



## Preparation for Employee Issues with Flu and H1N1 Virus

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**First the good news:** The Centers for Disease Control and Prevention (CDC) report a decrease in the incidence of influenza activity during the period November 1 - 7.

**Now the bad:** The proportion of deaths continues to rise and is above the epidemic threshold for the sixth consecutive week; the number of outpatient visits is above the baseline average for all regions surveyed by the CDC; and 46 states report geographic widespread activity, with the remaining four states reporting local activity.

This information implicates a continuing concern regarding the H1N1 virus (a type of influenza responsible for the 2009 flu pandemic) and emphasizes the importance of maintaining efforts to prepare and protect employees. This post addresses factors providers should consider towards that goal.

Provider efforts to address H1N1 issues must comply with state and federal employment, discrimination and occupational safety and health laws. In addition to implementing measures to protect their workplaces, providers should also re-evaluate their sick leave policies and procedures for compliance with both state and federal laws including the Occupational Safety and Health Act (OSH Act), Fair Labor Standards Act (FLSA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), Title VII of the Civil Rights Act, and the Age Discrimination in Employment Act of 1967 (ADEA). Sick leave and other policies must not discriminate against employees on the basis of race, color, religion, sex, or national origin.

### OSHA

The OSH Act requires employers to furnish each employee a place of employment free from recognized hazards that are likely to cause death or serious harm. On November 9, 2009, the Occupational Safety and Health Administration (OSHA) issued guidance to healthcare workers and employers to identify and minimize or eliminate high to very high risk occupational exposures to the H1N1 virus. OSHA guidance on H1N1 has followed the CDC guidelines. Both the CDC and OSHA advise health care providers to employ a hierarchy of

controls to prevent exposure and transmission of the virus in the following order of preference:

**a. Eliminate potential exposures.**

One of the most basic ways to do this is to limit, where possible, the presence of persons with the virus.

1. Where possible, provide care instructions via remote means for patients with mild symptoms and encourage them to stay home. The CDC recommends minimizing outpatient visits for patients who do not have risk factors for complications and denying entry to visitors who are sick.

2. Monitor healthcare personnel. Provide healthcare personnel with instructions on how they are to respond if they have symptoms. These instructions include specific information about symptoms which require immediate medical attention. The CDC urges that persons, who develop fever and respiratory symptoms, should be instructed not to report to work, or if at work, promptly notify their supervisor. Providers may direct employees who have H1N1 symptoms and who pose a direct threat to patients and other employees to go home. Additionally, the CDC recommends tracking absences to identify work areas with higher incidence of risk. Examining these areas may identify other measures that can be taken to reduce risk.

**b. Engineering controls.** Such measures include partitioning spaces to reduce exposure and shield patients and personnel and installing effective ventilation systems. A sliding glass screen that separates clerical personnel from a patient waiting area is an example of an engineering control. Another example may include using furnishings and floor surfaces that are easy to clean in order to remove bacteria through routine housekeeping. Other examples include: hands-free devices to open doors, operate faucets, open trash and other containers; hands-free devices to dispense items; installation of hand-sanitizing dispensers in hall-ways and at entrances to rooms; and architectural designs to avoid the need for doors to restrooms. These controls are considered effective because they are implemented without depending upon individuals to take precaution measures.

**c. Administrative controls and work practices.** These controls and practices include promoting and providing vaccination, training and enforcing hygiene practices, triage measures to manage patients with flu symptoms, providing tissues and hand sanitizers, posting signs, and establishing work rules to protect and prevent exposure. Other work

practices include keeping work surfaces clear of unnecessary paper and articles, so that they are easier to clean, and frequent checks to clean restrooms and restock towels and soap. Commonly touched surfaces, such as latches, knobs, controls and keyboards, should be cleaned frequently with appropriate solutions. Work practices can also address culprits for contaminants including accumulation of newspapers and magazines and ensuring trash disposal containers are conveniently located and emptied frequently.

Measures which increase and promote hand washing/sanitizing make a significant difference and should be emphasized. In the 1840s, prior to discovery of the germ theory, Ignaz Semmelweis, an Austrian physician, discovered that by simply employing hand washing protocols he was able to significantly reduce the mortality rates of his patients. The CDC emphasizes that transmission of influenza usually occurs from contact with the hands, typically, by touching an infectious patient or contaminated surface. The CDC recommends washing hands “before and after” all patient contact (physical touching of the skin or body including taking pulse, blood pressure), contact with respiratory secretions and before putting on and taking off personal protective equipment (PPE).

Although hand washing is an effective and inexpensive means to protect against infection, its effectiveness is contingent upon individual practice. OSHA’s guidance encourages the posting of signs to promote safe practices. The challenge is to promote a workplace environment where frequent hand-washing/sanitizing is convenient and the norm. This may include encouraging employees to wash up in the presence of the patient before they begin an examination to provide reassurance to the patient the importance of hygiene in healthcare. Also facilities may consider recognition of healthcare workers and staff who set the example in this area. Facilities may also impose disciplinary action for failure to adhere to hygiene protocols, but should ensure such action is enforced uniformly.

**d. Personal Protective Equipment (PPE).** The OSHA standards require employers to conduct an assessment for hazards which necessitate the use of PPE and to select and have employees use PPE as protection. 29 C.F.R. § 1910.132(d)(1). The standard also requires the assessment be verified by written certification and employees receive PPE training on the proper selection, use, care, and disposal of PPE. The CDC recommends use of fit-tested N95 disposable respirators for healthcare workers whose duties require them to be in close contact (within 6 feet) of a person who may have the H1N1 virus. Providers, who require employees to wear respiratory PPE, must have a complete written

respiratory program in compliance with 29 C.F.R. § 1910.134. Additionally, providers should ensure they have a sufficient supply of PPE to include respirators and that they have an alternative plan if they do not have sufficient respirators.

For more information on the N95 disposable respirators see our post “Respirator Protection for H1N1 Influenza,” dated October 22, 2009, at the following link: [http://www.kingballow.com/Publications\\_files/Healthcare/RespiratorProtectionH1N1.pdf](http://www.kingballow.com/Publications_files/Healthcare/RespiratorProtectionH1N1.pdf)

### The Americans with Disabilities Act

Providers who have 15 or more employees must also ensure they comply with the Americans with Disabilities Act, which protects employees from disability discrimination. The ADA, which is enforced by the Equal Employment Opportunity Commission, prohibits employers from making disability-related inquiries and from requiring medical examinations, except under limited circumstances. It also prohibits employers from excluding disabled persons from work for health or safety reasons, unless they pose a direct threat. Furthermore, it requires reasonable accommodations for employees with a disability and who are qualified to perform the essential functions of their work. Under the ADA, “disability” includes an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

Here are some key points providers should know with respect to responding to the H1N1 virus and compliance with the ADA:

1. Health related inquiries which are not likely to elicit information about a disability are permissible under the ADA. The EEOC provides the following as an example of a permissible inquiry: “asking an individual about symptoms of a cold or the seasonal flu is not likely to elicit information about a disability.” Inquiries as to why an employee was absent from work and when they will return to work are not considered to be disability-related inquiries. Providers may inquire as to the existence of flu symptoms such as fever, chills, cough, or sore throat. However, inquiries as to whether an employee has a health condition that may make them more susceptible to the flu is not permissible as it may disclose the existence of a disability. Also, “yes” or “no” inquiries as to whether an employee would be unable to come to work for any of several reasons (listing non-medical reasons on equal footing with medical reasons) is not disability-related if the employee may answer

with a single “yes” or “no” response to the entire list of reasons without specifying the specific reason which applies to them.

2. Disability-related inquiries and/or medical examinations of employees are prohibited by the ADA unless they are job-related and consistent with business necessity. In general, this requires either objective evidence that the employee’s ability to perform essential job functions is impaired by a medical condition or they will pose a direct threat due to a medical condition.
3. All information obtained through disability-related inquiries, medical examinations, and provided voluntarily by employees must be kept as a confidential medical record and maintained separately from other employee records and files.
4. The ADA does not prohibit employers from requiring employees to comply with infection control work practices, to use personal protective equipment, and to go home if they have flu-symptoms such that they pose a direct threat to others.
5. The ADA requires employers during a pandemic to continue to provide reasonable accommodation to employees with a disability unless it imposes an undue hardship on the employer.
6. Although providers may deem mandatory vaccination necessary for the protection of patients and health care providers, they should be aware that employees may claim an exemption based on an ADA disability or a sincerely held religious belief or practice. In such instance, the ADA and Title VII of the Civil Rights Act of 1964, requires employers to provide reasonable accommodation unless doing so would pose an undue hardship.

#### The Family and Medical Leave Act

Providers, who have 50 or more employees during 20 or more workweeks in the current or preceding calendar year, are covered under the FMLA.

Under the FMLA, covered employers must grant 12 weeks of unpaid leave to an eligible employee under certain qualifying conditions including, a serious health condition which makes the employee incapacitated, or employee absence to care for a spouse, child or parent with a serious health condition. If the employee’s absence is to care for a spouse, child, parent or next of kin who is a current member of the Armed Forces, a total of 26 weeks of unpaid leave must be provided.



As part of its leave policy, an employer may require employees to use paid leave first when taking FMLA leave before beginning to use unpaid leave.

In order for an employee to be eligible to receive FMLA benefits, the employee must: (1) have been employed by that employer for at least 12 months (note this is not required to be consecutive months); (2) have worked at least 1,250 hours during the last 12 months; and (3) be assigned at a worksite where the employer has 50 or more employees within a 75-mile radius.

A “serious health condition” may include illness from the H1N1 virus if it includes:

1. Inpatient care or overnight stay in a medical facility, including any subsequent treatment in connection with such care; or
2. Continuing treatment by a health care provider that includes either more than three consecutive, full calendar days of incapacity, plus either two visits to a provider with the first visit within seven days of incapacity and the second within 30 days, or one treatment by a provider with a continuing regimen of treatment.

Employees are required to provide 30-day advance notice of their intent to take FLMA leave, when the need is foreseeable and such notice is practicable. Otherwise, they must provide notice as soon as practicable. When an employee requests FMLA leave or the employer is put on notice that FMLA leave may apply, the employer must inform the employee of their FMLA rights and responsibilities.

Employers may require certification from the employee’s provider to confirm the leave is due to a serious health condition. The U.S. Department of Labor (DOL) has provided forms for this purpose, the Medical Certification Statement. (See the link at the end of this post to access a copy of these forms.) It is recommended these forms be provided to the employee for the employee to provide their health care provider to complete and return.

#### Fair Labor Standards Act

Providers should be aware of staffing issues and schedules to prepare for unexpected absences due to the flu season and school closings due to a pandemic. Planning ahead may prevent the need for overtime expenses to cover unexpected absences.

Federal wage and hour laws, under the FLSA, do not require employers to have a paid sick leave plan. However, providers should consider establishing such a plan, especially if they have employees who are exempt from the overtime requirements. DOL regulations prohibit deductions from the pay of employees who are exempt from the overtime



requirements unless an exception set forth at 29 C.F.R. § 541.602(b) applies. Among those exceptions are the bona fide sick leave exception and the FMLA exception. 29 C.F.R. § 541.602(b)(2) & (7).

Under the bona fide sick leave exception, deductions from pay may be made for one or more full day absences if done pursuant to a bona fide sick leave plan or policy. DOL regulations do not contain any prohibition against making hourly incremental deductions of less than a full day from an employee's accrued sick leave account. However, deductions from pay of exempt employees pursuant to a sick leave plan cannot be made in less than full day increments. The FMLA exception allows employers to pay a proportionate part of the exempt employees' pay for leave which qualifies under the FMLA.

#### The Age Discrimination in Employment Act of 1967

The ADEA applies to persons who are age 40 or more and prohibits discrimination on the basis of wage, terms, conditions or privileges of employment. It also prohibits employers from limiting, segregating or classifying employees on the basis of age. Consequently, although age may be a factor making a person more susceptible to influenza complications, providers cannot discriminate against those employees on that basis.

#### State and Local Laws

In reviewing their programs and policies for compliance with federal laws, providers should also be aware that state and local laws may impose additional requirements beyond those imposed by the federal government.

Other References:

Flu.gov:

- **H1N1 Self Evaluation**  
<http://www.flu.gov/evaluation/>
- **Business Planning – Information, Resources and Checklists**  
<http://www.flu.gov/professional/business/index.html>
- **State Specific Information, including flu shot availability**  
<http://www.flu.gov/individualfamily/vaccination/locator.html>

CDC References:

- **CDC Interim Guidance on Infection Control Measures for 2009 H1N1 Influenza in Healthcare Settings, Including Protection of Healthcare Personnel**  
[http://www.cdc.gov/h1n1flu/guidelines\\_infection\\_control.htm](http://www.cdc.gov/h1n1flu/guidelines_infection_control.htm)



- **CDC Guidance for Businesses and Employers To Plan and Respond to the 2009–2010 Influenza Season**  
<http://www.cdc.gov/h1n1flu/business/guidance/>
- **CDC Guideline for Hand Hygiene in Healthcare Settings 2002**  
<http://www.cdc.gov/handhygiene/>

EEOC References:

- **Employment Discrimination and the 2009 H1N1 Flu Virus (Swine Flu)**  
<http://www.eeoc.gov/facts/h1n1.html>
- **Pandemic Preparedness in the Workplace and the Americans with Disabilities Act**  
[http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html)

US DOL References:

- **Certification of Health Care Provider for Employee's Serious Health Condition (FMLA)**  
<http://www.dol.gov/whd/forms/WH-380-E.pdf>
- **Certification of Health Care Provider for Family Member's Serious Health Condition (FMLA)**  
<http://www.dol.gov/whd/forms/WH-380-F.pdf>
- **US DOL: Family and Medical Leave Act**  
<http://www.dol.gov/compliance/laws/comp-fmla.htm>

OSHA References:

- **Employer Guidance: Reducing Healthcare Workers' Exposures to the 2009 H1N1 Virus**  
<http://osha.gov/h1n1/healthcare.html>
- **What Employers Can Do to Protect Workers from Pandemic Influenza**  
<http://osha.gov/Publications/employers-protect-workers-flu-factsheet.html>
- **Guidance on Preparing Workplaces for an Influenza Pandemic**  
[http://osha.gov/Publications/influenza\\_pandemic.html](http://osha.gov/Publications/influenza_pandemic.html)
- **Worker Guidance: Precautions For Healthcare Workers during the 2009-2010 Flu Season**  
[http://www.osha.gov/h1n1/protectyourself\\_healthcare.html](http://www.osha.gov/h1n1/protectyourself_healthcare.html)
- **Pandemic Influenza Preparedness and Response Guidance for Healthcare Workers and Healthcare Employers**  
<http://osha.gov/Publications/3328-05-2007-English.html>

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