



The GSH 60-Second Memo

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Laurie E. Meyer, Esq.

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Privacy and Leave Concerns and H1N1 Flu

by Laurie E. Meyer, Esq.

Although there has been a great deal of media coverage devoted to H1N1 flu (commonly known as Swine Flu), the reach and severity of an H1N1 flu outbreak within the American population this year is not yet known. According to the Center for Disease Control ("CDC"), as of August 30, 2009, a total of 9,079 hospitalizations and 593 deaths associated with 2009 influenza A (H1N1) viruses have been reported to CDC. The CDC has reported increased H1N1 activity each week as we approach the fall months. The purpose of this article is to define the legal issues employers may face when dealing with the potential threat of an H1N1 flu outbreak in the workplace.

Federal and state occupational safety and health laws and regulations require employers to provide a safe workplace free of recognized hazards that may cause death or serious physical harm to employees.^[1] Employers can be penalized for violating this "General Duty Clause" if there is a recognized hazard and they do not take reasonable steps to prevent or lessen the hazard.

The potential for a widespread, pandemic outbreak of H1N1 flu also presents employers with significant challenges in connection

with high employee absenteeism and/or incapacitation. Consequently, employers should adopt proactive measures to protect their workforce from this potential influenza pandemic. The Occupational Safety and Health Administration ("OSHA"), the Department of Health and Human Services ("DHHS") and other governmental bodies have developed and published informational resources to assist employers in developing and implementing pandemic flu preparedness plans.[2]

Medical Privacy Concerns

At the same time, it is important that employers be aware of privacy and confidentiality concerns. Many employers will have to balance their employees' privacy rights with public health concerns. For instance, what if an employee calls in sick and rumors swirl around the office that the employee is suffering from Swine Flu? What steps can the employer take to determine if the particular employee has been exposed to H1N1? Does the employer have an obligation to notify that employee's co-workers of their potential exposure to the virus? What privacy rights does the employee who is ill have?

If an employer learns that an employee is suffering from flu-like symptoms, the employer should learn the facts and not rely on rumors. An employer may ask for voluntary disclosure of the symptoms and encourage the employee to seek medical attention. If an employee provides information related to his or her symptoms, the employer may need to alert the employee's supervisor(s). The Americans with Disability Act ("ADA") requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and other safety personnel, and government officials investigating compliance with the ADA. Therefore, employers should instruct supervisors and human resources personnel of the need to maintain confidentiality of employee health information.

An employer may consider asking an employee for consent to inform co-workers that they may have been exposed to H1N1. If the employee refuses to consent to such disclosure, the employer should inform the employee that it may have to share information about the employee's infection with others, but will do so only to the extent allowed by law. The employee should not be subjected to any discipline because they have not consented to such disclosure. If it becomes necessary to disclose to the employee's co-workers that they may have been exposed to the virus, avoid using any identifiable information about the infected employee to the extent possible.

Under the ADA, an employer may require medical examinations so long as the examinations are "job related" and "consistent with business necessity." [3] According to the EEOC Guidelines, a "business necessity" occurs when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability

to perform the essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." Thus, in the context of H1N1 and other flu outbreaks, employers should be cautious in requiring employees to submit to such examinations and should limit the information they seek to a simple "fitness for duty" statement. Employers should not ask for other medical information beyond that related to H1N1 because such inquiries could implicate medical privacy laws or the ADA.

Further, the EEOC has issued guidelines specifically regarding the H1N1 virus, in an effort to provide employers with information as to the scope of questions they may ask and information they may seek from its employees. The EEOC allows employers to survey its workforce to gather information needed to help plan for absenteeism. The survey may be found at http://eoc.gov/facts/h1n1_flu.html. The survey allows the employer to ask broad questions that are not limited to disability-related inquiries. For instance, an inquiry would not be disability-related if identified non-medical reasons for absence during a pandemic (e.g., school closures) are given equal footing with medical reasons (e.g., chronic illnesses that weaken immunity). In the survey suggested by the EEOC, the employee is not asked to check "yes" or "no" to any individual item, but rather is asked to acknowledge if any of the circumstances on an aggregate list applies to him or her.

FMLA and Other Leave

Employers should understand that in some circumstances, certain employees may be eligible for federal and/or state FMLA leave if they or their family members contract the H1N1 virus. An employee who is otherwise eligible for federal FMLA leave^[4] may take up to twelve weeks for his or her own "serious health condition" or to care for certain family members suffering from such a condition. A "serious health condition" is one which involves inpatient care at a medical facility or continuing treatment by a health care provider. "Continuing treatment" is determined by the number of days of incapacity (more than three consecutive, full calendar days); number of times treated by a healthcare provider (at least two in-person visits within 30 days from day one of incapacity, the first being within seven days from day one of incapacity); and must result in continuing treatment, such as prescription medication. In the context of H1N1 or other flu, if an employee visits a healthcare provider and is prescribed medication or is hospitalized, then he or she may qualify for FMLA leave. An employee may also qualify for FMLA leave if his or her spouse, child or parent visits a healthcare provider and is prescribed medication for the condition or is hospitalized. In contrast, preventative absences or absences where the employee or family member has not sought care from a health care provider do not qualify for FMLA leave. Accordingly, employers should carefully review short-duration absences to ensure proper FMLA treatment and need to be prepared to be proactive about offering FMLA leave to employees who qualify. Employers should contact experienced legal counsel if they are unsure about or have questions regarding the application of FMLA in any particular circumstance.

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If an employer encourages employees with flu-like symptoms to stay home, it should consider developing flexible leave policies so that employees do not fear losing their jobs if they or their family members are sick or if they need to care for children whose schools are closed due to influenza. Even in instances where FMLA or other leave is not available, employers may consider flexible worksites (e.g., telecommuting) or flexible work hours (e.g., staggered shifts), where possible.

[1] See Occupational and Health Safety Act, 29 U.S.C. § 654 (a).

[2] DHHS has created a website, www.flu.gov, to provide continuously updated information and assistance to the public in connection with H1N1, avian and pandemic flu outbreaks. The Center for Disease Control ("CDC") has published "H1N1 Flu and You", found at <http://www.cdc.gov/h1n1flu/qa.htm>, which can be circulated to employees to assist them in recognizing flu-like symptoms and provide prevention measures. On August 19, 2009, the CDC, with input from the U.S. Department of Homeland Security, issued updated guidance for businesses and employers to plan and respond to the 2009-10 flu season, which can be found at <http://pandemicflu.gov/professional/business/>.

[3] 42 U.S.C. § 12112(d)(4)(A).

[4] The federal FMLA applies to employees who have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and who work at a location where their employer employs 50 or more employees within 75 miles.

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