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LEGAL ALERT



Legal Alert: Swine Flu Pandemic - Advice for Employers

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The swine flu pandemic means employers need to take steps to protect workers. In this article, Ford Harrison provides advice for employers on swine flu infection control procedures. We also discuss the impact of the Americans with Disabilities Act (ADA) on employers' pandemic preparation efforts.

The World Health Organization (WHO) has raised the swine flu alert to its highest level, declaring that the 2009 H1N1 flu virus has reached the global pandemic level. Although the WHO has stated that the virus is "unstoppable," the announcement that it has raised the alert level to 6, the highest designation, means that the disease is more widespread, not deadlier or more dangerous than before.

In fact, the agency has stated that it considers the overall severity of the pandemic to be moderate, meaning that most people recover from infection without the need for hospitalization or medical care. However, the agency is concerned about current patterns of serious cases and deaths that are occurring primarily among young persons, including the previously healthy, and those with pre-existing medical conditions or pregnancy. It has also been reported that obese individuals seem to be more severely affected by the disease.

Swine Flu Infection Control Advice for Employers:

Employers can take some steps to help protect employees, including these, suggested by the Centers for Disease Control (CDC):

- Encourage sick workers to stay home and away from the workplace, and provide flexible leave policies.
- Encourage infection control practices in the workplace by displaying posters that address and remind workers about proper hand washing, respiratory hygiene, and cough etiquette.
- Provide written guidance on swine flu, either through e-mail or other written workplace communications. Employers should ensure that the guidance is written in a manner appropriate to the language and literacy levels of everyone in the workplace. Employers should work closely with local and state public health officials to ensure they are providing the most appropriate and up-to-date information. Information regarding the swine flu is available on the CDC's web site at <http://www.cdc.gov>.
- Provide sufficient facilities for hand washing and alcohol-based (at least

60%) hand sanitizers (or wipes) in common workplace areas such as lobbies, corridors, and restrooms.

- Provide tissues, disinfectants, and disposable towels for employees to clean their work surfaces, as well as appropriate disposal receptacles for use by employees.
- One study showed that the influenza virus can survive on environmental surfaces and can infect a person for up to 2-8 hours after being deposited on the surface. To reduce the chance of spread of the swine flu virus, disinfect frequently touched hard surfaces in the workplace, such as work stations, counter tops, door knobs, and bathroom surfaces by wiping them down with a household disinfectant according to directions on the product label.

Impact of the American with Disabilities Act (ADA):

Employers should be aware that the ADA may impact their ability to require employees be tested for the swine flu. As noted in our May 6, 2009 Legal Alert, *EEOC Issues Guidance Regarding ADA-Compliant Workplace Preparation for the Swine Flu*, the Equal Employment Opportunity Commission (EEOC) has issued a guidance regarding ADA-compliant workplace preparation strategies for the swine flu, which addresses many of these concerns.

Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment. An employer may not make any disability-related inquiries or require medical examinations prior to an employment offer. However, after an employee has received a conditional offer of employment, the employer may require the employee to undergo a medical test, such as a test for swine flu, if it requires all entering employees in the same job category to undergo the same test. Thus, an employer can require all entering employees to be tested for swine flu.

Under the ADA, employers can require current employees to undergo medical examinations (a test for the swine flu virus likely would be considered a medical examination) when such examinations are job-related and consistent with business necessity. An employer likely can meet this requirement by showing that an employee who displays symptoms of swine flu presents a direct threat of substantial harm to other employees. Thus, an employer likely can require an employee who displays symptoms of swine flu to submit to a test for the virus if this employee's present physical condition presents a direct threat to other employees.

Employers must treat the results of any swine flu test as confidential, as is required for all employee medical information. Additionally, employers should treat as confidential any information they receive indicating that an employee has been exposed to the swine flu.

The EEOC's guidance notes that an employer may survey its workforce to gather personal information needed for pandemic preparation if the employer asks broad questions that are not limited to disability-related inquiries. An inquiry would not be disability-related if it identifies non-medical reasons for absence during a pandemic (e.g., mandatory school closures or curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that weaken immunity). The EEOC provides a sample

ADA-Compliant Pre-Pandemic Survey on its web site. See http://www.eeoc.gov/facts/h1n1_flu.html.

Employers' Bottom Line:

Ford & Harrison attorneys can help you take steps now to implement a plan designed to protect your employees from the potential spread of this disease. If you have any questions regarding this issue or need assistance in developing a pandemic preparation plan, please contact the Ford & Harrison attorney with whom you usually work or Pedro Forment, pforment@fordharrison.com or 305-808-2104.