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H1N1 Pandemic - Are You Prepared

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In light of the potential H1N1 pandemic, all employers should consider taking a few simple steps to prepare for the possible disruption to their business. Just how many workers will become infected with H1N1 is unknown, but the impact to business could be significant if large numbers of employees (or their children or elderly parents) become sick around the same time.

Employers should develop a pandemic plan that, at a minimum, addresses the following issues:

- **Communication.** There should be one or two points of contact for employees and management to avoid conflicting messages or information.
- **Information.** Employers must understand how to access information about H1N1 from state and local health departments so that they can stay on top of any developments and react accordingly.
- **Decision-making.** Local management should have discretion to deal with day-to-day issues, such as absences, to avoid delays and provide flexibility to deal with issues on a case-by-case basis if necessary.

All employers that sponsor health plans should do the following:

- Review the terms of your group health plan regarding vaccination coverage. Some large insurance providers have already indicated that the cost of the H1N1 vaccine will be fully covered as "preventive care" without the imposition of deductibles, co-pays or coinsurance. If not already covered, assess the cost-benefit effect of amending your plan to cover the vaccination cost, which is estimated to be about \$25 per dose.
- Consider waiving timely provision of doctor's notes or other "proof of illness" requirements that might otherwise be required for granting sick leave and/or return to work authorizations, as physician offices may be overwhelmed during a flu outbreak and unable to comply with normal paperwork requests immediately.
- Evaluate your short-term disability coverage. If several employees experience a lengthy recovery and/or complications resulting from an employee's bout with the H1N1 virus, is your company satisfied that the level of available short-term disability coverage is appropriate?
- Revise your business travel policy to encourage less travel and

fewer face-to-face meetings, and more alternative meeting forums such as video conferences.

- Communicate clearly to your workforce any changes to, or suspension of, normal benefit protocols, preferably before an H1N1 outbreak begins at your workplace.

In addition, employers should be aware that an H1N1 pandemic might implicate a variety of different legal issues, some of which are addressed below:

- Can Employers require employees to disclose whether they have H1N1, have its symptoms or have been exposed to H1N1? Yes. Neither HIPAA nor the Americans with Disabilities Act prevents you from asking an employee whether they have the H1N1, but do not share such information with others who do not need to know.
- Can we require our employees to be tested for H1N1? Yes. But you will be obligated to pay for this test and keep any such results confidential. From a practical standpoint, though, testing may be a non-issue. Doctors may be inundated by sick patients, so it might take too long to get tested, and it is possible that doctors' offices will tell patients to stay home rather than come in and be tested if the symptoms are not life-threatening or the patient is not high risk.
- Do employers have a reporting obligation under the Occupational Safety and Health Act (OSHA) to report cases of H1N1 infection? Maybe. Under OSHA, employers are required to provide all employees with a non-hazardous workplace. OSHA does not have regulations specifically pertaining to pandemic flu, but OSHA can cite employers under the general duty clause if the hazard is generally recognized and is likely to cause death or serious physical harm. In addition, companies may have an obligation under OSHA to record employee-related influenza cases in the appropriate OSHA injury logs, much like they are now required to do for employee-related tuberculosis cases. Take some time to look at DOL guidance on the Occupational Safety and Health Act website.
- Does contracting H1N1 in the course and scope of employment entitle an employee to workers' compensation benefits? Maybe. Most states' workers' compensation laws cover occupational diseases, which may include influenza contracted in the course of employment -- especially if the illness were contracted as a result of the employer's failure to take reasonable precautions against infection. If an employee wants to file a claim, you should allow the employee to do so.
- Do employers have potential liability if an infected employee comes into contact with a member of the public and transmits the disease? It seems unlikely that an individual would be able to pinpoint the exact person from whom he contracted H1N1, especially if there is a wide outbreak. As a result, it would be difficult to blame one person, or that person's employer, for contracting H1N1.
- What are an employer's obligation of the Family and Medical Leave Act (FMLA)? Employees may qualify for FMLA leave either due to

their own condition or because they have to care for a family member. The FMLA requires covered employers to provide eligible employees with up to 12 weeks of unpaid leave. A "serious health condition" is one which renders the employee unable to perform his or her job and requires ongoing medical care. H1N1 may be sufficiently serious to constitute a serious health condition, if the condition involves: (1) inpatient care in a hospital or medical care facility, or (2) continuing treatment by a health care provider. To qualify as "continuing treatment," the employee must have a period of incapacity of more than three consecutive, full calendar days. Many states have adopted their own analogs to the FMLA and provide greater benefits or coverage than the FMLA. Assuming pandemic flu meets the definition of a serious health condition under the FMLA, those state mini-FMLA laws are also likely to be triggered. Furthermore, the privacy provision of the FMLA limits an employer from inquiring about an employee's health condition except as is reasonably necessary to determine if the employee's leave qualifies under the FMLA.

- How might an Employer Sick Leave, PTO program or other employer-sponsored leave program be affected by the H1N1 pandemic? Employers should be ready to encourage employees who are infected with influenza to stay home from work. You will want to reevaluate eligibility requirements for various company-sponsored leave programs to remove barriers that prevent employees from taking advantage of those programs. For example, if schools close due to an influenza outbreak and the employee needs to stay home to care for his or her children, the company's sick leave policy could be modified in order to allow the employee time-off to handle such an emergency. Employers may also want to consider leave donation policies to permit employees to share accrued paid leave. Ultimately, an employer has the right to tell an employee to stay home if he or she is sick, whether it is for one day or many. Be aware of the potential to run afoul of the Fair Labor Standards Act -- a salaried employee who's used all of her paid time off, but is being forced to take one or more days off may be entitled to get a full paycheck. On the other hand, if an employer requires an employee to stay home a full work week, the employer is not obligated to pay a salary for that week. Hourly employees told to stay home, despite not having any sick, personal or vacation days, are not entitled to be paid unless they can work from home - at which point they will be paid only for the hours that they worked.

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