

Preparing for and Responding to Issues Relating to Flu Season and Specific Considerations Regarding the H1N1 Influenza Virus

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On October 9, 2009, the Equal Employment Opportunity Commission ("EEOC") updated its pandemic preparedness technical assistance document. This update is just another reminder that flu season is here. The EEOC update follows on the heels of the Secretary of Homeland Security's issuance of a preparedness guide for businesses, specifically regarding the H1N1 influenza, and similar information provided by the World Health Organization ("WHO"). The Centers for Disease Control and Prevention ("CDC") has also issued interim guidance on infection control measures. As the sheer volume of information about the coming flu season can be daunting, the following highlights particular concerns of these agencies as applies to businesses and provides practical tips for employers in preparing for and responding to the influenza virus.

Making Sure Your Policies and Practices Comport with Existing Laws.

The [EEOC's guidance](#) (the "Guidance") synthesizes much of the information provided by the CDC and the WHO. The Guidance is a reminder to employers that, even in times of a flu pandemic, they must still abide by anti-discrimination laws such as the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964. The Guidance provides assistance on preparing for a flu pandemic and what steps employers can take once a pandemic occurs.

In its discussion of preparedness, the EEOC cautions employers that they may not survey their employees to determine if any employee is more susceptible to the pandemic (*e.g.*, has a compromised immune system). While disability-related inquiries are prohibited by the ADA, employers are permitted to identify which employees may be more likely to be unavailable for work in the event of a pandemic. The permitted inquiries relate to non-medical reasons for absence during a pandemic, such as the unavailability of public transportation or school closures.

The Guidance answers two other common questions regarding new employees. *First*, can an employer require new employees to undergo a post-offer medical examination to determine general health status? Yes, as long as *all* entering employees in the same job category are required to undergo the testing and if the results of the tests are kept on separate forms and treated as confidential. *Second*, can an employer rescind a job offer if a post-offer medical

examination reveals that the employee is at risk of increased complications from influenza? No, unless the applicant would pose a "direct threat" as defined by the EEOC and applicable regulations ("a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation"). The "direct threat" factor must also be proven by objective medical evidence (*i.e.*, the mere fact of being more susceptible to the flu or its symptoms is not enough to rescind a job offer). Moreover, employers are required to determine whether a reasonable accommodation could reduce the employee's risk below the direct threat level.

The Guidance also assists employers in dealing with issues that arise *during* a pandemic. The following are some of the most frequently asked questions:

May an ADA-covered employer send employees home if they display influenza-like symptoms during a pandemic? Yes. Taking a cue from the CDC, the EEOC confirms that employees who display flu-like symptoms should leave the workplace to prevent further infection.

When an employee returns from travel during a pandemic, can an employer ask questions about the employee's exposure to pandemic influenza during the trip? Yes. Even when travel is personal, if the CDC or state or local officials recommend that people who visit certain locations remain at home for several days until it is clear that they do not have flu symptoms, an employer may ask whether the employee is returning from these locations.

During a pandemic, can employers require their employees to adopt infection-control practices, such as telecommuting, regular hand washing or wearing personal protective gear? Yes. According to both the EEOC and the CDC, these are all permissible infection-control techniques that do not run afoul of EEO laws.

In worksites where a flu vaccination is or becomes mandatory, can an employer require that its employees take the flu vaccine regardless of their medical condition or religious beliefs? According to the EEOC, the answer is "no." Employees subject to mandatory vaccinations (*e.g.*, some health-care workers) may be entitled to an exemption based on an ADA disability or based on the employee's "sincerely held religious belief, practice, or observance." Employers whose employees are or might be subject to mandatory vaccination should seek additional advice regarding these exemptions prior to requiring all employees to be vaccinated.

Both the EEOC and the CDC recommend that employers simply encourage employees to get the influenza vaccine (the "flu shot") rather than requiring them to take it. The CDC provides [additional detailed information](#) for businesses regarding the flu shot, for both seasonal flu and the H1N1 virus, and also provides a [link to the department of health](#) for each state.

Can an employer ask an employee about an absence from work if the employer suspects it is for a medical reason, including the seasonal flu or the H1N1 virus? Yes. The EEOC is clear that an "employer is always entitled to know why an employee has not reported for work."

A final reminder from the EEOC is that Title VII prohibits discrimination on the basis of national origin. For example, Title VII would prohibit employers from singling out Mexican-

American applicants for post-offer medical examinations or from sending home all Mexican-American employees during the flu season because of a belief that the H1N1 virus originated from Mexico.

The Family and Medical Leave Act. The flu typically does not qualify as a "serious health condition" as defined by the Family and Medical Leave Act ("FMLA"). However, depending on the severity of the flu symptoms (*e.g.*, requiring hospitalization), the condition may qualify as a serious health condition. In that instance, the employee may be entitled to FMLA leave for him- or herself, or to care for a qualifying family member. Employers should revisit their FMLA policies to familiarize themselves with the requirements of the FMLA and consider those provisions when implementing a pandemic preparedness plan.

Other Federal and State Resources. Additional general information from federal and state agencies is available on the Internet. For example, the [Occupational Health & Safety Administration](#) has a website that provides further guidance similar to that provided by the EEOC and the CDC. The [Washington State Department of Health](#), the [Oregon Department of Human Services](#) and the [Alaska Department of Health & Social Services](#) all have online resources available.

Tips on Prevention. Of course, the easiest way for employers to avoid complications from the flu, whether it is the seasonal flu or the H1N1 virus, is to enact preventive measures. The CDC emphasizes a comprehensive approach consistent with the EEOC's recommendation that every employer identify a "pandemic coordinator" or a team of individuals with expertise in EEO laws and the information currently available regarding pandemic influenza to create a pandemic response plan. The Department of Homeland Security has issued a guide entitled "[Preparing for 2009 H1N1 Influenza Virus.](#)" This guide offers practical tips on preparing for and helping to prevent the spread of influenza in the workplace.

What this Means for Employers. Flu season is nothing new for most employers, but the advent of pandemic influenza can be more complex. It implicates not only an employer's ongoing responsibility to provide a healthy and safe work environment, but also to ensure compliance with applicable anti-discrimination and leave laws, as well as any applicable collective bargaining agreements. As noted above, employers with any questions about mandatory vaccination requirements should consult counsel.

Information about influenza and the H1N1 virus is abundant. Employers should be proactive and review available resources and put together a plan to prevent and respond to the spread of the flu. As the adage goes, "an ounce of prevention is worth a pound of cure."

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