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Plan For Now and For Later; H1N1 Expected to Resurge in the Fall Is Your Organization Prepared?

In today's economic climate, employers are already operating with limited workforces. The possibility of an H1N1 flu (swine flu) pandemic means that employers may have to operate their businesses with even fewer workers during the pandemic, while flu-stricken employees increasingly worry about job security.

You may think that the worst of the H1N1 flu has passed, but as of May 5, 2009, the World Health Organization still considers the outbreak to be at Phase 5, one level below an official pandemic. The United States has reported 286 cases in 36 states, with one death. Most importantly, experts caution that the outbreak may weaken in the warmer months only to resurge with a vengeance in the fall and winter, during the normal flu season when illnesses spread more easily. At the height of a pandemic, experts warn that up to 40 percent of the workforce could be absent for about a two-week period. If your organization does not have a pandemic plan in place, now is the time to act.

OVERVIEW OF H1N1

What Is the H1N1 Flu?

Influenza, or flu, is a virus that infects people, birds, pigs and other animals such as ferrets. H1N1 is a form of the virus that normally infects pigs. There are many forms of flu, and the different varieties have the ability to exchange genes with one another. The form of flu that originated in Mexico is a genetic mixture of viruses that have been seen in pigs, birds and people. It is being called H1N1 because the overall structure of the virus is of the type that affects pigs.

How Is It Spread?

Studies are ongoing as to how H1N1 is transmitted. Flu is generally transmitted through the respiratory tract. Droplets of infected body fluids can carry flu when people cough or sneeze. Neither contact with pigs nor eating pork has been linked to the spread of the flu.

What Are the Symptoms?

About one to four days usually elapse between the time a person is infected and the onset of symptoms. Influenza normally causes symptoms such as coughing, sneezing, headaches and body aches, fever, chills and sometimes vomiting and diarrhea. H1N1 causes the same symptoms, and may be difficult to distinguish from other strains of flu and respiratory illnesses. Severe cases of flu that lead to death are normally seen in very young and very old people whose immune systems are

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too weak to fight off the virus. Adults with severe illness may also have difficulty breathing, dizziness, confusion or severe vomiting and diarrhea.

How Is H1N1 Currently Treated?

According to the Centers for Disease Control there are currently two antiviral medications recommended for treatment and/or prevention: oseltamivir (Tamiflu®) and zanamivir (Relenza®). These medications keep the flu viruses from reproducing. Thus, if a person becomes ill, the medications can reduce the severity of symptoms and speed recovery; the medicines also can prevent complications from occurring. Once infected, treatment should begin as soon as possible, preferably within two days.

LEGAL CONSIDERATIONS ASSOCIATED WITH A PANDEMIC FLU

OSHA

Both the Occupational Safety and Health Act (OSHA) and Ohio law (R.C. Ann. §4101.11) impose a duty upon employers to provide a safe workplace free of recognized hazards likely to cause harm or death. In the event of a flu outbreak in the workplace, this duty would require employers to take certain steps to protect the health and safety of workers.

Every employer should review OSHA's guidance on preparing for an influenza pandemic in the workplace and prepare a comprehensive plan tailored to their business. This plan will include implementing good hygiene and infection control practices. Of particular note, OSHA has strict regulations regarding the distribution and use of masks and respirators in the workplace. Employers can be subject to citations and monetary penalties for OSHA violations. To review *OSHA Guidance on Preparing Workplaces for an Influenza Pandemic*, go to http://www.osha.gov/Publications/influenza_pandemic.html.

Workers' Compensation

In Ohio, an employee who is exposed in the workplace and infected with pandemic influenza may be entitled to workers' compensation if the condition is found to be "arising out of and in the course of employment." Employers are advised to ensure that their workers' compensation premiums are up-to-date and to evaluate what occupational diseases are covered.

While employees must provide medical evidence that the illness is work-related, in a pandemic the health care system will be taxed and employees may have difficulty obtaining medical proof. Employers should consider whether they will pay workers' compensation benefits in the absence of medical proof of a work-related illness in a pandemic.

Keep in mind that workers' compensation immunity does not extend to intentional torts, and thus implementing infectious control practices like those suggested by OSHA will be important to avoiding claims of intentional exposure.



FMLA

Under the Family and Medical Leave Act (FMLA), influenza is generally not a serious health condition. However, pandemic flu could qualify as a serious health condition triggering an employee's entitlement to 12 weeks of unpaid leave if it requires treatment by a physician over a three-day period, and otherwise meets the definition of serious health condition.

Remind employees to follow established call-in procedures absent extenuating circumstances, so that the company can quickly adjust operations affected by absences. Employees must be notified in advance if a fitness-for-duty certification is required for them to return to work.

Companies should review their policies under the new FMLA regulations. Be prepared to meet the FMLA notice requirements even when faced with numerous requests at once. At the same time, employers should be aware that an employee's ability to timely submit a medical certification form or fitness-for-duty form may be impaired during a pandemic due to strain on the health care system. Because the FMLA provides extended time for employees to submit this information where it is not practicable under the circumstances to meet the normal deadlines, employers are advised to review the regulations and contact counsel before taking adverse action.

ADA and HIPAA

While influenza generally does not qualify as a disability because of the temporary nature of the condition, an employee infected with influenza could develop serious or chronic symptoms or aggravate a pre-existing disability and become entitled to a reasonable accommodation under the Americans with Disabilities Act (ADA) and Ohio law. A reasonable accommodation may be unpaid leave during recovery, or job modifications such as telecommuting.

During a pandemic, employers may ask employees to disclose whether they or a family member have been exposed to the influenza. Keep medical information confidential in order to comply with privacy requirements under the ADA and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

An employer may also require employees to remain home until symptom-free or to provide a doctor's note indicating the ability to return to work if the employer has a reasonable belief that the medical condition would impair the employee's ability to perform the essential functions of the job or pose a direct threat to safety in the workplace.

FLSA

While employers should strongly consider establishing more liberal leave policies and flexible work schedules that will apply during a pandemic, relaxing some aspects of these policies could implicate the Fair Labor Standards Act (FLSA).



Telecommuting is a viable option for exempt employees during a pandemic, but is a little risky for non-exempt employees who must be paid for all hours worked. Where a non-exempt employee is permitted to work from home, the company has less oversight over the number of hours actually worked and is more susceptible to claims for overtime. Maintaining strict time-keeping requirements and disciplinary policies for unauthorized overtime would be essential to minimizing risk.

When a significant part of the workforce is out sick with influenza and temporary employees are hard to come by, a desperate employer may be tempted to seek volunteers to help keep the company going. However, under the FLSA, the general rule is that workers for private, for-profit companies are entitled to minimum wage and cannot volunteer their time. Employers are advised to seek counsel on exceptions that might apply.

Employers are also advised to review their employee handbooks, collective bargaining agreements and other contracts that govern the employer-employee relationship in developing a pandemic plan.

PRACTICAL ADVICE FOR EMPLOYERS

Education

Before taking any steps, be sure to stay abreast of the day-to-day developments—both for yourself and for proper communications to employees.

- Staying abreast of available information shows that an employer is making good faith efforts to keep its workplace safe from known hazards.
- Maintaining current and accurate information helps ensure that any precautionary measures are appropriate in terms of the risk involved.

Evaluate Your Risk

Every business is different; the kind and amount of risks and responsibility that an employer has depends largely on the industry involved. Evaluate the extent of your workforce and the nature of employee interaction. A large company where employees work largely with the public or with a large group of people will have a different level of risk than a small and/or private office. Further, companies that have nationwide or international locations are at a different risk level than other businesses.

Evaluate Your Current Preparedness

In consideration of your company's particular risks, determine how prepared you currently are to meet those risks and work from there to fill in any gaps.



Develop Plans Accordingly

- Forecast for employee absences during a pandemic based on factors such as personal illness, family member illness, community containment measures and quarantines, school and/or business closures and public transportation closures.
- Develop a planning/implementation team.
 - Assign primary and secondary responsibility for well-defined roles.
 - Identify a pandemic coordinator to ensure that team members are adequately trained on their responsibilities for response planning.
- Identify essential employees and other critical inputs (*e.g.*, raw materials, suppliers, sub-contractor services/products and logistics) required to maintain business operations by location and function during a pandemic.
- Train and prepare an ancillary workforce (*e.g.*, contractors, employees in other job titles/descriptions, retirees).
- Evaluate availability of and employee access to health care services during a pandemic, and improve services as needed for your risks.
- Depending on your risk level, you may wish to consider coordinating with local health organizations.
- Encourage and track annual influenza vaccination for employees. Consider covering the vaccination costs.
- Identify employees and key customers with special needs, and incorporate the requirements of such persons into your preparedness plan.

Policy and Practice Considerations

It is difficult to foresee the extent to which your workplace policies might be impacted, but the wise course of action is to modify such plans to allow for contingencies stemming from the H1N1.

- Establish sick time and return-to-work policies or recommendations.
 - Encourage or require employees to go or stay home immediately upon showing symptoms of H1N1.
 - Where there is a known risk of potential outbreak within a business, consider requiring employees who have traveled to areas with a high level of risk to remain off work during the incubation period.
 - Consider requiring a physician's authorization before employees who were diagnosed with H1N1 return to work.



- Establish other policies for preventing influenza spread at the worksite, such as promoting cough etiquette and hand hygiene.
- If considering the use of masks, be careful. All masks are not created equal. There are two types of masks that look very similar—one is a surgical or dust mask and the other is an N95 respirator. The surgical or dust mask protects others from any disease the wearer might have but not vice versa. The N95, however, provides protection both ways.
- Establish policies for employee compensation and sick-leave absences unique to a pandemic (*e.g.*, non-punitive liberal leave), including policies on when a previously ill person is no longer infectious and can return to work after illness.
- Establish policies for flexible worksite (*e.g.*, telecommuting) and flexible work hours (*e.g.*, staggered shifts).
- Establish policies for restricting travel to affected geographic areas and evacuating employees working in or near an affected area.
- Set up authorities, triggers and procedures for activating and terminating the company's response plan, altering business operations and transferring business knowledge to key employees.

Communication

Precautionary measures have no value unless accurately and thoroughly communicated.

- Specific information to communicate includes:
 - Your commitment to keeping the workplace safe;
 - Policy changes;
 - Your plan to deal with outbreaks;
 - What you expect from employees in terms of compliance with policies;
 - Persons to contact for information; and
 - Notification to employees who may have been exposed to H1N1 by another employee.

Maintain Documentation

There is always a risk of employee abuse of policies, as well as for human error. Therefore, keeping accurate documentation can minimize an employer's liability and the risk of employee policy abuse.

- Maintain a record of the communications that have been sent to employees.
- Maintain an updated list of employees who have taken sick leave and keep a record of personnel who have had contact with infected people.



Know Your Resources

Various web sites offer up-to-date information and recommendations including:

- The federal government's pandemic flu web site: <http://www.pandemicflu.gov/>
- World Health Organization: <http://www.who.int/en/>
- Department of Health and Human Services: <http://www.hhs.gov/>
- Centers for Disease Control and Prevention: <http://www.cdc.gov/h1n1flu/>

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