

Legal Considerations of a Pandemic Flu

By Amy Angel

The government is warning of a resurgence of the H1N1 influenza virus this fall, with predictions that up to half of all Americans will be infected. This could lead to spikes in absenteeism at the workplace due to actual illness, school and daycare closures that affect working parents, and disruptions to public transportation.

Is your law firm ready? Do you know what to tell your clients when they call asking for help?



Occupational Safety and Health Act

Under OSHA's "general duty" clause, employers must protect their workforce from known hazards. Taking precautions to contain the spread of a pandemic flu arguably falls within this broad obligation. Such precautions may include increasing cleaning of work stations, supplying disinfectant or face masks, and excluding individuals exhibiting flu-like symptoms from the workplace until 24 hours after fever has resolved.

Fair Labor Standards Act

Employers can send employees with flu-like symptoms home. There is no legal obligation to pay non-exempt employees that are sent home. Exempt employees who are able, willing, and ready to work (even if sick) must be paid their full week's salary when they perform *any* work in a workweek: For example, if an employer sends an exempt employee home and that employee sends work email via their Blackberry that week, the employee must be paid for the entire week. The employer can require the employee to use sick or other paid time off to cover the absence but, if the employee has exhausted all paid leave, he or she must be paid anyway.

Family Medical Leave Acts

Generally, the flu does not qualify as a "serious health condition" to trigger protections under the federal or state family medical leave acts. Absences that are not covered should not be counted against an employee's leave entitlement. Depending on the severity of the infection and the course of treatment required, however, an employee may qualify for protected leave. Additionally, OFLA also has a separate category of "sick child leave," providing an employee needing to stay home to care for a child with the flu with protected leave. But this does not cover absences necessitated by school or daycare closures if the employee's child is not actually sick.

Americans with Disabilities Act

While the flu generally is not a disability, many individuals with disabilities are at high-risk for complications if they get the virus. These individuals may be entitled to reasonable accommodations to limit their exposure, including telecommuting or a leave of absence.

Under the ADA, FMLA and OFLA, any medical information provided to an employer should be treated confidentially, maintained separately from personnel files as medical records, and shared only on a "need to know basis." There is no need to identify individuals who contract the virus.

Anti-Discrimination Statutes

Whatever actions employers or businesses take to deal with a pandemic, all individuals should be treated similarly to avoid claims of discrimination based on a protected category: e.g., national origin (because this virus originated in Mexico), sex (because women traditionally are the primary caretakers), or disability (because a disabled employee might be incorrectly viewed as "high-risk").

In preparing for potential absences, employers may gather personal information about employees by asking broad questions aimed at discovering whether employees anticipate being absent during a pandemic for any reason—whether because they are in a high-risk category, will have no alternative childcare if schools or daycares close, or rely on public transportation—as long as the questions are not limited to disability-related inquiries or other protected statuses and are asked of all employees.

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