



Employment Law Alert

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Swine flu in the workplace: an update and proactive response

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As the outbreak of novel influenza A (H1N1) (“Swine Flu”) continues to spread, and given the uncertainty about what the upcoming flu season might bring and when, the Center for Disease Control’s Advisory Committee on Immunization Practices has taken an important step in preparations for a voluntary novel H1N1 vaccination effort to counter a possible severe upcoming flu season. On July 29, ACIP met to consider who should receive the novel H1N1 vaccine when it becomes available and published its guidance. Employers should monitor these developments.

Employers should also now be taking other action to educate employees and prepare for the impact of a swine flu outbreak in the workplace this upcoming flu season. This is particularly true for high risk workplaces such as hospitals, medical offices, schools, and workplaces that provide services to high risk populations. However, it is prudent for all employers to now take precautionary steps. For most employers this is best accomplished through a written communicable illness response plan, which serves as a guide for management and employees. For those employers who have such a program in place, now is the time to review and update your program and activate it. For those employers who do not yet have a program, now is the time to implement one. Waiting until a crisis occurs is waiting too long. It is virtually impossible to develop and effectively implement such a program under crisis conditions and by waiting you will miss the opportunity to take proactive preventative steps.

Background

Swine flu viruses do not normally infect humans, however, there are documented cases of human infections with swine flu and cases of human-to-human spread of swine flu viruses have been documented. The World Health Organization recently raised its threat level for the current outbreak of swine flu due to evidence of sustained human-to-human transmission in more than one country, and requested that governments begin implementing plans to deal with a possible pandemic. Prudent employers should regularly monitor developments here from reputable sources. Two of the best are the CDC at www.cdc.gov and the WHO at www.who.int.

Prudent employers can and should now be taking proactive steps to help protect their employees and prepare them for the potential impact of swine flu on the workplace. This is best done through implementation of a communicable illness response program that provides a structure for responding to the current swine flu outbreak as well as outbreaks of other communicable illnesses in the future.

Implementing a communicable illness response program

An effective communicable illness response program will be simple and clear, and should cover each of the elements listed below. Of course, high risk work environments will need a more comprehensive program and lower risk environments will need only a more limited program. However, the same eight fundamental elements are needed in all programs. Please note that if you are implementing a new program or making revisions that change working conditions, you may have a bargaining obligation if you have a unionized workforce.

1. **Scope.** The program should cover *any* communicable illnesses or disease that poses a credible threat of transmission in your particular workplace. Examples might include swine flu, active TB, SARS, seasonal flu, etc., and the program should *not* just be limited to currently known illnesses and diseases. Typically the program should *exclude* any communicable illnesses that do not pose a credible threat of transmission in the particular work place (e.g., HIV in an office environment). Such exclusions will help avoid violations of the ADA and, with proper explanation, should help alleviate any unnecessary employee concerns and fears.
2. **Responsibility.** The program should assign responsibility to one or more individuals to maintain and implement the program, and to keep it updated as necessary. This includes regular monitoring of developments through news reports, and information from the CDC, WHO, local public health authorities, and other appropriate governmental agencies and health organizations.
3. **Following applicable regulations and instructions by appropriate governmental agencies.** Typically, the program will note that the company will follow all applicable regulations or instructions issued by appropriate agencies but may distinguish between a government regulation and a non-mandatory guideline. The program may provide discretion for the company to modify guidelines to best fit the needs of the particular work place. This is particularly important for high risk work environments.
4. **Information and education.** The program should provide a method for distributing appropriate information to employees about communicable illnesses generally and specifically about particular outbreaks.

With specific regard to the current swine flu outbreak, we recommend early communication now. This will help ensure employees understand that you are monitoring the situation and are prepared to respond. In addition to their own health concerns, we recommend providing employees with information that will help them keep their families safe and healthy. Experience has shown that this is often the number one concern of employees and it should be addressed early. At this early stage, employees should be provided with a list of credible resources so they can readily access good information, such as the CDC and WHO websites. They should be specifically instructed to be alert for symptoms and encouraged to consult with their own medical providers if they have any questions or concerns. To date, swine flu symptoms have been very similar to seasonal flu (fever, sore throat, cough, stuffy nose, chills, aches and pains, and fatigue). Diarrhea and vomiting have also been reported. Pregnant women are known to be at a higher risk for seasonal influenza complications, and might also be at higher risk for novel H1N1 influenza complications. Pregnant women with flu-like symptoms should contact their health care provider. For more information, access the CDC website and visit “What Pregnant Women Should Know About the H1Na Virus.”

Spread of this flu is thought to be happening in the same way as the season flu spreads—coughing or sneezing by people with influenza, or by touching something that has the flu virus on it and then touching one’s eyes, mouth, or nose. To prevent the spread of the illness, employees should be instructed to take universal precautions as noted below, and they should be instructed as to their reporting obligations as also noted below.

5. **Requiring universal precautions.** The program should mandate the use of universal precautions. While every illness is different, there are certain simple, yet very effective, steps that *every* employee can follow to minimize the potential for infection and the potential for transmission of swine flu and other communicable illnesses. These universal precautions include the following:
 - a. **Frequent hand washing.** Since access to soap and water is not always convenient (and some employees are allergic to antibacterial and/or other soaps), ready access to a hypoallergenic hand sanitizer should be provided. As an example, in an office environment this might mean providing containers of such hand sanitizers at work stations. In other environments, it might mean hand sanitizer wall dispensers in convenient locations. Employees should be instructed to frequently wash or sanitize their hands, and particularly to do so after shaking hands, using a phone, handling money, etc. Employers may want to provide sanitizing towelettes so that employees can wipe down work surfaces, such as phones, chair arms, desks, computer keyboards, door handles, door knobs, etc. before use.
 - b. **Coughing/sneezing protocols.** Employees should be taught basic coughing/sneezing protocols. In high-risk environments, surgical masks are recommended for individuals who are coughing.
 - c. **Minimizing exposure to others who are ill.** Minimizing exposure to others who are ill is obviously critically important. Employees who appear ill when they are at work should be sent home, and when an employee is ill, they should be encouraged, or perhaps required, to stay home. This can, of course, create an enforcement problem with employees who try to take advantage of this policy. But the cost of having a widespread illness in the workplace can be very high, and, employees who attempt to misuse the policy can be subject to discipline, up to and including discharge.

To further minimize misuse, an employer may also want to have a policy requiring medical certification when an employee calls in ill for an extended period, or has a confirmed case of an illness communicable in the workplace. Clear absenteeism policies can often serve to minimize misuse. All applicable leave laws (FMLA etc.) must also be followed, as well as the terms of any applicable collective bargaining agreement.

6. **Reporting Requirements.** The program should require employees to report to the company when (a) they are experiencing symptoms of influenza-like illness, or (b) are diagnosed with an illness communicable in the workplace, or (c) they believe they may have been exposed to a person so diagnosed, or (d) when they have recently visited a location where there has been an outbreak of a communicable illness. The policy should note that the information reported will be kept confidential to the extent reasonably possible, but must make it clear that full confidentiality cannot be guaranteed. The policy should also urge employees to consult with their medical provider under these same circumstances.

The program should also describe when the employer will make a report of a known or suspected communicable illness to public health authorities and to co-workers.

7. **Travel procedures.** Typically a communicable illness response program will note that the company will generally follow the travel advisories issued by the CDC or other appropriate agencies. Distinctions can be made between work travel and personal travel. As an example, work and personal travel typically can be handled differently with regard to whether or not employees will be paid during a period of incubation and quarantine.

In the case of swine flu, it appears there may be a period of up to seven (7) days between infection and the appearance of symptoms. This should be taken into account in setting policies for return to work after travel to an area where there has been an outbreak.

8. **Return-to-work procedures.** The program should require certification from a medical provider that it is safe for an employee to return to work after (a) being diagnosed with a communicable illness, (b) returning from an area where there has been an outbreak of a communicable illness and (c) when an employee has been quarantined in association with such an illness.
9. **Business continuation preparation.** The program should include critical business continuation plans. This will vary widely from employer to employer, but should generally include backup plans for supply and distribution chains, and contingent workers in the event of mass absences.

Conclusion

We are observing the early stages of the H1N1 flu outbreak and it is not clear how quickly or far it will spread in the upcoming flu season. However, it is prudent for employers to adopt or update a written communicable illness response program now. Doing so will allow an employer to address current employee concerns and respond quickly and effectively to the outbreak should it impact the workplace.

If you would like more information about responding to swine flu in the workplace or developing, revising, or activating your communicable illness response program, please contact your regular Nixon Peabody attorney or:

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