

RESOURCES FOR FLU INFORMATION

By Karen Sutherland

LEGAL BACKGROUND

With the ongoing publicity about the H1N1 “swine flu” and the start of the usual fall influenza season, many employers have questions about how to respond to communicable disease issues. For example, is it acceptable to require employees to stay home until they are healthy, even if they are out of paid leave? Can you require a doctor’s note? Can employees be required to take precautions against transmission at work? What about the overly cautious healthy employee who is scaring others by wearing a mask and gloves? Is the flu a disability? What about FMLA leave? What resources are available to employers who want to learn more about prevention and triage?

PRACTICAL GUIDELINES

The answers to some of the above questions keep changing as more is learned about the spread of the H1N1 flu. There are some general guidelines you can keep in mind, though, as you implement procedures for addressing the flu or other communicable diseases.

- You can make an employee stay home until he or she is well, even if it means the employee will be on unpaid leave.
- You can require a doctor’s note for an employee to return to work if you apply this requirement to everyone who is similarly situated. In other words, don’t single out certain conditions or certain people for this requirement unless you have a non-discriminatory reason for doing so or you may risk a claim of discrimination. For example, it is permissible to require a doctor’s note from anyone who misses three or more days of work due to illness or who has a pattern of abusing time off, or who has a condition that is contagious through casual contact, but if you start exempting certain people from this requirement (such as management employees) then it begins to look like people are being singled out for reasons that are not related to concerns about disease transmission or abuse of leave. However, some agencies are advising against requiring doctor’s notes because they are concerned about overwhelming the health care system with recovering flu victims who may not otherwise need to see a doctor.
- You can require employees to take measure to reduce the transmission of disease, such as handwashing, not having communal food/candy bowls, use of hand sanitizer, wearing a mask if contagious, wearing gloves if contagious, etc. but if you do so, you should provide the mask, gloves and sanitizer.
- You can have a dress code and enforce it. Your dress code can include wearing appropriate business attire, which for the “worried well” would not include masks, gloves, goggles, etc.
- The flu is unlikely to qualify as a disability under federal law since it is usually over within a week or less, but complications from the flu could qualify as a disability. However, the flu may qualify as a disability under state law.

ADDITIONAL RESOURCES

There are numerous resources available to employers and employees regarding the flu, and many of these resources are being updated regularly. Some examples include the following:

- <http://www.flu.gov>. This site has a preparedness guide for small businesses, among other helpful resources, and has been updated regularly. The small business guide is located at <http://www.flu.gov/professional/business/smallbiz.html>.
- www.cdc.gov/h1n1flu/guidance_homecare.htm This link provides a copy of the Center for Disease Control's publication *Interim Guidance for H1N1 Flu (Swine Flu): Taking Care of a Sick Person in Your Home*.
- www.cdc.gov/h1n1flu/identifyingpatients.htm. This link provides a copy of the Center for Disease Control's publication *Interim Guidance for Clinicians on Identifying and Caring for Patients with Swine-origin Influenza A (H1N1) Virus Infection*
- www.kingcounty.gov/health/h1n1. This site is King County's site on the H1N1 virus.
- <http://www.eeoc.gov/facts/h1n1.html>. This is one of two EEOC links about legal issues that may arise from employer's flu policies and procedures. It primarily provides links to other resources.
- http://www.eeoc.gov/facts/h1n1_flu.html. This second EEOC link is more specific to ADA-compliant employer preparedness for the H1N1 flu.
- http://www.dhs.gov/ynews/releases/pr_1250698238233.shtm. This link is to information from the Department of Homeland Security regarding the flu.
- <http://www.flu.gov/professional/school/higheredguidance.html>. This link (which is intended for college dorms) is also helpful if your employees live onsite.
- <http://www.osha.gov/Publications/exposure-risk-classification-factsheet.html>. This OSHA publication is for workers with high exposure risks, such as workers in health care facilities.
- <http://www.osha.gov/Publications/respirators-vs-surgicalmasks-factsheet.html>. This OSHA publication discusses the merits of respirators vs. surgical masks.
- <http://www.osha.gov/Publications/employers-protect-workers-flu-factsheet.html>. This OSHA publication discusses steps employers can take to protect employees.

This article is not legal advice. For more information, contact Karen Sutherland at ksutherland@omwlaw.com or by phone at 206-447-7000. Karen is the Chair of the Employment and Labor Law Practice Group at Ogden Murphy Wallace, P.L.L.C., <http://www.omwlaw.com>.