

## IT'S NOT TOO LATE TO IMPLEMENT FLU POLICIES IN THE WORKPLACE!

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With the flu season upon us, and the potential for an H1N1 flu pandemic, the news media has spent considerable time reviewing best practices for keeping children and other high risk groups safe and healthy. However, little focus has been spent on the impact the flu will have on employers. This Alert addresses the legal obligations of employers in light of a possible pandemic, and some of the frequently asked questions on this topic.

### What should employers do to prepare?

- ✓ **Develop a Pandemic Flu Plan** - The Occupational Health and Safety Administration (OSHA) regulations require that employers take "all reasonable steps" to provide and maintain a safe work environment. OSHA has issued guidance advising all employers to plan for a pandemic flu (<http://www.flu.gov/professional/business/index.html>). The costs to an employer for a violation of this "general duty" clause of OSHA can be significant, amounting up to civil penalties of \$70,000 for each violation. Pandemic plans should include, among other things:
  - (a) designation of a coordinator to implement the plan;
  - (b) how employee absences will be handled;
  - (c) steps and strategies for minimizing the spread of the disease;
  - (d) an assessment of critical functions and operations and how the functions can be performed with limited staffing, if necessary, including cross-training of employees;
  - (e) any flexible work arrangement options available to reduce contact such as telecommuting, flexible work hours and reduced travel;
  - (f) the establishment of communication practices during a pandemic;
  - (g) plans for disruption of services (phone, electricity, etc) and supply and distribution chains;
  - (h) establishment of a training program for HR professionals, supervisors and others who have responsibility for implementation of the pandemic plan; and,

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- (i) if a union is involved in the workplace, review of any changes required in the collective bargaining agreement(s).

In the healthcare setting, the CDC has set forth additional guidance to control the spread of the flu between patients and healthcare employees, and has produced a specific planning checklist for hospitals and other healthcare settings which is available at <http://www.flu.gov/professional/hospital/index.html>.

- ✓ **Remind Employees of Appropriate Infection Control Policies and Practices** - Among other things, employees should be instructed to stay home if sick until 24 hours after their fever is gone, encouraged to obtain flu vaccines and instructed to follow respiratory etiquette and hand hygiene at all times. Employees should also be reminded to keep all surfaces that are frequently touched clean and sanitized and supervisors should be directed to immediately separate employees who develop flu like symptoms and request them to go home. The CDC has provided additional guidance in this area at their website (<http://www.cdc.gov/h1n1flu/guidance/>).
- ✓ **Review and Revise, if necessary, Standard Employment Policies** - Employers should review and revise, if necessary, any employment policy that may be implicated by the flu, such as, sick leave policies, unscheduled leave policies, absences, and the like. Employer flexibility on absences is important, and employees should be encouraged to stay home if genuinely sick without fear of reprisal. Employers are cautioned against penalizing employees for staying home when sick during a flu pandemic, unless exceptional circumstances exist. Discipline can run afoul of OSHA (see discussion above on obligation of employer to provide a safe working environment) and the Family and Medical Leave Act and Americans with Disabilities Act (see discussion below on possible application of these federal statutes to employees with the flu and/or workplace rules addressing the flu).
- ✓ **Inform your HR Staff, employee screening nurses, and other pertinent employees of on-line Government Resources** - To limit the spread of the illness, and decrease any legal liability, it is important to provide employees with the most up-to-date information provided by the relevant Government Agencies. This information may be found at [www.flu.gov](http://www.flu.gov); [www.osha.gov](http://www.osha.gov); [www.cdc.gov](http://www.cdc.gov); and [www.eeoc.gov](http://www.eeoc.gov).

**If an employee comes to work and is suspected of being ill with the H1N1 virus can an employer send the employee home?**

Yes, and this is expressly recommended by the CDC, and it is also in compliance with OSHA's requirement to take all reasonable steps to maintain and safe work environment. This same rule should be followed if an employee develops signs of illness while working. Of course, any action taken must be take in a non-discriminatory manner, without regard to race, ethnicity, gender, religion, or any other protected characteristic.

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## **If an employee becomes ill with flu-like symptoms at work should the employer tell other employees in the workforce that they have been potentially exposed to the virus?**

Yes, and this too is expressly recommended by the CDC, and it is also in compliance with OSHA's requirement to take all reasonable steps to maintain and safe work environment. If an employee becomes ill at work, inform fellow employees of their possible exposure in the workplace to influenza-like illness but maintain confidentiality as required by the Americans with Disabilities Act (e.g., you may disclose the fact of the exposure, but do not identify the source of the possible exposure, that is, do not inform co-employees "it was Jane D. in radiology who went home with a fever and a cough").

## **Are employees entitled to leave under the Family and Medical Leave Act (FMLA) for absences due to the flu?**

Under the FMLA, the flu may constitute a "serious health condition" if it involves either hospitalization or "continuing treatment" by a healthcare provider for incapacitation lasting at least three consecutive days; but, the FMLA's implementing regulations expressly note that "ordinarily" the flu is an example of a condition that does not meet the definition of serious health condition and does not qualify for FMLA leave. "Continuing treatment" means either two in-person doctor visits or one in-person doctor visit followed by a treatment regiment such as prescription medication. If an employee's specific case of flu satisfies this definition of "serious health condition," then the employee is entitled to such leave if he/she meets all of the eligibility requirements for FMLA, and the employer is a "covered employer" under the FMLA (which usually means an employer with 50 or more employees). Also, an employee may be entitled to FMLA leave to care for a covered family member if all of these same eligibility criteria are met and the family member's flu qualifies as a "serious health condition." Employers have the right to require a medical certification for the serious health condition of an employee or a covered family member.

## **Are employees suffering from the flu protected by the Americans with Disabilities Act (ADA) or the New Hampshire equivalent?**

In most cases, an employee will not be entitled to protection under the ADA or the New Hampshire Law Against Discrimination (which contains language modeled on the ADA). Under the ADA, a "disability" is defined as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual." It also includes having a "record of" such an impairment, or being "regarded as" having such an impairment. Generally, an impairment must be long term and involve lasting effects, and the flu does not fall within this category of illness. Employers should take care not to treat an employee who has suffered from the flu as "disabled" or in a disparate fashion because this may trigger liability under the ADA.

The EEOC has issued special guidance with respect to the ADA and the flu, and has outlined the rights of employers to handle infection control in the workplace. Employers are cautioned to review ADA policies and procedures in the workplace in light of potential liability for



making impermissible disability-related inquiries or improperly disclosing private and confidential employee medical information, when and how an employee may be required to undergo a medical examination, and as noted above, tangible employment action because of an individual's perceived disability.

### **Is the Fair Labor Standards Act (FLSA) implicated by a pandemic flu outbreak?**

The FLSA, and the New Hampshire laws governing the payment of wages, are always implicated when the terms and conditions of an employee's job and/or wages are altered. For example, if an employer plans to reduce an employee's wages due to an absence for H1N1, then the FLSA and NH wage laws are implicated. In general, under the FLSA and New Hampshire law, an employer may not reduce the wages of an FLSA salaried exempt employee for an absence due to H1N1 without running afoul of both statutes. Also, if an employer requests salaried exempt employees to "fill in" for absent non-exempt employees, then both statutes may be implicated. The FLSA provides that an exempt employee may "fill-in" by performing a non-exempt employees job on an emergency basis, but any time period longer than the first day or partial day may affect the "exempt" status of the employee.

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Hopefully, this flu season will pass by without major incident for employers and employees. Businesses will be busy enough plowing and shoveling if the forecast in the Farmer's Almanac is accurate. However, if the flu does strike your workforce and you are concerned about the company's legal obligations or liability, or you would like information on "best practices" on handling a unique situation, please do not hesitate to contact a member of Devine Millimet's Labor and Employment Law Practice Group.

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