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What Employers Can Do To Confront The Flu

Swine Outbreak Offers Legal Challenges

By JASON R. STANEVICH

A pandemic influenza, commonly referred to as the "swine flu," has infected humans in the United States as well as multiple other countries, and the spread of the virus continues. On July 10, the Centers for Disease Control and Prevention released an update stating that as of the previous week, there were a total of 37,246 confirmed cases of swine flu in the United States. To date, in Connecticut, seven deaths have been contributed to the swine flu and nearly 1,400 cases exist. New York and New Jersey combine for nearly 4,000 cases, along with 52 deaths attributed to the virus. Given these updated statistics, the CDC anticipates more confirmed cases, hospitalizations, and deaths as influenza season approaches.

Although the effect of the H1N1 virus has been milder than anticipated, now is the time for employers to implement effective precautions to prevent the spread of swine flu or any other pandemic virus among employees. In addition, prudent employers will evaluate internal policies and procedures to remain in compliance with disability, leave, and health and safety laws. The purpose of this article is to educate employers about appropriate precautions and work practices that minimize the risk of potential employment claims caused by a pandemic influenza.

ADA Considerations

Title 1 of the Americans with Disabilities Act protects applicants and employees from disability discrimination. Because H1N1 is a short-term condition, the virus would probably not create the need for a reasonable accommodation under the ADA unless the virus left the employee with a lingering and disabling condition. The more likely ADA issues invoked by the swine flu are the ADA's limitation on disability-related inquiries and medical examinations, as well as the required confidentiality of medical records.

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Employers can require employees to adopt infection control practices. Requiring hand washing, coughing and sneezing etiquette, and tissue disposal does not violate the ADA.

The ADA regulates when and how employers may require medical examinations or request disability-related information from applicants and employees, regardless of whether an individual suffers from disability. This requirement affects when and how employers may request health information from applicants and employees regarding the H1N1 virus. Employers need to know when they can and cannot conduct said inquiries and require medical examinations.

An employer's ability to make disability-related inquiries or conduct medical examinations is reviewed at three distinct stages: (1) pre-offer of employment; (2) post-offer of employment; and (3) during employment. At the first stage, the ADA precludes all disability-related inquiries and medical examinations, even if job-related. However, after an employer provides an applicant with a conditional job offer, but before the employee starts work, the employer may make disability-related inquiries and require medical examinations regardless of whether they are job-related, provided that the employer does so for all entering employees in the same category.

At the third stage, after the employee starts work, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition." Thus, in limited situations, an employer may require an employee with H1N1 symptoms to be tested.

Careful With Questions

On May 4, the Equal Employment Opportunity Commission issued technical guidance to answer questions about workplace preparation strategies for the H1N1 virus. The EEOC provided guidance on how employers can properly plan for absenteeism and control infection in the workplace while remaining ADA compliant.

In light of the increasing number of swine flu cases, employers may wish to ask employees about factors, including chronic medical conditions, which may cause them to miss work in the event of pandemic. An employer must be careful here. Employers may legally survey their workforce to gather personal information needed for pandemic preparation only if the employer asks broad questions that are not limited to disability-related inquiries. An inquiry would not be disability-related if it identified non-medical reasons for absences during a pandemic on the same footing with medical reasons. A question about whether an employee has a compromised immune system may be considered disability-related under the ADA. On the other hand, asking an employee if he or she has a family member who has been exposed to pandemic influenza probably would not be considered a prohibited disability-related question.

Employers are also free to require employees to adopt infection control practices. For example, requiring hand washing, coughing and sneezing etiquette, and tissue disposal does not violate the ADA. Likewise, employers may require employees to wear personal protective equipment designed to reduce the transmission of a pandemic virus. Employers, however, should keep in mind that than an employee with a disability who needs a reasonable accommodation (*i.e.* non-latex gloves) should be accommodated, absent undue hardship. Lastly, an employer can lawfully encourage or require employees to work from home as an infection control strategy. Employers, however, must not single out employees based on national origin or any other class protected by federal and state anti-discrimination laws.

The ADA generally requires that an employee's medical information be maintained separately from their personnel information and not be disclosed to other employees or third parties. It goes without saying that employers are required to treat medical information obtained from disability-related inquiries and medical examinations as confidential medical records. As such, an employer taking steps to prevent or contain the swine flu or other pandemic virus should do so while making every effort to avoid disclosing the identity of any employee who has the virus, symptoms of the virus, or was exposed to the virus.

FMLA Considerations

Another employment-related concern triggered by the H1N1 virus is how employers should treat employee absences. If an employee is absent because he or she contracted the swine flu, or because the employee must care for a spouse, parent or child who contacted the virus, the employee is probably protected by the federal Family Medical Leave Act (FMLA) and its state counterpart. The FMLA provides leave to an employee if he or she is unable to come to work because of either the employee's own serious health conditions or that of the employee's spouse, parent or child. This does not mean that the employee can remain home to avoid catching the swine flu. If an FMLA-eligible employee is absent for more than three consecutive days and requires visits to a healthcare provider and/or continuing medical treatment, however, FMLA leave is likely available. FMLA requires an employer to return an employee to his or her job, or to a substantially similar position, after the employee returns from medical leave.

In most cases, H1N1 probably qualifies as a serious health concern, which is broadly defined as "an illness, impairment or physical condition that (A) involves inpatient care in a hospital, hospice, nursing home or residential medical care facility; or (B) continuing treatment, including outpatient treatment by a healthcare provider." Even if an employee may not be eligible for FMLA, employers are encouraged by the CDC to provide flexible leave policies or develop policies that encourage H1N1-affected employees to remain home voluntarily without fear of discipline or reprisal.

When an employee not protected by FMLA refuses to come to work, or when an employee refuses to come to work because of fear of contracting H1N1, employers must decide whether to grant time off or to take disciplinary action. As a practical matter, an employer may wish to voluntarily extend time-off policies in certain situations. However, if the employer wishes to suspend or terminate the employee, the employer must consider whether the employee is at-will or covered by a union contract, and consider other potential legal claims.

OSHA Considerations

Workplace safety law requires employers to provide a workplace free from hazards likely to cause death or physical harm. The Occupation Safety and Health Administration, on its web site www.osha.gov, provides detailed guidance on how to prepare the workplace for pandemic influenza. OSHA recommends that employers provide sufficient and accessible infection control supplies and, if needed, personal protective equipment to control the spread of virus among employees.

Employers must also remain cognizant of potential retaliation claims if the employer takes an adverse employment action against an employee who refuses to report to work because of H1N1 concerns. Employees have the right to file a complaint and request OSHA to conduct an inspection if they believe serious workplace hazards exist in the workplace. The Occupational Safety and Health Act prohibits employers from discharging or in any manner retaliating against any employee because the employee has exercised rights under the act, including the right to file a complaint. The act does not protect a worker who refuses to come to work or perform specific duties when there are no workplace hazards. Employees may refuse an assignment only if: (1) they reasonably believe that doing the work would put them in serious and immediate danger; (2) they have asked their employer to fix the hazard; (3) there is no time to call OSHA; and (4) there is no other way to do the job safely.

Best Practices

As an overall matter, employers should be guided in their relationship with their employees not only by federal employment law, but by their own employee handbooks, manuals, and contracts (including collective bargaining agreements), and by applicable state or local law.

At a minimum, employers must examine leave policies and ensure managers and supervisors are up to date on sick leave and medical examination procedures. Employers should also identify essential employees, essential business functions and other critical inputs required to maintain business operations should there be disruptions during a pandemic flu outbreak. While the H1N1 virus has not caused widespread employment issues, now is the time for employers to update their policies and prepare business continuity plans in the event of a serious pandemic influenza. ■

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