

# H1N1 Flu Presents Employers with Numerous Issues

*This Legal Advisory does not purport to be a substitute for advice of counsel on specific matters.*

Harris Beach has offices throughout New York State, including Albany, Buffalo, Ithaca, New York City, Niagara Falls, Rochester, Saratoga Springs, Syracuse and Yonkers, as well as Newark, New Jersey.

The emerging threat of H1N1 flu presents employers with numerous labor and employment issues. These issues may require employers to review and revise some of their existing employment policies or, in certain situations, implement entirely new policies in an effort to prevent or combat the spread of H1N1 flu in the workplace. The following information is intended to answer common questions that employers may have about H1N1 and various laws including the Americans with Disabilities Act ("ADA"), the Fair Labor Standards Act ("FLSA"), the Family and Medical Leave Act ("FMLA"), and the Occupational Safety and Health Act ("OSHA").

While this Legal Advisory highlights and provides general guidance on various legal issues, many determinations surrounding H1N1 and labor and employment laws require a factual case-by-case analysis. Accordingly, if you have specific questions about the impact of H1N1 on any employment or employment related issues, please contact Daniel J. Moore at (585) 419-8626 or the Harris Beach attorney with whom you usually work.

## General Issues on Employer Preparation and Prevention

**Question:** May an employer ask its employees to disclose if they have a compromised immune system or chronic health condition that the CDC says could make them more susceptible to complications associated with H1N1?

**Answer:** The ADA generally prohibits employers from requesting such information because it is a disability-related inquiry that is likely to disclose the existence of a disability. Such an inquiry may be lawful under limited circumstances where an employer has a reasonable belief, based on objective evidence, that an employee's ability to perform his or her essential job functions will be impaired by a medical condition or an employee will pose a direct threat due to a medical condition. Employers should consult with legal counsel prior to making any disability related inquiry.

**Question:** May an employer attempt to identify which employees are more likely to be unavailable for work in the event of a major H1N1 pandemic without violating the ADA?

**Answer:** Yes. Employers may make inquiries that are not disability related. According to the EEOC, an inquiry is not disability-related if it is designed to identify potential non-medical reasons for absence during a pandemic on an equal footing with medical reasons. Such an inquiry should be structured so that employees give only one answer of "yes" or "no" to the entire question without specifying the factors that apply to them individually. Relevant non-medical inquiries include whether the employee would be unable to come to work if: (1) schools or day-care centers were closed; (2) other services available to dependents were unavailable (e.g., hospice, home health services); and (3) public transportation was sporadic or unavailable.

**Question:** May an employer require its employees to adopt infection-control practices such as regular hand washing and coughing and sneezing etiquette at the workplace?

**Answer:** Yes. The EEOC has indicated that implementing such practices is allowable under the ADA. Employers should ensure that such policies are enforced consistently to avoid claims of discrimination.

**Question:** May an employer compel all of its employees to take an influenza or H1N1 vaccine?

**Answer:** No. Employees may be entitled to an exemption from a mandatory vaccination requirement due to disability or sincerely held religious belief, practice, or observance that prevents such vaccination. Additionally, any vaccination requirement may be impractical due to vaccine shortages and the effect it may have on employee morale.

**Question:** May an employer require an individual who has potentially been exposed to H1N1 to remain out of work until the incubation period passes regardless of whether the employee is exhibiting any H1N1 symptoms?

**Answer:** Yes. Although the CDC has indicated that employees without symptoms may report to work regardless of whether they have been exposed to H1N1, employers may choose to require employees to stay home during the incubation period, which can be as long as seven (7) days according to the CDC. When evaluating a policy with regards to employees exhibiting no H1N1 symptoms, employers should consider the effect a policy will have on its employees and, if applicable, its customers. For example, health care providers may wish to send exposed employees home to protect patients in high risk categories. Whatever policy employers implement, they must ensure that it is applied

consistently and fairly to avoid any claims of discrimination.

**Question:** May an employer direct an employee who is exhibiting symptoms of H1N1 to leave work without the employee's consent?

**Answer:** Yes. Employers must apply such a practice consistently to avoid any claims of disparate treatment on the basis of protected characteristic.

**Question:** May an employer disclose the fact that an employee has H1N1 to other employees and customers/clients?

**Answer:** It depends. The first issue an employer must determine is whether the disclosure of such information is prohibited by law. Such information is not protected by HIPAA's privacy protections unless the employer acquired the information pursuant to its role as the administrator of the employee's health insurance, which will usually not be the case. Although generally not subject to HIPAA protections, the EEOC has issued guidance indicating that an employee's voluntary disclosure of H1N1 symptoms or diagnosis to an employer constitutes confidential medical information under the ADA and, therefore, can only be disclosed to certain individuals such as supervisors and first-aid personnel. Thus, the EEOC believes that employers cannot disclose that an employee had H1N1 to coworkers and customers that may have come in contact with the infected individual. The EEOC's position, however, is arguably unsupported by the plain language of the ADA and has been contradicted by some federal court opinions that hold an employee's voluntary self disclosure does not constitute confidential medical information and, therefore, may be disclosed.

Due to the uncertainty surrounding the confidential nature of voluntary self disclosures, employers should weigh the potential benefits of informing other employees and customers against the risks of failing to comply with the position stated by the EEOC. Employers can also attempt to mitigate such risks by either obtaining the affected employee's consent to disclose the information or by issuing a general statement regarding a case of H1N1 in the workplace without identifying the affected employee. For many employers, the benefits of disclosure will outweigh the risks. However, due to the EEOC's position on the issue, employers should consult with their labor and employment attorneys prior to reaching a final decision on the matter.

**Question:** When should employers allow an employee with H1N1 symptoms to return to work?

**Answer:** The CDC's current guidelines provide that employees in general business settings may return to work after they have been fever free for a period of twenty four (24) hours. In employment settings where people in the workplace are at a greater risk of either contracting H1N1 or exhibiting complications due to H1N1 (e.g., health care settings, daycare, nursery schools) the CDC recommends that employees return to work seven days after the onset of symptoms or twenty four (24) hours after the resolution of symptoms, whichever is longer. An employer may choose to follow these guidelines.

**Question:** May employers require employees that have been absent for exhibiting H1N1 symptoms to provide a doctor's note indicating they are fit for duty prior to allowing their return to work?

**Answer:** Generally, employers may require such a note as long as it is a part of their policy and is applied consistently. Additionally, employers should remember that H1N1 may qualify as a "serious health condition" under the FMLA and, as such, may be subject to specific rules regarding an employee's return to work under the FMLA and the employers' FMLA policies.

## **Wage and Hour Issues**

**Question:** May employers require an employee who has been sent home involuntarily due to exhibiting H1N1 symptoms or being exposed to H1N1 to use his/her vacation or PTO for the absence?

**Answer:** Yes, subject to the provisions of the employer's employment policies and the "salary basis" rules under the FLSA, both exempt and non-exempt employees may be required to use vacation or PTO in full day and less than full day increments when they are sent home due to H1N1 policies. Employers must also ensure that such a practice is not limited by the terms of any employment contract or collective bargaining agreement.

**Question:** If an employee either has no PTO or vacation or has exhausted such vacation or PTO, can the employer reduce the employees pay for time missed due to H1N1?

**Answer:** An employer may dock non-exempt employees' wages for missed time under the FLSA. For exempt employees, employers may generally only dock pay for full day absences initiated by the employee. If an issue arises regarding payment to exempt employees, employers should contact legal counsel to ensure that their actions do not compromise an employee's FLSA exempt status.

**Question:** May an employer require certain employees to work from home or telecommute due to concerns regarding H1N1 in the

workplace?

**Answer:** Yes. However, employers must implement practices and policies that allow them to determine how many hours employees work outside of the office and ensure that all employees are credited and paid for all hours worked.

**Question:** Must an employer pay employees if it closes down their work location due to concerns surrounding H1N1 virus?

**Answer:** An employer need not pay a non-exempt employee in the event the employee performs no work due to an office closure. Exempt employees, however, must be paid even if they perform no work due to office closure as long as the exempt employee is ready, willing and able to work. This is true even if the exempt employee does not have any vacation or PTO.

## **ADA and FMLA Issues**

**Question:** Does H1N1 constitute a "disability" under the ADA?

**Answer:** Generally no. The EEOC has issued guidance indicating that if H1N1 is akin to seasonal influenza or the 2009 spring/summer H1N1 virus, then it does not constitute a disability. However, certain complications arising from H1N1 may qualify as an ADA disability. Additionally, employers must be aware that H1N1 may constitute a disability under the New York State Human Rights Law, which has a more expansive definition of the term disability than the ADA, even as newly amended. Unfortunately, the New York State Division of Human Rights has yet to issue any guidance on this subject.

**Question:** May an employee assert a claim under the ADA on the basis that the employee was "regarded as disabled" in the event that the employer sends an employee home due to H1N1 symptoms or exposure to H1N1?

**Answer:** No. The ADA amendments exclude impairments that are "transitory and minor" when determining whether an individual is disabled. An impairment is "transitory" if it has an actual or expected duration of six (6) months or less. Moreover, the EEOC has issued proposed regulations on the ADA that clearly indicate "seasonal or common influenza" is usually not a disability within the meaning of the ADA.

**Question:** Are otherwise FMLA-qualified employees able to take FMLA leave simply because they have H1N1 or H1N1 type symptoms?

**Answer:** No. Employees with H1N1 will not qualify for FMLA leave unless the circumstances of the individual case satisfy the regulatory definition of a "serious health condition." Many cases of H1N1 will not constitute a "serious health condition" because employees will not seek treatment from a health care provider. On the other hand, H1N1 may constitute a "serious health condition" for some employees either because they seek medical treatment or suffer or develop additional issues because of H1N1. Accordingly, employers must review each case of employee absence related to H1N1 on its own merits.

## **OSHA Issues**

**Question:** May an employer provide and allow employees to wear dust or face masks on a voluntary basis?

**Answer:** Yes. However, if an employer provides masks and allows employees to use them it must comply with certain OSHA regulations, which, among other things, require the employer to provide employees with certain information on respiratory protection issued by OSHA.

**Question:** May an employer require its employees to wear personal protective equipment such as masks and gloves in response to the H1N1 pandemic?

**Answer:** Generally yes. However, employers must be aware that some employees may need a related reasonable accommodation due to disability under the ADA. For example, some individuals may not be able to use a certain kind of mask due to asthma or a certain kind of glove due to a dermatological condition. Additionally, if an employer requires employees to wear masks or any other kind of "respirator," the employer must have a written respiratory protection program that includes training, fit-testing medical examinations, and other provisions. Employers considering the use of masks or other respirators should contact legal counsel to ensure compliance with all OSHA regulations.

**Question:** Does an employer ever have to provide its employees with respiratory protection?

**Answer:** Yes, according to OSHA's H1N1 guidance. OSHA has indicated that the "General Duty Clause" of the act, which requires employers to maintain a workplace free from recognized hazards, requires certain employers to provide protection under certain circumstances. For example, OSHA indicates that health care providers are in the "high risk" category for contracting H1N1 and, therefore, such employers

should take certain actions, including providing respiratory protection to employees.

For industries other than health care, OSHA does not recommend the provision of respiratory protection or other personal protective equipment at this time. However, employers should still take certain action in response to a known case of H1N1 in the workplace to avoid a violation of the "General Duty Clause." For example, OSHA recommends that employers encourage sick workers to stay home, promote hand hygiene and cough etiquette, keep the workplace clean, promote vaccination, address concerns regarding travel to areas with a high concentration of H1N1, and plan for additional actions if the severity of the pandemic increases. OSHA also recommends that employers develop a policy on how to deal with workers and customers that become ill and appoint a "go to" person to respond to cases of H1N1.

**Question:** Is H1N1 an illness that employers must record and document pursuant to OSHA's recordkeeping requirement?

**Answer:** While it is somewhat unclear, employers should likely act as if H1N1 is subject to OSHA's recordkeeping requirements. The recordkeeping requirement applies only to an employee illness if it is more likely than not that a factor or exposure in the workplace caused or contributed to the illness. In terms of H1N1, it will be very difficult for the majority of employers to prove that the illness was contracted outside of work or that the workplace had absolutely no effect on the illness.

Additionally, while recordkeeping requirements do not apply to the common cold or flu, it is likely that OSHA would differentiate between common flu and H1N1 in light of the vast amount of information and guidance it has issued on the subject since the spring of 2009. Accordingly, the best practice for employers is to treat H1N1 illnesses as workplace illnesses subject to recordkeeping requirements.

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