

## PANDEMIC PREPAREDNESS IN THE WORKPLACE

### *An Employment Law Perspective*

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The recent H1N1 (aka swine) flu outbreak has gripped the world with concerns of a pandemic illness. The sudden emergence of this flu strain adds to the anxiety and serves as a reminder of the importance of having a plan in place in advance of an emergency. While recent reports indicate that the flu strain is having a milder effect than anticipated, some experts caution that, with the return of flu season next winter, Americans could face a more virulent outbreak with the potential to take a more serious toll.

With this in mind, employers would do well to take the opportunity to assess their particular workplace and develop a plan of action in the event of pandemic illness. The exact contents of such a plan necessarily will vary according to the needs of each specific employer. The size of the employer, the nature of the industry, and the extent to which employees are involved in international travel all will be factors to consider in tailoring each employer's response. Obviously, employers in the healthcare industry must take special precautions, and will likely already have an emergency pandemic plan in place. Other employers with heightened concerns will be those involved in the care of the elderly or disabled. Educational institutions, universities, schools, and day care centers will all need to take a higher level of precaution. Businesses with employees who travel internationally will need to have a plan in place with respect to employees who may have been exposed to a virus while abroad.

Employers should remember that communication with employees is key. It is a good idea to have a general memorandum, written in advance, which can be modified based on the specifics of the outbreak. The contents of this memo will include instructions on limiting spread of a virus. For example, while it seems common sense, frequent and thorough handwashing is recommended as a defense against the spread of illness, and should be required in the workplace. Some

employers may want to distribute hand sanitizers in key locations throughout the workplace. Employees may be instructed to remain at home if they are ill, and further instruction should be provided as to the return of an employee to the workplace after recovering from an illness. It is appropriate in most cases to require a medical clearance to return to work after an employee has been out sick. Employers should communicate pandemic policies and procedures to employees in a timely and effective manner, such as through an intranet bulletin and/or email updates.

Legal counsel should be sought with regard to the drafting of illness policies as well as communications to employees. Pandemic flu precautions in the workplace will intersect with a variety of employment laws, including the Family and Medical Leave Act, the Americans with Disabilities Act, OSHA, the FLSA, and potentially HIPAA. For example, each of the following questions asked by employers in this context raise employment law implications which should be discussed with counsel:

- *Can an employer prohibit employees from coming to work if they have flu symptoms?*
- *Can an employer prohibit an employee from returning to work after an illness, and if so, for how long?*
- *To what extent can an employer inquire as to an employee's symptoms or require medical testing for flu?*
- *What if an employee has exhausted all of their sick leave?*

Employers who are covered by the Family and Medical Leave Act (FMLA) will need to make sure that their FMLA policies, procedures, and forms are up-to-date. Eligible employees who are sick may request FMLA leave, which may be a covered condition, and employers should provide the

appropriate certification forms to employees who are out sick.

But what about those employers who are not covered by the FMLA or a state equivalent? Most employers have sick leave or paid time off policies. Employers should consider relaxing these policies in the event of a pandemic illness for employees who have exhausted their leave entitlement but are out sick. Also, employers should give thought to temporarily relaxing attendance standards during a pandemic for employees who must care for sick children. In this regard, it is important to clearly convey to the workforce that any relaxation of attendance policies is limited to the duration of the emergency. Employers must also be mindful of federal and state wage and hour laws. If an employer decides to grant additional unpaid sick leave, legal counsel should be sought to review the application of such a policy to exempt employees.

Some employers may encourage employees to work from home during a pandemic. It is best to have a telecommuting policy already in place which addresses issues such as the recording of time worked by non-exempt employees under such circumstances in compliance with the FLSA and state law, as well as clarifying which positions are eligible to work from home.

Keep in mind that the Americans with Disabilities Act limits medical inquiries by employers. Medical information concerning employees must be kept confidential on a need-to-know basis. Depending on the context, HIPAA may also apply, in which case medical information must be treated with strict confidence. Employers should also guard against any unwarranted assumptions or stereotypes that could run afoul of employment discrimination laws, such as taking a different approach toward flu precautions depending on worker's age.

Employers should avail themselves of government resources in pandemic preparations. The U.S. Department of Labor Occupational Safety & Health Commission has published a *Guidance on Preparing Workplaces for an Influenza Pandemic*, available at the web address [www.osha.gov/Publications/influenza\\_pandemic.html](http://www.osha.gov/Publications/influenza_pandemic.html). In addition, the Centers for Disease

Control and Prevention provides guidance for employers, including a business planning checklist. Information is available at [www.cdc.gov/business](http://www.cdc.gov/business), as well as at [www.pandemicflu.gov](http://www.pandemicflu.gov). As always, the attorneys in our Firm's Labor and Employment Practice Group are available to address these issues as they impact your business.

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