

## H1N1 Virus (Swine Flu): What Every Employer Needs To Know

With the flu season imminent, the potential H1N1 virus (also known as the “swine flu”) pandemic has generated worldwide concern. The World Health Organization raised the pandemic threat level for the H1N1 virus to level 6, the highest alert level. For employers, this potential outbreak raises a myriad of issues. In addition to business issues such as possible widespread employee absences, the potential pandemic implicates the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Occupational Safety and Health Act (OSHA), privacy laws and other employment-related laws. This Alert addresses some commonly asked questions.

### What is the H1N1 virus?

The H1N1 virus is a new strain of the flu that has been contracted by persons in the United States and in many other countries around the world. The virus is spread mainly from person to person when infected people sneeze or cough around others. The virus can survive on hard surfaces such as doorknobs, tabletops and telephones for hours. Thus, a person can also be infected by touching the virus on an object and then touching his or her nose, eyes or mouth. Symptoms of the H1N1 virus include fever, cough, runny or stuffy nose, body aches, chills, headaches, fatigue, sore throat, and in some instances, diarrhea and vomiting.

### If an employee comes to work and is suspected of carrying the H1N1 virus or admittedly has the H1N1 virus, can an employer send the employee home?

Yes. The Centers for Disease Control and Prevention (CDC) has issued guidance recommending that employers send home employees who have been or are suspected of being infected with the H1N1 virus in an effort to control the spread of the virus. This guidance is consistent with OSHA’s requirement that employers provide employees with a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

Decisions involving when and when not to send an employee home should be made without regard to ethnicity, race or any other protected characteristic. For example, even though the H1N1 virus is believed to have originated in Mexico, employers should not scrutinize employees of Mexican or Hispanic descent more rigorously.

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### **Can an employer inform other employees if an employee is suspected of or has a confirmed case of the H1N1 virus?**

Yes, consistent with the privacy protections described below. The CDC recommends that co-workers of sick employees be informed that they have been exposed to an individual who has a probable, confirmed or suspected case of the H1N1 virus. Potentially exposed employees should be encouraged to monitor themselves for any signs of infection.

The failure to safeguard an employee's confidential medical information is a violation of the ADA, which allows disclosure of employee medical information in very limited circumstances, including to first aid and safety personnel and to the employee's manager in certain instances, but not to co-workers of the employee. Thus, employers should take care not to provide identifying information about an infected or potentially infected individual. For example, an employer should inform employees that they may have been exposed, but should not identify the employee who may have exposed them. Employers should also ensure that all employee medical information is kept separate from other personnel records and otherwise kept confidential.

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### **Is an employee who contracts the H1N1 virus considered disabled under the Americans with Disabilities Act?**

Not in most cases. Under the ADA, a "disability" is defined as a physical or mental impairment that substantially limits a person in a major life activity. Generally, an impairment must be long term, and the seasonal flu is not considered a disability as it generally lasts only for a short duration and has no lasting effects.

The ADA, however, protects not only individuals whose medical condition renders them disabled, but also those who, though not actually disabled, are "regarded as" disabled by their employer. Thus, employers should take care not to treat employees who have returned from a virus-caused leave of absence in a disparate fashion.

Also, certain states (*e.g.*, New Jersey and New York) employ lower thresholds as to what constitutes a disability, so employers should be mindful of applicable state law as well.

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### **If an employee is absent from work due to the employee's contraction of the H1N1 virus or is taking care of a family member who has been infected with the virus, is the employee entitled to any sort of leave?**

Usually, yes. If the infection causes the employee (or a family member for whom he or she is caring) to need in-patient treatment or results in a period of incapacity of more

than three consecutive days and continuing treatment from a healthcare provider, the illness will qualify as a “serious health condition” under the FMLA and the employee will be eligible for FMLA leave, assuming he or she meets the hours and length of service thresholds and has not already used all of his or her leave allotment.

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### **If an employee wants to return to work after a bout with the HiNi virus, can an employer require the employee to provide a fitness-for-duty certification or submit to a medical examination to confirm that the virus is gone?**

Yes, as to a fitness-for-duty certification. If an employee is out on FMLA leave due to the flu and the employer has a uniformly applied policy of requiring employees on FMLA leave to provide a fitness-for-duty certification from their physician upon return from leave, the employer may insist that an infected employee provide such a certification upon his or her return from FMLA leave. In most situations, this certification should be sufficient, and the employer should not require a separate medical examination.

There are a few situations where an employer may require a separate medical examination, either in lieu of a fitness-for-duty certification or in addition to one. We recommend that employers who believe that a medical examination is necessary (typically where the employee still has some work restrictions) consult their counsel.

At a minimum, employers will want to heed the CDC’s recommendation that they should advise employees who are absent due to an H1N1 infection not to return to work until at least 24 hours after the employee’s fever (100°F or higher) has subsided.

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### **If an employee must be absent from work because his or her children’s school has closed due to a HiNi virus outbreak, is the employee’s time off of work protected under the FMLA?**

No. If the school is closed due to a flu outbreak, but the employee’s child is not affected by the illness, the FMLA does not require leave.

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### **What practical steps can employers take to prepare the workplace for a potential HiNi pandemic?**

- > *Develop a Pandemic Plan* – The Department of Labor has issued guidance via OSHA advising all employers to plan for an influenza pandemic. Pandemic plans should include, among other things: designation of a coordinator responsible for oversight of the plan’s implementation; specific policies addressing issues that are likely to arise during a pandemic (*e.g.*, absenteeism, compensation, handling sick employees, etc.); an assessment of critical functions and operations and how the functions can be performed during a pandemic with limited staffing; an assessment of telecommunications and information technology systems to enable telecommuting; the establishment of communication practices during

a pandemic; and the establishment of a training program for HR professionals, supervisors and others who have responsibility for implementation of the pandemic plan.

- > *Revisit and Update Employment Policies* – Employers should revisit policies regarding unscheduled leave, sick leave, compensation and any other policies that will be vital in the event of a pandemic. At a minimum, employers should ensure that their policies do not penalize employees for staying home when sick and that sick employees are encouraged to stay home if they are suffering flu-like symptoms.
- > *Educate Employees on the H1N1 Virus and Good Hygiene* – Employers should consider providing employees with up-to-date information on the H1N1 virus and making available or providing access to information regarding the seasonal flu vaccine. In addition, employers should promote good hygiene in the workplace by placing posters in common work areas or sending e-mails regarding hand washing, cough/sneeze etiquette and other good hygiene practices that can help prevent the spread of the flu virus.
- > *Ensure that Appropriate Infection Control Practices Are in Place* – Among other things, employers should verify that there is sufficient soap and anti-bacterial hand gel available in common work areas; that adequate tissues and disposable towels are available to employees; and that cleaning staff has appropriate disinfectant and cleaning products and regularly cleans and disinfects work areas.

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### **Are there any resources that employers and human resources professionals can consult regarding the HiNi virus and the workplace?**

Yes. A list of resources for employers offered by OSHA, the EEOC and the CDC regarding the H1N1 virus can be found below:

- > [http://www.osha.gov/Publications/influenza\\_pandemic.html](http://www.osha.gov/Publications/influenza_pandemic.html)
- > [http://www.eeoc.gov/facts/h1n1\\_flu.html](http://www.eeoc.gov/facts/h1n1_flu.html)
- > [http://www.pandemicflu.gov/faq/workplace\\_questions/human\\_resource\\_policies/index.html](http://www.pandemicflu.gov/faq/workplace_questions/human_resource_policies/index.html)
- > <http://www.cdc.gov/h1n1flu/guidance/workplace.htm>
- > <http://www.flu.gov/plan/workplaceplanning/guidance.html>

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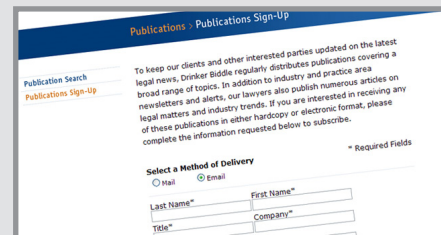
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