

Client Alert

Swine Flu: Is Your Workplace Prepared?

As of this writing, the Centers for Disease Control and Prevention has confirmed 109 cases of the H1N1 virus, commonly known as swine flu, in the United States. The World Health Organization has confirmed 331 cases of swine flu worldwide and has raised the pandemic threat level to Phase 5 on its six-step scale (Phase 5 designation essentially means that infections from the outbreak that originated in Mexico have been jumping from person to person with relative ease). This Client Alert outlines a few of the myriad legal issues that employers may face with regard to swine flu. As every situation is different, employers are strongly encouraged to seek the advice of counsel with respect to any questions related to these issues. We are, of course, available to provide a more detailed analysis as to any of the matters discussed below or to advise on any other questions that you may have on pandemic flu planning and its implications for the workplace.

General Duty of Care

- Under federal and state laws, employers have a duty of care to their employees, and thus may be required to provide employees with information on the spread of swine flu, to take protective measures against the spread of the contagion, and to provide warning if employees may have been exposed to someone diagnosed with the disease (but not identifying that individual).
- Employers should consider developing written policies, guidelines and training materials with information about swine flu, so that employees know how to look for symptoms, avoid contamination, and prevent the spread of the virus.
- For more information about swine flu, employees should be encouraged to visit the Department of Health and Human Services pandemic flu website (www.PandemicFlu.gov), the American Centers for Disease Control website (www.cdc.gov), and the World Health Organization website (www.who.int).
- In locations with a high concentration of employees, employers may want to arrange for on-site coverage by a doctor or nurse to be available in the event of an ill employee, contractor or visitor on the site, to assure appropriate measures are taken, and to answer questions that may arise.

Keeping Employees Out of the Workplace

- If an employer has reason to believe that an employee is ill with flu-like symptoms, the employer can instruct the employee to go home. Employees should be told not to report for work if they are experiencing flu-like symptoms.
- Employers should develop or evaluate existing telecommuting policies, to determine standards for allowing employees to telecommute during the pandemic threat. Individuals in jobs that are not normally candidates for telecommuting might nevertheless be allowed to do so if there is a sufficient risk of contagion. This would reduce the potential for spreading swine flu among employees, enable more employees to function for a longer period of time, and result in fewer confrontations over a refusal to report to work.
- Employers may have the right to discipline or discharge any employee who comes to work when directed *not* to do so. Such a directive should only be given if there is a legitimate non-discriminatory reason, such as a reasonable suspicion that the employee is ill with flu-like symptoms or may have been exposed to swine flu, that the workplace is unsafe, or that there is insufficient work for the employee because of the pandemic.

Employee Refusal To Come to Work

- Under some circumstances, an employee may have the right to refuse to perform a task or refuse to come to work if the employee reasonably believes that the work would place the employee in imminent danger of death or serious injury. Whether swine flu could meet such a standard is not clear and must be determined on a case-by-case basis, depending on the circumstances. The more the risk can be reduced through protective and preventive measures, the less justification will exist for an employee to refuse to come to work.
- Where an employee's refusal to come to work is unjustified, the employer may impose disciplinary action, though employers are strongly advised to seek the advice of counsel before doing so.

FMLA Leave

- Under some circumstances, swine flu may qualify as a serious health condition under the Family and Medical Leave Act (and similar state leave laws), such that an employee may be entitled to personal medical leave or leave to care for a family member.
- If an employer mandates leave for employees who may have been exposed to swine flu or who are exhibiting flu-like symptoms, whether such leave could be counted as FMLA leave will depend on the circumstances. Employers may wish to conditionally designate such mandated time off as FMLA leave, pending further information from the employee or a health care provider.

Directive To See a Doctor

- Generally, an employer may send an employee to a qualified health care provider, if the employer has a reasonable belief that the employee is a direct threat to him- or herself or to others in the workplace. Thus, at least while there is a serious threat of pandemic swine flu, if an employee appears ill with flu-like symptoms in the workplace, the employer could ask the employee to be seen by a physician and provide a doctor's note indicating that the employee is cleared to return to work.
- Note that many states require an employer to pay for any mandatory medical examination, at least to the extent that it is not covered by insurance.

Reporting to Authorities

- While only a few states require employers to report suspected contagious diseases to public health authorities, if someone in the workplace is diagnosed or is reasonably suspected to have contracted swine flu, employers are advised to contact the Department of Health for guidance.

Planning

- Employers should review the policies and procedures they have in place for dealing with pandemics and other emergencies, and modify them as appropriate.
- Employers are encouraged to put a pandemic flu plan in place. To the extent that employers utilize, either directly or through a provider, services that may play a role in spreading or containing a contagion (such as food preparation services, cleaning crews, on-premises day care or the like), employers should consider including such services in their preparedness planning.
- Employers subject to collective bargaining agreements should note that they may have bargaining obligations with respect to new policies or procedures (or changes to existing policies and procedures) that they intend to implement.

Insurance Issues

- The prospect of a swine flu pandemic presents a wide range of insurance issues ranging from obvious issues of health, workers compensation and employers' liability coverage to more complex issues concerning coverage for property damage and business interruption. Depending on applicable wordings, property policies may cover business interruption due to loss of stock, supply chain disruptions, restrictions on ingress and egress by civil authority and closings of facilities due to contamination. Environmental impairment, travel and event cancellation policies also are likely to be implicated. Employers are encouraged to seek the advice of counsel with respect to any of these issues.

Of course, the above are just a few of the many issues employers are facing, and will face, with regard to this important issue. Because the situation is changing rapidly, and because an employer's rights and obligations in this area will depend on the facts and circumstances specific to that employer, employers are advised to seek the advice of counsel whenever employment issues related to swine flu arise.

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