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How Should Employers Treat the H1N1 Pandemic?

While much of the initial panic regarding the H1N1 virus (commonly referred to as the “swine flu”) has subsided, employers are now being forced to deal with the many practical considerations of a pandemic. While the questions regarding how to best handle the legal, medical, and ethical issues are plentiful, the answers, unfortunately, are not always clear.

When it comes to the H1N1 virus and other major health scares, legal, medical, and public health issues become inter-twined, creating web of issues that can be confusing and, at times, daunting for business owners who are worried about maintaining the continuity of their business in today’s economy. Some of the legal issues employers must consider include:

1. When employees report to work sick, concerns about Workers’ Compensation and the Occupational Safety and Health Act arise in terms of avoiding on-the-job compensable injuries and maintaining a reasonably safe workplace;
2. When sick employees miss work, absentee policy and Family Medical Leave Act issues rear their heads; and
3. When sick employees are asked to undergo diagnostic testing for the H1N1 virus, the Americans with Disabilities Act must be considered.

The H1N1 virus has infected more than forty-seven million people in America alone. Unfortunately, millions more are likely to be infected. For the business owner, this means there is a strong chance one or more employees will contract the H1N1 virus in the near future, if they have not already. Employers will continue to see increased absenteeism and reduced productivity as employees deal with the illness.

However, for employers the real life consequences stretch further than simply missing work. Under the Occupational Safety and Health Act, employers are required to maintain a reasonably safe workplace. Allowing employees to work while contagious with the H1N1 virus could trigger an OSHA violation. Even more, personal injury law firms have already begun informing employees about potential claims under state workers’ compensation laws for a disease or injury arising out of or in the course of employment.

Employers however, must be careful how they handle sick workers. In certain cases, where an employee or an employee’s family member with the H1N1 virus has developed a serious health condition, the Family Medical Leave Act can come into play, allowing the employee up to 12 weeks of unpaid leave. Additionally, requiring employees to submit to a test for the H1N1 virus might trigger a red flag under the Americans with Disabilities Act, unless the employer can show the purpose of the medical examination was job-related and consistent with business necessity.

Some employers are considering requiring employees to receive a H1N1 vaccination, especially those who work in the medical field where a vaccination is arguably a legitimate business necessity. Concerns about the infancy of the H1N1 vaccine, coupled with the threat of litigation, make mandatory vaccinations less attractive for employers, however. In New York, for instance, a group of nurses successfully challenged a state mandate that required all health care workers to receive H1N1 vaccinations before the end of November 2009. Shortly after, the nurses were granted a temporary restraining order, and New York’s Governor announced that the state was suspending the mandatory immunization requirement. A prominent Charleston hospital announced that it is requiring its employees to have the seasonal flu vaccination as a requirement of continued employment, although the hospital has not yet implemented any plans to make the H1N1 vaccination mandatory for hospital employees.



As employers consider how to react to the myriad legal and HR issues surrounding the pandemic, they may consider policies such as:

1. Encouraging (but not requiring) employees to receive the H1N1 vaccination. This allows employees to make the medical decision that best protects their personal interests. Employers may also want to publicize information regarding upcoming vaccination dates and locations, and allow employees time off work to receive the vaccine if they choose.
2. Encouraging employees to stay home when they display symptoms of the H1N1 virus. Employers should consider modifying their sick leave or PTO policy to accommodate the additional sick days, if necessary. While this policy may appear troublesome in today's weak economy, allowing potentially sick employees to report to work may risk greater harm – financially and legally – than temporarily revising an absentee policy. In fact, proposed legislation in the House of Representatives would require employers to provide paid sick leave to employees who are directed to stay home because the employee had symptoms of a contagious illness.
3. Requiring a sick employee to bring a note from a physician indicating they are safe to return to the workplace could be a better alternative than mandating that employees to be tested for the H1N1 virus. This approach provides the employer with an assurance that the employee is no longer ill while not triggering the ADA.

While the pandemic continues, the best medicine an employer can provide may be flexibility toward normal absenteeism policies and old-fashioned common sense. Relaxing absenteeism policies may be a small price to pay if the alternatives are more employees becoming infected and even less productivity.

Changes to COBRA Subsidy Period

Congress recently passed and the President signed the Defense Appropriations Act. The Act extends the eligibility period for the COBRA premium reduction for an additional two months (through Feb. 28, 2010) and the maximum period for receiving the subsidy for an additional six months (from nine to 15 months). Individuals who had reached the end of the reduced premium period before the legislation extended it to 15 months will have additional time to pay the reduced premiums related to the extension. To continue their coverage they must pay the 35% of premium costs by (60 days after date of enactment) or, if later, 30 days after notice of the extension is provided by their plan administrator. This amendment, contained in section 1010 of the defense bill, also imposes additional notice and re-notice requirements for employers about these extensions.

The Department of Labor released a statement indicating that it will soon post updated notices for employer usage and additional information at www.dol.gov/cobra.

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Happy Holidays!

As 2009 comes to a close, our firm would like to thank you for allowing us to serve you throughout the past year.

We are fortunate to have so many good friends. We wish you and your families a joyous Holiday Season and a happy – and healthy – New Year.

Contact your Huddleston Bolen Labor & Employment Attorney for more information



Michael Addair, Associate
(304) 720-7539
maddair@huddlestonbolen.com



James Cleveland, III, Partner
(606) 329-8771
jcleveland@huddlestonbolen.com



Ashley French, Senior Associate
(304) 720-7542
afrench@huddlestonbolen.com



J.H. Mahaney, Partner
(304) 691-8320
jmahaney@huddlestonbolen.com



Kevin Nelson, Partner
(304) 720-7545
knelson@huddlestonbolen.com



K.J. Dehler, Partner
(502) 339-8188
kaehler@huddlestonbolen.com



Scott Sheets, Partner
(304) 691-8418
ssheets@huddlestonbolen.com



Patrick White, Associate
(304) 720-7502
pwhite@huddlestonbolen.com

**HUDDLESTON
BOLEN** LLP

Huntington, WV (304) 529-6181 • Charleston, WV (304) 344-9869 • Ashland, KY (606) 329-8771 • Louisville, KY (502) 339-8188

www.huddlestonbolen.com • Kevin A. Nelson, Responsible Attorney

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