



**Labor & Employment Alert
May 2009**

Swine Flu (H1N1) and the Workplace

For a discussion of these and other issues, please visit the update on our website at www.mhtl.com/law. To receive mailings via email, please email information@mhtl.com.

Given the recently confirmed cases of Swine Flu (H1N1) in the United States, including Massachusetts and other New England states, questions have been raised as to how employers should handle the threat of an outbreak and exposed or infected employees. This memorandum provides guidance for employers on some of the important legal issues regarding the threat and on some questions employers are asking. Please be advised that government advisories on this issue are changing daily. If you have a specific question, please feel free to contact MHTL directly to receive the most up to date and informed advice.

Threat of an Outbreak

- Advise employees on methods to contain and prevent communicable illnesses.
 - Tips and handouts/posters are available for employers on the following websites:
 - Center for Disease Control: www.cdc.gov/swineflu
 - Pandemic Flu: www.pandemicflu.gov
 - Massachusetts Department of Public Health: www.mass.gov/dph/swineflu
 - Occupational Safety & Health Administration: www.osha.gov/dsg/topics/pandemicflu
 - If sanitation and hygiene guidelines are already in place, take steps to make sure that they are understood and followed.



- Revise Communicable Illness Contingency Plans in order to make sure they comply with OSHA advisories and guidance.
 - OSHA's advisory on Contingency Plans and other workplace safety programs can be found at www.osha.gov/dsg/topics/pandemicflu (please note there are two publications, one specifically for health care employers and one for other employers).
- Health Care Employers
 - Under the Occupational Safety and Health Act, health care employers (including hospitals, community health centers, nursing homes, physicians' offices, etc.) have an obligation to take appropriate measures to protect employees from contracting communicable diseases in the workplace. Although the specific requirements will vary by circumstance, health care employers should ensure that they have all required and other appropriate policies in place regarding personal protective equipment and exposure to pathogens, and that these policies are followed. Please contact MHTL directly with any questions or to discuss individualized situations.

Exposed or Infected Employees

- Encourage open communication with employees for them to inform: 1) occupational health department (if there is one) or the employer; 2) human resources (if no occupational health department); or 3) line management- in this order, if the employee has the symptoms of Swine Flu (H1N1), or has recently been in an infected area or in contact with a person who has been diagnosed or exposed to the Swine Flu (H1N1).
 - Consider creating a centralized response unit to receive any reports of employee illness.
- Employees who exhibit symptoms should be encouraged to stay home.
- Employers must remain mindful, because the origin of H1N1 has been linked in the news to a specific country, that there needs to be awareness that claims of unequal treatment may arise if it appears that a particular group is being treated differently based on its ethnicity or national origin.
- Laws that may come into play:
 - Family Medical Leave Act (FMLA)



- Many employees may be eligible to take FMLA leave to care for themselves or a covered family member, if the Swine Flu (H1N1) is determined to be a “serious health condition.”
 - Generally, an illness is determined to be a serious health condition where inpatient treatment is required or where there is continuing treatment by a healthcare provider, as those terms are defined in FMLA regulations.
 - Under the FMLA, an employer may require a return to work certification from a health care provider where the employer has a written policy allowing it to do so, and the employer is generally required to accept that certification (*i.e.*, no request for a second opinion, etc.).
- Americans with Disabilities Act (ADA)
- Under the ADA, experiencing flu-like symptoms in and of itself does not qualify as a disability; this does not, however, exclude the possibility that, as a result of the Swine Flu (H1N1), an individual may experience a disabling condition, or that someone with such symptoms could be “regarded as” disabled. Moreover, this does not preclude the Swine Flu (H1N1) from becoming a disability - a decision of this nature would likely be done on a case-by-case basis.
 - General ADA requirements still apply. For example, an employer may ask the employee to submit medical documentation where there is objective evidence indicating that:
 - The employee’s **present** medical condition:
 - Impairs his/her ability to perform an essential job function; or
 - Poses a “**direct threat**” to safety in the workplace.
- Worker’s Compensation
- If an employee is at a higher risk of contracting Swine Flu (H1N1) because of his or her job or job duties than the general public, and the employee becomes infected while performing those job duties, there may be some liability under state worker’s compensation laws.
 - If an employee becomes infected because of his or her job duties, the employee and the employer should follow standard practices for filling out applicable injury reports.



- Occupational Safety & Health Act (OSHA)
 - Under OSHA, an employer is required to maintain a safe and healthful workplace and safeguard against “recognized hazards”.

- The National Labor Relations Act (NLRA) and collective bargaining agreements
 - Safety/health standards in collective bargaining agreements should be reviewed.
 - Changes in policies may invoke an obligation to bargain.
 - Employees’ concerted refusal to work because of a fear of infection *could* be deemed protected concerted activity under the NLRA, so seek advice should that occur.

Common Questions

As concerns and the number of cases of Swine Flu (H1N1) rise throughout the United States, MHTL is currently assisting clients in all areas of business in navigating this uncharted territory. Please find below a list of common questions that MHTL is currently addressing with its clients:

1. What do you do if you find out an employee has recently returned from the location where the outbreak started?
2. How do you deal with employee fears of contracting the Swine Flu (H1N1)?
3. What happens if an employee exhibits the signs of the Swine Flu (H1N1)?
4. What do you do if an employee has been diagnosed with the Swine Flu (H1N1)?

MHTL encourages employers to keep abreast to the latest developments by visiting the above referenced resources. If you have any specific questions or concerns, please contact MHTL directly.

This Client Advisory was prepared by Samantha E. Kaplan. If you have any questions regarding this advisory please contact her or any of the attorneys working on your account.

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