

Swine Flu at Work

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The current news about the H1N1 Virus (formerly Swine Flu) has led many employers to consider how they would manage such an outbreak in the workplace. This article addresses some of the legal concerns for employers that have been raised by the possible pandemic.

Current Employment Policies

Employers should typically review their employment policies annually, and the possible virus outbreak provides an additional reason to make that review now. In particular, employers should ensure that they understand their current sick leave and personal leave policies, and that such policies are up-to date. For example, employers may want to modify policies that penalize excessive sick time use when that use is for illness due to the H1N1 virus or similar medical condition. Certainly, employers do not want ill employees coming to the workplace and spreading disease. Employers should also make sure that they are knowledgeable about the federal and state laws that might come into play if an outbreak were to affect employees.

Discrimination Laws

Both Federal law and the New York State Human Rights Law prohibit discrimination on the basis of national origin. The EEOC has already issued a statement reminding employers that they may not refuse to hire someone solely because the person is of Mexican decent or recently immigrated from Mexico.

Similarly, both Federal and New York State law prohibit discrimination on the basis of an employee's disability. While it is not clear that H1N1 would rise to the level of a disability under the federal law, it will almost certainly qualify under the New York State Law. Consequently, employers cannot require blanket testing of employees as a condition of employment. Employers may, however, require an employee exhibiting symptoms of the disease to be tested. The employer must pay the cost of the test and should maintain the results confidentially.

Family and Medical Leave Act (FMLA)

The FMLA applies to employers with 50 or more employees and provides unpaid leave to employees for certain serious health conditions and military service of a family member. Generally, the flu in an otherwise healthy adult is not considered serious enough to qualify under the FMLA as a serious health condition; however, hospitalization, or a course of treatment by a medical provider that meets the definition of the statute may qualify an employee for leave under the FMLA.

Health Insurance and Portability Act (HIPPA)

Employers who are in possession of medical information of employees must be careful not to disclose personally identifying information to others without authorization. HIPPA does not prohibit an employer from inquiring of employees about H1N1 exposure or requiring employees exhibiting symptoms to be tested. Moreover, HIPPA does contain some exceptions for disclosure to prevent the spread of disease, but employers would do well to consult with counsel prior to making such disclosures without authorizations or court orders.

Depending on the circumstances, other state and federal laws may affect an employer's response to a potential disease outbreak at work. Employers with concerns are advised to discuss their particular situation with an attorney.

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