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**Breaking Developments In Labor and Employment Law
12/4/09**

On November 20, 2009, the Occupational Safety & Health Administration ("OSHA") issued a [Directive](#) relating to healthcare workers' occupational exposure risks to the H1N1 flu virus. The Directive is in the form of Instructions to OSHA Compliance Safety and Health Officers ("Compliance Officers") and its applicability is limited to the inspection of workplaces where workers are likely to have "high" to "very high" occupational exposure risks. Workers at "high" and "very high" occupational exposure risk to the H1N1 flu virus include workers who, through close contact (within six feet), attend to patients with suspected or confirmed H1N1 flu virus, or who transport such patients in enclosed vehicles. The Directive provides that inspections of such workplaces will be conducted in response to worker complaints, referrals (including media referrals), or as part of a fatality and/or catastrophic event investigation.

Even though the Directive is addressed to OSHA personnel and not employers, employers who employ healthcare workers with high risk of exposure to H1N1 flu virus at work, would be well advised to consider and plan for the inquiries that will be made under the Directive should an OSHA inspection of their workplace occur. "Healthcare Worker" is defined as "a person whose occupational activities involve contact with patients or contaminated material in a healthcare or clinical laboratory setting." According to the Directive, such workers "may be engaged in a range of occupations, many of which include patient contact even though they do not involve direct provision of patient care, such as dietary and housekeeping services. Work settings include inpatient and outpatient facilities, home healthcare settings, and institutional settings such as schools and correctional facilities." The Directive also provides, however, that inspection activities will typically focus on "hospitals, emergency medical centers, doctors' and dental offices and clinics." Based on the definition of Healthcare Worker and the "inspection focus" announced by OSHA, operators of seniors housing and long term care facilities who want to assess their own likelihood of becoming the "focus of inspection activities" should evaluate the extent to which their employees can be said to have contact with "patients or contaminated material."

Under the Directive, OSHA Compliance Officers must review the employer's injury and illness records to identify any workers with recorded illnesses or symptoms associated with exposure to patients with suspected or confirmed H1N1 flu virus. Significantly, illnesses due to 2009 H1N1 flu virus are not exempt from recordkeeping as a common cold or flu, but must be recorded if

H1N1 flu virus is confirmed and it is work-related, and the employee received medical treatment or was absent from work.

Under the Directive, OSHA Compliance Officers are also instructed to assess potential workplace hazards and to evaluate the adequacy of an employer's protective measures for workers in light of the Centers for Disease Control and Prevention's ("CDC") October 14, 2009 guidance on H1N1. In fact, the OSHA Directive states specifically that: "Protective measures or guidelines referenced in this Directive shall be considered adequate *only* if these measures are at least as protective as the CDC's." (Emphasis in the OSHA Directive.)

Employers who employ workers at high risk of occupational exposure to the H1N1 flu virus should, therefore, consider the CDC's recommendations, as the measures taken by employers in response to such risks will be evaluated against these guidelines.

The CDC's recommendations are included as Appendix G of the OSHA Directive and provide for three broad categories of control measures: (1) *elimination of the hazard*, such as by limiting access/entry to visitors with suspected or confirmed influenza, and by putting non-punitive policies in place to keep ill employees at home; (2) *engineering controls*, such as providing hands-free soap and water dispensers and receptacles for garbage and linens, and by ventilating vehicles used to transport suspected or confirmed H1N1 patients; and (3) *administrative controls*, such as vaccinating healthcare workers, instituting and ensuring compliance with hand hygiene and cough etiquette, providing dedicated patient care equipment for H1N1 patients, and providing and ensuring the use of personal protective equipment, including respirators.

In addition, Appendix B of the Directive references several OSHA documents to assist employers, including the OSHA Fact Sheet "Employer Guidance: Reducing Healthcare Workers' Exposures to the 2009 H1N1 Virus," which may be found [here](#).

Other workplace issues raised by H1N1 are addressed in the Lane Powell article "Preparing for and Responding to Issues Relating to Flu Season and Specific Considerations Regarding the H1N1 Influenza Virus," which may be found on the Lane Powell [website](#).

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