

SPECIAL BULLETIN

November 11, 2009

Responding to the H1N1 Influenza (Swine Flu)

Announcements by public health officials and extensive media coverage have generated great concern regarding the H1N1 Influenza, sometimes called the Swine Flu. In case of a severe outbreak, public agencies are preparing to respond to potential employment issues arising from the spread of H1N1 Influenza. This Special Bulletin provides answers to some frequently asked questions regarding the legal implications of addressing H1N1 in the workplace.

1. What is H1N1 Influenza?

H1N1 influenza is a respiratory virus. Recently, it has begun to spread through the human population via person-to-person transmission in the same way as a "seasonal" flu - e.g., coughing, sneezing, and contaminated surfaces.

Individuals infected with the virus may be able to transmit the disease to others about one day before symptoms develop and up to seven or more days after becoming ill. Symptoms of H1N1 influenza may include fever, cough, sore throat, body aches, headache, chills, fatigue and possibly diarrhea and vomiting.

2. May an employer send an employee home if the employee shows signs of H1N1 Influenza or informs the employer that they have H1N1 Influenza?

Employers have a duty to provide a safe workplace for their employees. See, e.g., California Labor Code section 6404. Given the contagious nature and serious health effects of H1N1 Influenza, we recommend that employees who exhibit signs of H1N1 Flu or disclose having H1N1 be sent home. The Centers for Disease Control and Prevention, Equal Employment Opportunity Commission (EEOC), and Department of Homeland Security all recommend that employees with symptoms of H1N1 be sent home.

3. May an employer require an employee suspected of having H1N1 Influenza to be tested?

Under the Americans with Disabilities Act (ADA) and the Fair Employment and Housing Act (FEHA), an employer may require an employee to undergo a medical examination (and/or inquiry) if it is job-related and consistent with business necessity. Under EEOC regulations, a medical examination of a current employee meets this standard if the employer has a reasonable belief, based on objective evidence, that: a) an employee's ability to perform essential job functions will be impaired by a medical condition; or b) an employee will pose a "direct threat" due to a medical condition. A "direct threat" is defined as a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation. According to the most recent information published by the EEOC, it is too soon to tell whether an employee with H1N1 is a "direct threat". Employers should continue to consult with their health care providers to assess the level of threat posed by employees with H1N1 in the workplace.

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It is the opinion of this office that, since the H1N1 outbreak in the Spring/Summer of 2009 has been characterized as a pandemic and preparations are underway for a potentially more severe outbreak this Fall, an employer should send an employee home if the employer has a reasonable basis to believe the employee has H1N1. The employee should be allowed to return to work with a physician's note indicating that the employee can safely return to the workplace. While an employer may require an employee to submit to a fitness for duty examination if the employer has objective evidence to believe the employee may have H1N1, it is not the preferred strategy since an employer's ability to order a fitness for duty examination for employees suspected of having H1N1 has not been settled. The limited purpose of such an examination, as well as the purpose of the physician's note for employees returning from leave, would be to determine whether it is safe for that employee to be in the workplace, not whether the employee had or did not have H1N1.

The employer would only be entitled to learn whether it is safe for the employee to return to work and, absent a written authorization in compliance with the Confidentiality of Medical Information Act, could not be informed whether the employee was infected with H1N1.

4. What is the proper pay status of an employee who is sent home because the employee is exhibiting signs of H1N1 Influenza or who discloses having H1N1 Influenza?

The proper pay status of an employee who is sent home because the employee is exhibiting signs of H1N1 Influenza or discloses having H1N1 Influenza will depend upon an employer's collective bargaining agreements, personnel rules, and local ordinances.

5. If an employer confirms that an employee has been infected with H1N1 Influenza, may the employer notify other employees?

An employer may acquire information that an employee has contracted H1N1 Influenza. For example, an employee may voluntarily disclose that they contracted H1N1. An employer should not disclose the identity of any employee the employer learns has been infected with H1N1 Influenza. However, provided that sufficient steps are taken to ensure that the infected individual's identity is not disclosed, an employer may warn its other employees that they may have been exposed to the virus in the workplace.

6. May an employee use leave under the Family Medical Leave Act (FMLA) and California Family Rights Act (CFRA) to recover from the H1N1 Influenza or care for a qualified individual who is infected?

The extent of the illness experienced by each individual may vary. However, it is possible that H1N1 Influenza would qualify as a "serious health condition" which would entitle an employee to FMLA/CFRA leave. Employers should review and follow their family medical leave policies (presuming that the employer's policies have been updated to reflect the revised FMLA regulations published in 2008).

7. Would an employee with H1N1 Influenza be considered disabled under the ADA or FEHA?

According to the EEOC, if the illness is akin to seasonal influenza or the 2009 Spring/Summer H1N1 virus, it likely would not rise to the level of a disability under the ADA. However, depending upon severity and duration of the illness in an individual case, an employee with H1N1 Influenza may still be considered disabled under the FEHA. Each case should be evaluated based on its individual merits.

8. Should the employer keep its employee organizations informed of its policies regarding employees with H1N1?

Yes. It is our recommendation that if the employer's policy for responding to employees with H1N1 will differ from its current policies/practices regarding how it deals with employees with other communicable diseases, the employer should notify affected employee organizations in writing of the employer's plans. The notification should invite those employee organizations with questions about the H1N1 policy to bring those

questions forward to the employer.

9. Other resources that may be helpful:

- ◆ Human Resource Policies and Pandemic Planning Workplace Questions" issued by the U.S. Department of Health & Human Services ("HHS"), available at http://www.pandemicflu.gov/faq/workplace_questions/human_resource_policies/index.html
- ◆ The HHS website discusses issues such as leave policies (including FMLA), return to work, layoff/termination/firing, sending workers home, refusal to work, pay policies, work restrictions, working at home and social distancing, re-employment rights, child care at the work place, liability issues and pre-pandemic workplace planning
- ◆ Guidance from the Occupational Safety and Health Administration (OSHA) on precautions to protect other employees from occupational exposure to influenza can be found at <http://www.osha.gov/Publications/OSHA3327pandemic.pdf>.
- ◆ More information can be found at: www.eeoc.gov/facts/h1n1_flu.html and www.eeoc.gov/facts/h1n1.html

Liebert Cassidy Whitmore continues to monitor employment issues related to H1N1 influenza and will issue ongoing bulletins as appropriate.

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*If you have questions about this issue, please contact our
Los Angeles, Fresno or San Francisco office.*