

Preparing Employers for the H1N1 Pandemic

Businesses have already been affected by the outbreak of the H1N1 (swine flu) influenza during the spring and summer of 2009, and they need to be prepared for the fall and winter flu season. The Centers for Disease Control and Prevention (CDC) anticipate that more communities may be affected in the coming months than were affected in the spring and summer season, and the impact will be more severe.¹ This month's column provides general guidance that will help employers plan their responses during the upcoming fall and winter flu season.

Employers must balance a variety of factors when determining how to respond to the spread of influenza in the workplace. Employers should focus their objectives on reducing transmission among staff, protecting people who are at an increased risk of influenza-related complications, maintaining business operations, and minimizing adverse effects on other entities. The CDC recommends that employers base their strategies and response to flu outbreaks on local information and on state public health authorities, because the CDC expects a wide variety of disease patterns to spread across the country. Employers should consider the following factors, among others, when making decisions about adequate responses:

- the severity of the disease in the community in which the business is located;
- the extent of the disease in the community;
- the level of amount of workers' absenteeism in the business;
- the impact of disease on workplace populations that are vulnerable and at higher risk; and
- other factors that might affect employees' ability to get to work.

Recommendations for Employers During the Current Flu Conditions

The CDC recommends several specific steps for employers to follow under current flu conditions. First, the CDC recommends that sick employees stay home. Employers should advise workers to be alert for signs of influenza before reporting to work, and employees with influenza symptoms should stay home for at least 24 hours after they are free of fever without the use of fever-reducing medications. Employers should expect sick employees to be away from work for approximately three to five days and should ensure that sick leave policies are flexible enough to accommodate the

different time allowed. Employers should also maintain policies that permit employees to stay home to care for ill family members.

The CDC recommends that employees who appear to have an influenza-like illness be promptly separated from other employees and advised to go home until at least 24 hours after they are free of fever. Employers should inform other employees of possible exposure to the flu in the workplace but must maintain confidentiality. Because influenza is spread from person to person through coughs and sneezes, employers should provide employees with messages on the importance of covering their mouths and nose when coughing and sneezing and make tissues readily available. Employers should also instruct employees to wash their hands and should provide sanitizers in the workplace. It is essential that employers frequently clean all commonly touched surfaces in the workplace.

The CDC also suggests that employers encourage employees to get vaccinated. Employers should offer opportunities at their worksite for influenza vaccinations; if vaccinations are not offered on-site, employers should consider granting employees time off from work to get vaccinated. Employers should also take measures to protect employees who are at higher risk for complications of influenza—for example, pregnant women; children under the age of five; adults and children who have chronic lung disease, heart disease, diabetes, or diseases that suppress the immune system and other chronic medical conditions; and employees who are 65 years old or older. Employers should inform employees that have a higher risk of complications to seek medical care as soon as possible.

Employers should prepare for increased number of employee absences because of illness among employees and their family members. The CDC recommends that employers monitor and respond to the level of absenteeism at the workplace and implement plans to continue absent employees' essential functions in case of higher than usual absenteeism. To maintain essential functions, employers should cross-train personnel to perform different functions so that the business can still operate even if relevant staff members are absent. The CDC also recommends that employers be prepared to change their business practices if needed so that critical operations can be maintained—for example, by identifying alternative suppliers, prioritizing customers, or temporarily suspending some operations.

Employers should also advise employees to take



certain steps before traveling. Employees should check themselves for fever and other signs of influenza before starting travel. In addition, employers should inform employees that, if they become ill while traveling, they should notify their supervisors. Finally, for the current strain of influenza, the CDC recommends that employers prepare for the possibility that workers' children will be dismissed from school or that schools and child care programs will be closed down temporarily. Employers must be prepared to allow workers to stay home to care for their sick children, and it is strongly recommended that employees refrain from bringing their children to work with them when schools need to be closed. As with its other recommendations, the CDC suggests that employers should ensure that their leave policies are flexible and should cross-train employees to cover the essential functions of the business when employees' children are affected.

Recommendations for Employers if Flu Conditions Worsen

The CDC has also issued specific recommendations for employers if the flu season worsens. If the severity of influenza increases, employers should screen employees who report to work. At the beginning of the workday, employers should ask all employees about symptoms, such as fever or chills and cough or sore throat. The CDC recommends that employees who come down with influenza-like illnesses under worsened flu conditions not come to work or travel and stay at home for at least seven days. Employers should not require a physician's note from workers who have come down with the flu and should continue to advise employees to check for any signs of illness before reporting to work each day.

If the flu season worsens, the CDC also recommends that employers should consider changing duties, work spaces, or schedules for employees who are at higher risk for complications. Moreover, as in the recommendations during the current flu conditions, employers are encouraged to have a plan for continuing their essential business functions. Finally, the CDC recommends that, if flu conditions worsen, employers should increase social distances at work by cancelling nonessential in-person meetings and business travel and conducting such meetings by conference calls instead.

Compliance with the Americans with Disabilities Act

In preparing to respond to the outbreak of influenza among employees, employers need to also be sure to comply with the Americans with Disabilities Act (ADA).² Title I of the ADA protects applicants and employees from discrimination based on a disability and, among other things, the act regulates when and how employers may require a medical examination or request disability-related information from applicants and employees. This requirement affects when and how employers may request health information from applicants and employees regarding the H1N1 virus.³ The Equal Employment Opportunity Commission pro-

vides guidelines for employers to ensure ADA compliance in their responses to this virus.

Under the ADA, employers are prohibited from inquiring about a job applicant's disabilities and conducting or requesting medical examinations, even if they are job-related, before offering employment. Yet, after an applicant is given a conditional job offer, but before he or she begins work, an employer may make disability-related inquiries and conduct medical examinations regardless of whether they are related to the job, as long as the employer makes the same inquiries of all newly hired employees in the same job category. After the employee starts work, an employer may make disability-related inquiries and conduct medical examinations only if they are job-related and consistent with the needs of the business.

In the event of a pandemic, an employer may survey its workforce to gather personal information needed to respond to a pandemic if the employer asks broad questions that are not limited to disability-related inquiries. An inquiry is not disability-related if it identifies nonmedical reasons for absences during a pandemic, such as "school closures," on the same level of importance involved in questioning "medical reasons."

Moreover, requiring infection control practices, such as washing hands and using tissues, does not

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sion of this country in *Making Poor Nations Rich* signals that the book targets not only political institutions—such as property rights, privatization, and stable environments—but also big government as a cause of poverty. The inclusion of Sweden diffuses the message of the book, because it suggests an agenda that goes beyond explaining and addressing the issues of developing countries.

In addition, the reader struggles for some time to determine what exactly the book means by “entrepreneurship” (a term technically meaning one who organizes, manages, and takes on the risk of a business enterprise), especially

in some developing countries where being a shopkeeper or farmer is common. In some relatively poor countries, many citizens are self-employed, although not always by choice (and one chapter in the book distinguishes between “necessity entrepreneurs” and “opportunity entrepreneurs”). When the problem of vagueness in the meaning of the term is compounded with a heavy reliance on anecdotal evidence, the book’s message becomes a little less persuasive. For a reader not versed in development economics and seeking an understanding of the causes of and cures for economic development, further reading is advis-

able before accepting wholeheartedly the message in this book. **TFL**

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wasn't engaging in very defensive behavior and unfortunately that affected the court's outcome. ... What the court was reacting to was what was more sympathetic, which was the plaintiff.

(Both of the above quotes appeared on SF Gate, the Web site of my hometown newspaper, the *San Francisco Chronicle*, in its “Tech Chronicles” column. (See www.sfgate.com/cgi-bin/blogs/techchron/detail?&entry_id=45920.) The Electronic Frontier Foundation has published a timely online legal guide for bloggers. (See www.eff.org/issues/bloggers/legal.)

Conclusion

The final teachable moment provided by this case

is that if you (or your client) don't have something nice to say about someone else, be aware that a court may out you for saying something offensive about that someone else on the Internet. Anonymity is not guaranteed. Proceed at your peril in Cyberia. When is a door not a door? When it's ajar. **TFL**

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implicate the ADA. Employers may also require employees to wear personal protective equipment, such as gloves or masks. However, if an employee has a disability and needs an accommodation under the ADA when using the equipment—nonlatex gloves, for example—the employer must provide the accommodation unless it would cause undue hardship. Finally, EEOC guidelines provide that employers may require employees to work remotely as an infection-control strategy as long as employers do not single out employees because of a disability or any other reason that is protected under the law.

It is important for attorneys to advise employers on actions they need to take to prepare for a response to the upcoming flu season. Employers should formulate a flu response plan that ensures not only their employees' safety and but also the continuity of business operations.⁴ **TFL**

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Endnotes

¹Centers for Disease Control and Prevention, *Guidance for Businesses and Employers to Plan and Respond to the 2009–2010 Influenza Season*, available at www.cdc.gov/h1n1flu/business/guidance/, (last visited Sept. 4, 2009).

²Note that pandemic issues bring many federal laws into play, such as the Occupational Safety and Health Act, Family Medical Leave Act, HIPAA, and Fair Labor Standards Act, along with Title VII and state laws including antidiscrimination provisions.

³U.S. Equal Employment Opportunity Commission, *ADA-Compliant Employer Preparedness for the H1N1 Flu Virus*, available at www.eeoc.gov/facts/h1n1_flu.html (last visited Sept. 4, 2009).

⁴For more information on this topic, see www.flu.gov, www.cdc.gov, and www.eeoc.gov.