
- √ In addition to identifying how to communicate to employees about business operations, determine how to communicate to employees about the flu, the current threat level, and recommended actions for employees.
- √ Determine how to coordinate with local and federal health and disaster response agencies.
- √ Identify critical functions within each business unit and determine how to keep the functions operational despite the anticipated absenteeism. Ideas include cross-training employees, increasing the ability for employees to telecommute and if necessary, enlarge the capacity of remote online access systems, creating teams of employees who can be rotated in to perform critical tasks, and altering business operations such as limiting or shutting down operations in affected areas, and considering how to handle manager and supervisor absences to ensure key decisions are made during a pandemic.
- √ If any employees are represented by a union and covered by a collective bargaining agreement, make sure that any changes in policies or working conditions will be consistent with the labor contract and understand that any changes in working hours or conditions may necessitate bargaining with the union prior to implementation.
- √ Identify impacted geographic areas in which business is transacted and limit travel to those locations. Teleconferencing or videoconferencing may be a safer alternative.
- √ Consider whether and how to distribute anti-viral medication for employees and family members.
- √ Anticipate that customers may have increased or decreased needs during a pandemic and making appropriate financial preparations.
- √ Review the supply chain to determine where and how materials may be vulnerable during a pandemic.

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Q: Is the flu a covered condition under the Americans with Disabilities Act?

A. An employee with the seasonal flu, or an employee with 2009 H1N1 flu that does not involve serious complications, is not an “individual with a disability” under the ADA. A “disability” under the ADA is a physical or mental impairment the “substantially limits one or more major life activities.” The flu, absent complications, runs its course in about a week, and a temporary illness is not typically considered to be a disability under the ADA.

Q: May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic?

A: Yes. The CDC recommends that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 H1N1 virus. And if the influenza were to be more serious, sending the infected person home would be viewed as a reasonable step to avoid a serious direct threat to the wellbeing of coworkers, which would be permitted under the ADA.

Employees who have been diagnosed with H1N1 flu should stay home, follow their doctor’s orders, and watch for signs that immediate medical attention is needed. The CDC recommends that persons with the flu stay home for at least 24 hours after the fever (100°F or 37.8°C) is gone except to get medical care. (The CDC advises that the employee should stay home until he or she is fever-free without the use of a fever-reducing medication.)

Q: Should an employee stay home from work if he or she has a family member at home who is ill with H1N1 flu?

A. The CDC advises that an employee who is well, but who has a family member who has the flu, may go to work as usual. Such employees should be instructed to monitor their own health daily and to use hygiene precautions (frequent hand washing with soap and water, use of alcohol-based hand sanitizers, care when coughing or sneezing) at home and at work. If the employee subsequently becomes ill, he or she should notify supervision and stay home until they are again symptom-free.

Q. Would an employer be obligated to pay employees who stay home because they are sick with the flu?

A. If the employer has a policy providing paid sick days, or if a union contract provides for paid sick time, then the employer must abide by its sick pay policy or its contract. Otherwise, there is no obligation that an employer pay an employee other than for hours actually worked. For a salaried executive, administrator, professional, or outside salesperson who is exempt from the overtime pay provisions of the Fair Labor Standards Act, the issue is more complicated. Docking such an employee’s salary for one or more sick days during a workweek, is inconsistent with the salary basis, and may lead to the Department of Labor or a court ruling that the employer has forfeited the exemption; that could lead to substantial liability for unpaid overtime compensation.

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Q: During a pandemic, how much information may an ADA-covered employer request from employees who report feeling ill at work or who call in sick?

A: ADA-covered employers may ask such employees if they are experiencing influenza-like symptoms. In fact, the CDC advises employers to “conduct active screening” of all employees when they arrive at work (during a flu pandemic), asking about symptoms in the prior 24 hours, such as fever, cough, runny nose, muscle aches and sore throat. Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

If pandemic 2009 H1N1 influenza is like seasonal influenza, these inquiries are not related to a “disability” as defined in the ADA. And if pandemic influenza becomes so severe as to constitute a “disability,” the inquiries will still be lawful under the ADA as justified by a reasonable belief based on objective evidence that the severe form of pandemic influenza poses a direct threat to employee health.

Q: May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

A: No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee’s sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII (“more than de minimis cost” to the operation of the employer’s business, which is a lower standard than under the ADA). In theory, though, an employer could mandate vaccination for all employees who do not have sincere religious objections or who do not request exemption from the vaccination requirement as a reasonable accommodation to some disability. If the employees are represented by a labor union, however, the employer would probably have a duty to bargain in good faith with the union representative about any mandatory vaccination program.

Q. Can an employee take FMLA leave to stay home to care for a family member who has the flu?

A. That depends. The Family and Medical Leave Act entitles eligible employees of a covered employer to take up to 12 weeks of unpaid leave per year to due to the employee’s “serious health condition” or to care for an immediate family member with a “serious health condition.” The FMLA defines “serious health condition” as one that involves inpatient care or continuing treatment by a health care provider (defined as more than 3 days of incapacitation and treatment by a health care provider). So if the illness does not involve hospitalization, or it does not involve more than 3 consecutive days of incapacity along with two treatments by a health care provider (or at least one treatment by a provider plus a continuing regimen of medication or other treatment), then the illness will not qualify as a “serious health condition” justifying FMLA leave. Of course, even where the employee is not entitled to FMLA leave, a company policy, a labor agreement, or the employer’s compassion may lead to providing the days off under those circumstances.

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Q. If an employee claims to have contracted the H1N1 flu at work, would he or she be entitled to Workers Compensation benefits?

A. Probably not. Absent unusual circumstances, the employee would not be able to prove that his or her case of flu arose out of a risk associated with the workplace, rather than at home, at the store, on the bus, etc. And, with the possible exception of some health care workers, employees are at no greater risk of contracting the flu than are members of the general public at large, so flu cases are not job-related for Workers Compensation purposes.

Q: How does an employer's benefits plan interact with an outbreak of H1N1?

A: Employers are advised to review their existing compensation, benefits, sick leave and family and medical leave policies to consider whether the plans should be modified to deter sick employees from continuing to come to work while encouraging healthy employees to report to work. Some employers may decide to provide enhanced or lengthened sick time for employees during a pandemic, because they want to prevent employees from coming to work while they are infectious due to financial concerns or concerns that they will lose their jobs if they are absent.

Q: During a pandemic, may an employer require its employees to adopt infection-control practices, such as regular hand washing, at the workplace?

A: Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal is appropriate.

Q: During a pandemic, may an employer require its employees to wear personal protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of pandemic infection?

A: Yes. An employer may require employees to wear personal protective equipment during a pandemic. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these, absent undue hardship.

Q: Where can I get more information about the H1NI and services available in my area?

A: The federal government sponsored website located at: <http://www.flu.gov/individualfamily/vaccination/locator.html> allows you to click on your state on the map to obtain information about resources in your area including the availability of vaccinations and other resources specific to your area. The progress of the pandemic, both internationally and domestically, can be obtained from the CDC www.cdc.gov and the WHO at www.who.int

The CDC has a helpful booklet ["Preparing for the Flu: A Communications Toolkit for Businesses and Employers"] which can be downloaded from http://www.cdc.gov/H1N1flu/business/toolkit/pdf/Business_Toolkit.pdf