

Flu: Things Employers Need to Consider As They Prepare

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"Prepare" has been the theme of the week for businesses trying to deal with what the World Health Organization has described as a situation in which a "pandemic is imminent," and the United States has declared a "public health emergency": the swine flu, Influenza A or H1N1. Companies planning how to maximize continuity and minimize disruptions caused by this virus face a multitude of issues. The flow of information about this situation in the past few days has inundated business owners, executives and managers with more than they can navigate. Sometimes, they focus so sharply on external business affairs that they give little or late attention to the preservation of critical internal resources, employees. This is a quick reference to things employers should consider during this time:

Communicating with employees about the flu

Establish a team to (1) monitor the situation, including new guidance issued by lead government agencies; (2) confer with operational and administrative management and legal counsel where necessary to determine actions and responses; and (3) keep employees informed as the situation changes.

Informed employees are more likely to feel safe coming to work and are less likely to take drastic unwarranted actions, so communicate! **Remind employees to remain calm, caution against overreaction, but counsel prudent preparation.** Emphasize the value of a common-sense approach and reinforce the basic steps for maintaining a healthy workplace environment.

Tell employees, and when applicable their bargaining representatives, how the company plans to address the situation, especially pertaining to safety precautions, changes to hours or conditions of work, absences and shutdowns.

Assist employees in managing pandemic stress. Anticipate that employees will develop fear and worry. If an Employee Assistance Program (EAP) is in place, make sure employees know it is available and how to use it. An EAP can provide training, resources, and guidance on health and wellness issues, including appropriate referrals for mental health care.

Train managers and supervisors about communications with employees, transmitting information from employees about exposure with due care for privacy and confidentiality concerns, sending employees home who are ill but do not wish to leave work, and handling employee absences for various flu-related reasons.

Keeping the workplace and employees safe

The types of actions to keep the workplace safe depend on the level of exposure risk posed by the nature of the work and the importance of the employer to critical infrastructure areas like law enforcement, utilities, emergency response and health care. For example, most office settings would be considered lower risk, but health care facilities would be considered higher risk. Employers with higher risk of exposure workplaces will likely need to consider additional engineering and procedural changes and greater use of personal protective equipment. Likewise, employers in critical infrastructure areas with highly trained and licensed employees who are difficult to replace during a crisis will need to take heightened precautions.

A basic understanding of this virus will drive safety plans. The swine influenza A (H1N1) virus is contagious and is spreading from human to human. Sunlight, warm weather and fresh air decrease the transmission of most respiratory viruses. Often though, influenza viruses which appear this time of the year "go into hiding" and re-emerge when cooler weather returns.

Spread of the swine flu is thought to be happening in the same way that seasonal flu spreads. Flu viruses are spread mainly from person to person through coughing or sneezing of people with influenza. Sometimes people may become infected by touching something with flu viruses on it and then touching their mouth or nose.

So, encourage employees to limit the risk of exposure by:

- (A) Avoiding close contact with others ("social distancing");
- (B) Washing hands thoroughly and frequently and/or using a hand sanitizer;
- (C) Covering mouth and nose when sneezing or coughing;
- (D) Avoiding coughing or sneezing into the hand – using a sleeve, elbow or a tissue instead; washing hands immediately if coughed or sneezed upon;
- (E) Avoiding touching eyes, nose or mouth;
- (F) Using alcohol rubs or hand sanitizers (please note, alcohol content should be over 60% to have maximum effect);
- (G) Staying home from work and seeking appropriate medical care if they experience flu symptoms. These can include: fever (100.5 or higher), cough, sore throat, body aches, headaches, chills, wheezing or difficulty breathing, and fatigue. Younger people in particular may have diarrhea and vomiting associated with swine flu. Like seasonal flu, swine flu may cause a worsening of underlying chronic medical conditions.

Help with these efforts by:

- (A) Providing hygiene products like soap, tissues, sanitizers, disinfecting wipes;
- (B) Making sure employees know where supplies for hand hygiene are located;
- (C) Stepping up cleaning: Use a disinfecting wipe to clean surfaces of common areas such as door handles, phones, keyboards or tools;
- (D) Developing a flu situation-specific policy that encourages employees to stay home if they develop flu symptoms and recognizes that employees with ill family members may need to stay home to care for them. This policy may include permitting employees to use available forms of paid leave or borrow against future paid leave accruals to limit the impact of unpaid leave.

Figuring out the logistics

Give some thought to these questions as they pertain to the workplace:

How will social distancing work in this workplace? Is it feasible to ask employees to keep 6-10 foot distance from others? Must changes be made to physical facility layout

or work schedules to facilitate social distancing?

Is telecommuting a viable option for some employees? How much can the IT infrastructure accommodate? Which jobs in the organization can be performed effectively remotely, and which cannot? Does the company have a telecommuting policy, and—if so—is it flexible enough to work in this situation, or are changes needed?

If closures of public transportation, schools and child care centers impact healthy employees' ability to report for work, how will the company handle those situations?

Are restrictions on travel out of the immediate area appropriate?

Is it feasible to limit non-essential face-to-face interactions through the use of e-mail, websites and teleconferences?

Are employees cross-trained on mission-critical functions and operations so that the company can sustain operations if the usual employees performing these functions are absent? Employers who have reduced staffing levels due to the economic downturn may find this particularly challenging and may need to think far outside the box when planning for continuity in the face of key employee absences.

Do steps need to be taken to address "Act of God" or "Force Majeure" clauses in insurance contracts or collective bargaining agreements that may relieve the parties of certain obligations?

Handling employee absences

Employers should be guided by their existing policies and procedures on absences, leave and other time off work, including whether such absences are paid or unpaid. However, the CDC has expressed that "businesses and other employers will play a key role in protecting employees' health and safety as well as limiting the negative impact to the economy and society" and encourages employers to encourage employees to stay home if they have flu symptoms. This calls for employers to consider developing a more flexible approach to employee leaves of absence that are connected to this particular situation.

Employers who are covered by the Family and Medical Leave Act retain their usual obligations and should expect that employees may request time off work on relatively short notice due to them having (or an immediate family member having) a "serious health condition." The FMLA regulations specifically say ordinarily, unless complications arise, the flu is a condition that does not meet the definition of a serious health condition and does not qualify for FMLA leave. However, the "serious health condition" requirement could be met in the case of swine flu by an illness that involves either:

- (A) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity (i.e., inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; or
- (B) Continuing treatment by a health care provider, which includes:

- (1) A period of incapacity lasting more than three consecutive full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes:

- treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within seven days and both within 30 days of the first day of incapacity); or
 - one treatment by a health care provider (i.e., an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy); or

- (2) Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

Employees who are pregnant or who are disabled by conditions leaving them with heightened susceptibility to viral infections may also be entitled to leave under the FMLA and/or the Americans with Disabilities Act under certain circumstances in connection with the swine flu.

Employers generally can require employees to leave work promptly when symptoms occur, as long as such requirements do not violate applicable collective bargaining agreements or single out a particular group based on characteristics protected by state, federal and local discrimination laws. When deciding to exclude employees from the workplace, employers cannot discriminate on the basis of race, sex, age (40 and over), color, religion, national origin, disability, union membership or veteran status. However, employers may exclude an employee with a disability from the workplace if the employer:

- (A) obtains objective evidence that the employee poses a direct threat (i.e. significant risk of substantial harm); and
- (B) determines that there is no available reasonable accommodation (that would not pose an undue hardship) to eliminate the direct threat.

Employers can require medical releases for employees returning to work from being ill. However, it may be difficult for employees to get appointments with healthcare providers if local healthcare resources are overwhelmed. Under the ADA, an employer would be allowed to require a doctor's note, a medical examination or a time period during which the employee has been symptom free, before it allows the employee to return to work where it has a reasonable belief – based on objective evidence – that the employee's present medical condition would:

- (A) impair his ability to perform essential job functions (i.e., fundamental job duties) with or without reasonable accommodation, or,
- (B) pose a direct threat (i.e., significant risk of substantial harm that cannot be reduced or eliminated by reasonable accommodation) to safety in the workplace.

The FMLA permits employers to have a uniformly-applied policy or practice that requires all similarly-situated employees to obtain and present certification from the employee's health care provider that the employee is able to resume work. Employers are required to notify employees in advance if the employer will require a fitness-for-duty certification to return to work. (Employers should also conform their requirements to state or local law or the terms of a collective bargaining agreement.)

Employers may encounter employees who refuse to work due to fear. The Occupational Safety and Health Act does not provide a general right to employees to refuse to do a job because of potentially unsafe workplace conditions (though such a right could be found in a union contract or state law). Employees may refuse an assignment only if: (1) they reasonably believe that doing the work would put them in serious and immediate danger; (2) they have asked their employer to fix the hazard; (3) there is no time to call OSHA; and (4) there is no other way to do the job safely. So, technically, employers can impose disciplinary action when employees refuse to work. Nevertheless, caution here is warranted, because employees have the right to refuse to do a job if they believe in good faith (based on reasonable grounds) that they are exposed to an imminent danger. An employer can mitigate the risk that an employee would be able to develop such a good faith belief by implementing and communicating about its plan to manage the situation. Additionally, a group of employees' refusal to work could be considered concerted activity protected by the National Labor Relations Act.

Illness and associated lost time caused by workplace exposure in some cases may be compensable under state workers' compensation laws.

Resources for more information

This certainly does not cover everything businesses must consider as they prepare and handle this flu outbreak. For additional information, the following websites are maintained and frequently updated by government agencies monitoring the situation:

U.S. Centers for Disease Control and Prevention (<http://www.cdc.gov/h1n1flu/index.htm>)

World Health Organization (<http://www.who.int/csr/disease/swineflu/en/index.html>)

U.S. Government's "one stop shop" for pandemic flu information (<http://www.pandemicflu.gov/>)

*For specific inquiries, the McGlinchey Stafford **Healthcare** and **Labor and Employment** attorneys are prepared to advise about legal obligations and best practices pertaining to the flu.*