

Employment Law Q&As on H1N1 Flu

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Q: May an employer involuntarily send home an employee who has or is exhibiting symptoms of the H1N1 flu?

A: Yes. Of course, employers must be careful to apply such a practice in a manner that does not discriminate on the basis of other protected characteristics (e.g., gender, race, etc.).

Q: May an employer send home an employee who is not exhibiting H1N1 symptoms but who has been in close contact with someone with H1N1 (e.g., a family member or close friend)?

A: Yes, although employers should be aware that the Centers for Disease Control and Prevention (CDC) has indicated that in general business settings (e.g., non-health care settings where individuals in the workplace are not at a greater risk of contracting H1N1), employees without symptoms, but with sick family members, may report to work. An employer is free to meet with an employee who has been in contact with those with H1N1 to remind the employee that he or she should practice good respiratory etiquette and handwashing and should stay home if he or she is or begins to feel sick, for the health and safety of the employee and his or her co-workers and the continued operations of the employer. Employers should apply any "send-home" policy consistently.

Q: May an employer require an individual who has likely or potentially been exposed to H1N1 (e.g., contact with an individual with H1N1 who is returning from travel to an area with widespread H1N1 infection) and who has not exhausted the potential incubation period, to remain out of work for a certain period of time?

A: Yes, although employers should carefully consider the employee relations implications of such a decision. The CDC has advised travelers to monitor their health for up to seven days after returning from trips. Employers should closely monitor updates from the CDC and other local health care providers and agencies, as the flu season progresses.

Q: When may an employee who has had H1N1 or H1N1 symptoms return to work? (If the spread of H1N1 is as widespread as predicted and since the treatment for seasonal flu is the same as the treatment for H1N1 flu, it is expected that many health care providers will not test each individual to determine if H1N1 symptoms are indeed caused by H1N1—thus, our use of the term "H1N1 symptoms." Any time the term "H1N1" is used in this article, it should also be read as "H1N1 symptoms.")

A: The CDC has indicated that in general business settings (i.e., non-health care settings where individuals in the workplace are not at a greater risk of contracting H1N1), employees may return to work at least 24 hours after no longer having or exhibiting signs of a fever (100 degrees F), without the aid of fever-reducing medications (i.e., anything containing ibuprofen or acetaminophen). This is a change from the prior CDC guidance to stay out of work for seven days after the start of the illness or 24 hours after no longer having a fever (whichever is longer).

The CDC has indicated that employees may continue to be contagious for up to seven days after illness onset or, if ill longer than seven days, until all symptoms have resolved. Children, especially younger children, might be contagious for longer periods. Given that employees may continue to be contagious after no longer having or exhibiting signs of a fever, employers may adopt a policy requiring returning employees to remain out of work longer than 24 hours after no longer having or exhibiting signs of a fever (e.g., three days, five days, etc.) or for a certain period of time after the start of the illness (e.g., seven days), as long as that policy is consistently applied. Since employees

are likely to be or become aware of the CDC guidance, for employee relations purposes, employers that decide to adopt a longer "return to work" policy should explain to employees the employer's decision, along with the reasons for the decision (e.g., concern over the continued contagiousness of returning employees).

Individuals returning to work more than 24 hours after no longer having or exhibiting signs of a fever but within seven days of illness onset should practice good respiratory etiquette and handwashing, and avoid close contact with individuals at higher risk of flu-related complications. Employers are free to meet with returning employees to remind them that they should practice good respiratory etiquette and handwashing, avoid close contact with individuals at higher risk of flu-related complications (without disclosing other employees' medical conditions to the returning employee), and stay home if they begin to feel sick, for the health and safety of the employee and his or her co-workers and the continued operations of the employer.

In health care settings or settings in which individuals in the workplace are at greater risk of contracting H1N1 (e.g., daycare for children younger than five years old, camp for children with asthma, etc.), the CDC has indicated that employees may return to work seven days after the start of the illness or upon the resolution of symptoms (whichever is longer).

Q: If an employee who had H1N1 does not feel well enough to return to work at least 24 hours after no longer having a fever (without the aid of fever-reducing medications), may he or she remain out of work?

A: Yes, up to a reasonable amount of time. In fact, employers should encourage employees to stay home until they feel better, again up to a reasonable point. Employers should closely monitor situations for potential abuse.

Q: May an employer require a fitness-for-duty doctor's note for an employee returning to work after having H1N1 or H1N1 symptoms?

A: Generally yes, as long as such a requirement is applied consistently. If the employee's illness is a "serious health condition" under the Family and Medical Leave Act (FMLA), the employer must comply with FMLA requirements for returns to work—including, among others, notifying the employee in the initial determination that fitness-for-duty notes will be required, consistently applying the requirement to bring a note.

Q: If an employee says he or she is ready to return to work, has a doctor's return-to-work note, but is not able to work because he or she is still weak or disoriented, may an employer refuse to allow the employee to come back to work?

A: Yes, if the employee would create an unsafe or unhealthful work environment or is a direct threat to himself or herself or others. Often, a one-on-one conversation with the employee will reveal the reason for the employee's desire to return to work (e.g., he or she has exhausted all paid leave, has an important project to finish) and often convince the employee that he or she is not ready to return to work.

Vacation/PTO

Q: May an employer require an employee with H1N1 to use his or her vacation/paid time off (PTO) for the absence?

A: Yes, subject to (a) the provisions of the employer's current vacation/PTO and other applicable policies and (b) any state laws (e.g., implied contract of employment) restricting an employer's ability to interpret or amend those policies.

Q: May an employer require an employee without H1N1 symptoms but who has been in contact with an individual with H1N1 or is in a potential incubation period (e.g., after returning from travel to an area with widespread H1N1 infection), to use his or her vacation/PTO for the absence?

A: Yes, subject to (a) the provisions of an employer's current vacation/PTO and other applicable policies and (b) any state laws (e.g., implied contract of employment) restricting an employer's ability to interpret or amend those policies. Employers should carefully consider the employee relations implications of such a policy.

Q: May an employer advance employees vacation/PTO to cover H1N1 absences?

A: Yes. In fact, many employers are doing so. Employers should draft any new policies and agreements so that employees repay the advanced vacation first from their newly earned PTO/vacation and/or, where not otherwise prohibited by state law, employers can deduct any advanced but never earned time from a departing employee's vacation/PTO payout or final paycheck(s).

Wage and Hour

Q: May an employer "dock" an employee for time away from work for H1N1, if he or she has exhausted vacation/PTO?

A: For non-exempt employees, yes. For exempt employees, it depends on whether the absence is initiated by the employer or by the employee: (a) if initiated by the employee, the employer may dock the exempt employee for full-day absences only; (b) if initiated by the employer (e.g., "you must stay home because of a sick relative, even though you are willing to come to work"), the employer may dock the exempt employee only for full seven-day absences that coincide with the employer's pay week.

Q: May an employer require an exempt employee to use vacation/PTO in less than full-day increments?

A: Yes, as long as the exempt employee's overall salary/pay is not "docked."

Attendance

Q: May an employer count an employee's time away from work because of H1N1 against the employee for purposes of the employer's attendance policy?

A: Yes, as long as the illness does not qualify as an FMLA-qualifying serious health condition, in which case the employer must comply with the FMLA's prohibition on counting FMLA-qualifying absences against an employee. Note that there may be times when complications arising from H1N1 (or H1N1's effects on a pre-existing medical condition) could be considered a disability, in which case the Americans with Disabilities Act (ADA) may be implicated and a reasonable accommodation may be required, including possible variations in the employee's attendance requirements.

Q: Should an employer apply discipline for violation of its attendance policy against employees who are away from work because of H1N1?

A: Employers should strongly consider not doing so, because of the large number of employees whose attendance records will be adversely impacted. Having a large percentage of the workforce subject to termination because of attendance issues would be extremely disruptive to an employer's continued business operations and would have negative employee relations implications. Additionally, applying discipline for time away from work because of H1N1 might tend to encourage employees who already have attendance issues not to reveal their H1N1 symptoms rather than risk termination.

Q: Does an employer's waiver of strict compliance with its attendance policy for H1N1 set a negative precedent, allowing employees with other serious illnesses to argue that their absences should not be counted against them for purposes of the attendance policy?

A: No, as long as that waiver is consistently applied to all H1N1 absences and to H1N1 absences only. If employers make clear to employees that the waiver of strict compliance with the attendance policy is for H1N1 only, employers should be able to distinguish between an absence for H1N1 purposes and an absence for another reason, based on the serious, widespread, non-recurrent nature of the current H1N1 pandemic.

FMLA

Q: Is H1N1 automatically an FMLA-covered serious health condition?

A: No. If H1N1 does not satisfy the regulatory definition of a "serious health condition," it is not a serious health condition, and employers should not count the absence against the employee's 12 weeks of FMLA leave. Employers should evaluate any applicable state mini-FMLAs to ensure they do not contain different or additional requirements or provisions.

Q: What are the requirements for an FMLA-covered serious health condition?

A: The regulatory definition sections most likely to apply in the H1N1 context are:

More than three calendar (not work) days of incapacity plus two treatments by a health care provider (the first of which must occur within seven days of the first day of incapacity and the second within 30 days of first day of incapacity); or

More than three calendar (not work) days of incapacity plus one treatment by a health care provider (which must occur within seven days of the first incapacity) plus continuing treatment (including prescription medication) under the supervision of a health care provider.

Because the CDC has suggested that individuals not seek health care treatment unless they need urgent medical attention or they are at higher risk for complications from H1N1, many cases of H1N1 will not qualify as FMLA serious health conditions simply because the employees will not visit the doctor/health care provider for any visits/treatments.

ADA

Q: Is H1N1 a "disability"?

A: Normally, no. Even under the newly amended ADA (effective January 2009), H1N1 is likely not long-term enough to qualify as an ADA disability. In the Equal Employment Opportunity Commission's (EEOC) proposed regulations on the amended ADA, the EEOC is proposing to clarify that "seasonal or common influenza" usually is not a disability within the meaning of the ADA. Complications from H1N1 (e.g., pneumonia) may qualify as an ADA disability, triggering certain obligations by the employer (e.g., reasonable accommodation, etc.). Employers should evaluate any applicable state mini-ADAs to ensure they do not contain different or additional requirements or provisions.

Q: If an employer treats an employee as if he or she possibly has H1N1 (e.g., by forcing him or her to stay home until an incubation period has passed), is that a valid basis for a "regarded as disabled" claim?

A: No. The amended ADA makes clear that "regarded as" claims may not be brought for conditions such as H1N1 that are "transitory and minor." If H1N1 in a specific case is not transitory and minor,

then H1N1 would have become associated with a different condition or complication. That different condition or complication could, of course, give rise to a “regarded as” claim.

Confidentiality

Q: Is an employer’s knowledge that an employee has H1N1 subject to Health Insurance Portability and Accountability Act (HIPAA) privacy restrictions?

A: Not usually—not unless the employer acquired the information in its role as the administrator of the health insurance plan. Since most employers learn of an H1N1 diagnosis from the employee or his or her family, HIPAA is usually not implicated.

Q: May an employer disclose an employee’s actual or probable H1N1 diagnosis to others?

A: The EEOC has indicated that H1N1 symptoms or an H1N1 diagnosis is considered confidential medical information that an employer can disclose to only a limited group, including supervisors (so that the supervisor can implement necessary work restrictions for public health and safety reasons), first-aid personnel, and others not relevant in the current H1N1 context. This group does not include co-workers, patients or customers. Despite this position, some (though not all) courts have held that an employee’s voluntary self-disclosure (i.e., when the employee or his or her relative tells an employer that he or she has H1N1 or is ill) is not covered by this prohibition. Additionally, given the widespread and far-reaching nature of the H1N1 pandemic, an employer may be able to argue that its failure to disclose an employee’s H1N1 status to co-workers, patients and/or customers is a direct threat to the health of the co-workers, patients, and/or customers, by putting them at risk of not seeking treatment in a timely or appropriate manner, especially if any of the co-workers or customers is among the group at higher risk of developing complications from H1N1 (e.g., pregnant women, those with asthma) or is a patient in a health care setting. Because of the EEOC’s stated position on this issue, employers should consult with labor and employment counsel before making any disclosures of an employee’s H1N1 status to co-workers, patients, or customers.

Employers also should evaluate any applicable state privacy law or state mini-ADA to ensure it does not contain different or additional requirements or provisions.

Q: If so, should an employer disclose an employee’s actual or probable H1N1 diagnosis to others?

A: While there are some good practical reasons for an employer to make such a disclosure, including employee and client health and relationship reasons, there also are privacy concerns. Because the EEOC is taking the position that an employer may not disclose an H1N1 diagnosis to most employees, employers do so at their own risk (see above for some of the arguments employers would have in response to the EEOC’s position). In light of the EEOC’s stated position on this issue, employers should consult with labor and employment counsel before making any disclosures of an employee’s H1N1 status to co-workers, patients or customers.

OSHA

Q: May an employer provide and allow employees to use respiratory protection voluntarily?

A: Yes, but the employer must meet certain Occupational Safety and Health Act (OSH Act) requirements. If the employer provides dust masks (including N-95 masks) and allows employees who may be worried about exposure to use them voluntarily, then the employer must provide a copy of [Appendix D](#) to the Occupational Safety and Health Administration (OSHA) Respiratory Protection Standard to the employees. The employer must also verify that the masks do not pose an additional hazard to employees. For example, the use of dirty masks may inhibit breathing, or the masks may not be appropriate if employees are exposed to other substances (such as airborne chemicals).

If the employer requires respirators (including dust masks or N95s) or allows employees to wear respirators that are not dust masks or N-95s voluntarily, then the OSHA standard requires a written respiratory protection program that includes training, fit-testing, medical examinations and other provisions. For example, an employer that requires employees who may have been exposed to H1N1 or who may have been diagnosed with H1N1 to wear dust masks must have a written respiratory protection program. (See 29 C.F.R. § 1910.134).

Q: When is an employer required to provide respiratory protection, and what are the OSH Act compliance implications?

A: OSHA does not have a specific standard or regulation that mandates respiratory protection for employees exposed to H1N1. Employers are, however, required to comply with Section 5(a)(1) of the OSH Act (typically called the “general duty clause”), which requires employers to maintain a “workplace free from recognized hazards.” If H1N1 is actually present in the workplace, then the employer is likely required to take some action to protect employees.

In its H1N1 **guidance**, OSHA divides employers into three categories: high risk, medium risk, and low risk. Health care providers who are expected to treat patients diagnosed with H1N1 are considered high risk. Employers in the medium-risk category typically deal with the general public, and could include restaurants, hotels and retail facilities, and providers of services involving entering private homes, such as cable installers. Employers with manufacturing facilities or office environments are generally considered low risk. In the guidance, OSHA provides suggestions on how employers in the different categories can protect employees. California OSHA also has an Aerosol Transmissible Diseases **standard** that applies to H1N1.

The virus is generally assumed to be present in certain health care settings, such as emergency rooms, and employers would be expected to take action, including providing respiratory protection, or risk a citation under the general duty clause. In fact, at this point, OSHA enforcement actions related to H1N1 are expected to be focused on the health care industry. OSHA **guidance** has specific recommendations on pandemic influenza preparedness and response for health care employers.

In other settings, the compliance obligations are less clear. If an employee is diagnosed with H1N1, then OSHA would likely expect the employer to take some action, such as requiring the employee to leave the worksite until he or she is no longer contagious, implementing handwashing procedures, and allowing liberal leaves of absence for employees who believe they have been exposed. Although respiratory protection is not recommended by OSHA for medium and low risk facilities, it is possible that H1N1 may infect a larger population this fall. At that point, OSHA may advise respiratory protection. An employer’s compliance obligations under the general duty clause are fluid, fact-specific and highly-dependent on the significance of the risk at a particular worksite, and if the risk becomes more significant, an employer’s OSHA compliance obligations may change.

If an employer decides that respiratory protection is mandatory (which is likely the case in many health care settings, and which may become more broadly necessary in the “worst-case” H1N1 scenario predicted by some), then the employer must implement a written respiratory protection program that complies with the Respiratory Protection Standard (29 C.F.R. § 1910.134). The program must include a host of measures, including mandatory training, fit-testing, medical examinations and maintenance requirements for the respirators.

Q: Are there any OSHA requirements when an employee is diagnosed with H1N1?

A: Yes, in some cases. Employers are required under OSHA’s **recordkeeping regulation** (29 C.F.R. § 1904) to record illnesses that are “work-related” and meet one of the recording criteria, which include days away from work, job transfer and medical treatment. A work-related illness that meets these criteria must be recorded on the employer’s OSHA 300 Log, and an OSHA 301 form also must be completed. An illness is work-related if it is more likely than not that a factor or exposure in the workplace caused or contributed to the illness.

The recordkeeping regulation exempts the "common cold or flu" from the recordkeeping requirements. As a result, even if an employee catches a cold from a co-worker and misses work, the illness is not recorded on the OSHA 300 Log. OSHA has not explicitly said whether H1N1 is considered a "common cold or flu." Given, however, that the exceptions to the recordkeeping requirements are very narrow and that OSHA has expended significant resources advising employers on how to avoid H1N1 outbreaks, OSHA may take the position that work-related H1N1 cases must be recorded if the recording criteria are met. So far, however, OSHA has not done so.

An employer may be required to record an H1N1 case if it is work-related and results in days away from work, job transfer or medical treatment. For example, an employee may be diagnosed with H1N1 after working closely with another employee or a customer who was diagnosed with the virus. The employee then misses work or is treated with Tamiflu or some other prescription medication (or both). Unless the employer can prove that the employee contracted H1N1 in some other way and that the workplace exposure had no effect, the illness must be recorded on the OSHA 300 Log. The fact that the employer could not have taken any steps to prevent the employee from contracting H1N1 is irrelevant. The OSHA recordkeeping system is "no fault," and any illness resulting from an exposure to a workplace hazard is considered "work-related."

Employers should evaluate any applicable state OSHA plans or workplace safety laws to ensure they do not contain different or additional requirements or provisions.

Workers' Compensation

Q: Could H1N1 be covered by workers' compensation?

A: Workers' compensation claims and procedures are based on state law, which varies from state to state. Therefore, employers should consult with labor and employment and/or workers' compensation counsel on this question.

Generally, however, state workers' compensation law requires that an employee prove that he or she contracted the illness in the course and scope of employment and that the illness is caused by a hazard recognized as peculiar to a particular employment. Some states specifically exclude from coverage those contagious diseases resulting from exposure to fellow employees or from a hazard to which the ill employee would have been equally exposed outside of his or her employment.