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## The Arrival of H1N1 Influenza: Legal Considerations and Practical Suggestions for Employers

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Flu season is here. This year, not only must employers contend with regular influenza outbreaks, but also the much-discussed H1N1 influenza virus, commonly called swine flu.

The Centers for Disease Control (CDC) reported an increase in influenza activity in the United States in September, with 37 states reporting widespread flu activity. The CDC notes that widespread flu activity in the months of September and October is very unusual, and almost all of the flu viruses identified so far this year in the United States are H1N1.<sup>1</sup> More than 3,000 cases were reported in the Pacific Northwest region<sup>2</sup> since outbreaks began last spring.<sup>3</sup> From April 26, 2009, to Sept. 18, 2009, 174 cases of H1N1 requiring hospitalization were reported in Washington.<sup>4</sup>

Given the expectation of an increase in influenza cases this year, employers should be prepared to deal with a number of issues. They must be aware of health and safety responsibilities, including taking precautions to prevent infection, adhering to Occupational Health and Safety Administration (OSHA) requirements and handling vaccination programs. They should also be prepared to handle sick leave issues, comply with disability and antidiscrimination laws, and properly handle any union conditions.

This advisory provides an overview of these issues and some actions employers can take. It also updates our [prior client advisory](#) about H1N1 from May 2009.

### Prevention

The [CDC](#) and [state health department Web sites](#) provide various methods of preventing spread of the flu. [OSHA](#) provides a list of precautions that employers can take to prevent and stop the spread of flu in the workplace. The CDC Web site also provides the [latest vaccination information](#) and recommendations.

### Health and safety

While the Occupational Safety and Health (OSH) Act does not include standards or regulations specifically addressing H1N1, employers have a responsibility under state industrial safety and health acts<sup>5</sup> and the OSH Act<sup>6</sup> to provide their employees with a workplace free from recognized hazards. These types of issues are more likely to arise in workplaces where employees are at risk for regular exposure to H1N1, such as schools and healthcare facilities; however, all employers should evaluate precautions and communicate them to employees. To maintain a safe environment, employers should determine the feasibility of a basic plan to prevent infection and the spread of H1N1, and implement a protocol to properly handle any employees who contract it. In addition, employers should communicate with employees regarding prevention techniques.

One precaution that employers may consider is the use of masks or respirators by employees the employer identifies as particularly at risk. OSHA describes the different respirators available and their functions in its Respiratory Protection Standard.<sup>7</sup>

### Leave policies and the Family Medical Leave Act



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The CDC recommends that employees do not return to work until 24 hours after their fever has resolved.<sup>8</sup> This may warrant that employers revisit their sick leave policies to give employees time needed to recuperate from H1N1 before returning to work.

In addition, employers should be cognizant of Family Medical Leave Act (FMLA) leave requirements. While influenza generally does not qualify as a serious health condition under the FMLA, and not all cases of H1N1 will qualify, there may be severe cases of H1N1 requiring hospitalization or multiple doctor visits. Under these circumstances, an employee may qualify for FMLA leave for themselves or to care for a family member.

### **Americans with Disabilities Act and other antidiscrimination laws**

Generally, those who contract H1N1 will not qualify as having a disability under the Americans with Disabilities Act (ADA).<sup>9</sup> Remember, however, employees may have other conditions that qualify as disabilities, and those conditions may be exacerbated by or otherwise create a greater risk of H1N1 infection. Additionally, if employees without pre-existing conditions develop complications or related conditions that would “substantially limit” one or more “major life activities,” the ADA could become a factor. *Also, be aware that many state disability laws have a broader definition of disability.* If an employee is considered disabled due to H1N1 and is on leave, employers need to avoid taking any adverse employment action against the employee for taking such leave.

The ADA also regulates disability-related inquiries and medical examinations for job applicants and employees, including those who do not have disabilities.<sup>10</sup> Generally, during employment, the ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity. This means that an employer may not inquire about medical issues if it is likely to elicit information about a disability. However, an employer may ask about symptoms of a cold or the seasonal flu because it is not likely to elicit such disability-related information.<sup>11</sup>

Such inquiries or examinations are job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that an employee’s ability to perform essential job functions will be impaired by a medical condition or an employee will pose a direct threat to other employees due to a medical condition.

The ADA prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a “direct threat.” For there to be a direct threat, it must pose “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

According to the Equal Employment Opportunity Commission (EEOC), “Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations.”

Actions an employer may take include: sending employees home if they display influenza-like symptoms, asking employees if they are experiencing influenza-like symptoms (and keeping such information confidential), encouraging employees to telecommute, requiring employees to adopt infection-control practices, or asking for a doctor’s note to certify fitness to return to work.

### **Vaccinations**

There is an immunization available for H1N1. The CDC’s Advisory Committee on Immunization Practices recommends that vaccination efforts focus first on people in five target groups who are at higher risk for 2009 H1N1 influenza or related complications. These target groups include: pregnant women, those who live with or provide care for infants younger than six months of age, health care and emergency medical services personnel, people six months through 24 years of age, and people 25 years through 64 years of age who have certain medical conditions that put them at higher risk for influenza-related complications.<sup>12</sup>

If employers make the H1N1 vaccine available to employees, they also must be cognizant of any medical or religious objections to immunization.

### **Collective bargaining agreements**

If a unionized employer changes the terms and conditions of employment, they may need to bargain with the union, absent a waiver. This could arise in the application of attendance policies, allowing time off to those who contract H1N1, providing for telecommuting for those who contract H1N1 or shift changes to accommodate absences, among others. Likewise, if an employer decided to require immunization, it would need to bargain with

the union.

Employers should review existing collective bargaining agreements and past practices before unilaterally implementing changes.<sup>13</sup> In addition, employers should evaluate how high rates of absenteeism may affect their work force and plan accordingly, including reaching agreements with the union in advance.

## Resources

A variety of resources are available to assist employers in planning for H1N1 outbreaks and preventing infections with and the spread of H1N1:

The [CDC](#) provide updates on current reported cases and infection rates of H1N1 as well as methods of prevention.

The [U.S. Department of Health and Human Services](#) monitors outbreaks, provides prevention information, gives the latest information on where to get vaccines for both seasonal and H1N1 influenza, and provides ideas and suggestions for employers planning for flu season.

The [World Health Organization](#) provides information about H1N1 outbreaks and prevention worldwide.

The [EEOC](#) has published guidance for employers in preparing for a pandemic without violating the ADA. It includes what information an employer may require an employee to disclose, how it may ask and what types of precautions it may ask employees to perform.

Other important resources are the state health department Web sites, which provide localized information about H1N1.

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For more information on this subject, see Bureau of National Affairs publication, "Workforce Strategies - Preparing for the Pandemic: Strategies for Coping if H1N1 Hits Your Workplace," Vol. 27, No. 10, Oct. 2009, in which Courtney Mertes, co-author of this advisory, is featured as one of several attorneys nationally providing clients with counseling regarding H1N1 flu issues.

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## FOOTNOTES

<sup>1</sup> Centers for Disease Control, 2009 H1N1 Flu: Situation Update, <http://www.cdc.gov/h1n1flu/update.htm> (last visited Oct. 9, 2009).

<sup>2</sup> Alaska, Idaho, Oregon and Washington.

<sup>3</sup> Centers for Disease Control, H1N1 Flu Weekly Report, <http://www.cdc.gov/flu/weekly/> (last visited Sept. 25, 2009).

<sup>4</sup> Washington State Department of Health, H1N1 Newsroom, [http://www.doh.wa.gov/h1n1/h1n1\\_newsroom.htm](http://www.doh.wa.gov/h1n1/h1n1_newsroom.htm) (last visited Oct. 8, 2009). After Sept. 18, 2009, the Washington State Department of Health began tracking all cases of influenza together. From Sept. 19, 2009, to Oct. 2, 2009, there were 42 Washington residents hospitalized with cases of H1N1 and seasonal flu.

<sup>5</sup> See, e.g., WAC 296-800-110.

<sup>6</sup> 29 U.S.C. § 654.

<sup>7</sup> 29 CFR §§ 1910.134(a), 1910.134(b).

<sup>8</sup> Centers for Disease Control, H1N1 Flu: Business Guidance, <http://www.cdc.gov/h1n1flu/business/guidance/> (last visited Oct. 8, 2009).

<sup>9</sup> *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 380 (3d Cir. 2002) ("[A] temporary, non-chronic impairment of short duration is not a disability covered by the ADA.")

<sup>10</sup> 42 U.S.C. § 12112(d)(4)(A); *Conroy v. New York State Dep't of Corr. Servs.*, 333 F.3d 88, 94-95 (2d Cir. 2003); *Fredenburg v. Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997).

<sup>11</sup> EEOC Guidance, Pandemic Preparedness in the Workplace and The Americans with Disabilities Act, [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html) (last visited Oct. 8, 2009).

<sup>12</sup> Centers for Disease Control, H1N1 Vaccine: Key Facts, [http://www.cdc.gov/h1n1flu/vaccination/vaccine\\_keyfacts.htm](http://www.cdc.gov/h1n1flu/vaccination/vaccine_keyfacts.htm) (last visited Oct. 8, 2009).

<sup>13</sup> See, e.g., *Washington State Nurses Ass'n v. MultiCare Health Sys.*, No. C09-5614RJB (W.D. Wash. filed Oct. 1, 2009) (nurses union seeks to enjoin hospital policy requiring nurses to either obtain flu vaccinations or wear paper masks when around patients; policy announced in advance of negotiations on new contract for nurses).

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