

H1N1 Pandemic Preparedness in the Workplace

On June 11, 2009, the World Health Organization raised the worldwide pandemic alert level for novel influenza A (H1N1, or swine flu) to Phase 6. Phase 6 is the highest phase and indicates that a global pandemic is underway with at least 70 countries reporting cases of H1N1 at that time. On October 9, 2009, the EEOC published technical guidance for employers to consider when balancing the Americans with Disabilities Act with their pandemic- preparedness planning. Pandemic preparedness spans a number of legal issues in addition to the ADA and implicates employment decisions ranging from hiring, job assignments and reassignments, leaves of absence, and employment separations. Provided below are issues for employers to consider as they maintain and/or rebuild their workforces during the pandemic.

Employers should conduct a risk assessment to determine whether their place of employment or the nature of the work their employees perform poses a risk of exposure to their employees or the people to whom they provide a service. In order to reduce potential exposure, employers may encourage employees to "telework" where feasible (*i.e.*, work from home or an alternative location), and they may adopt infection-control practices at the workplace (e.g., regular hand washing, coughing and sneezing etiquette, and proper tissue usage and disposal). Separate and apart from any applicable OSHA requirements, employers may require employees to wear personal, protective equipment (e.g., face masks, gloves, or gowns) designed to reduce the transmission of infection.

If employers suspect employees are ill, employers are permitted to send employees home, and they may require employees who are sent home because of suspected illness, or who have been away from the workplace during a pandemic, to provide a fitness for duty certification prior to returning to work. Importantly, all written information about an employee's medical condition must be treated as a medical record and maintained in a confidential file separate from a personnel file. And, employers should remember to utilize their FMLA and other, discretionary leaves of absence policies in order to manage absenteeism during the upcoming months and throughout the year. Many employers would like to mandate influenza vaccinations as a condition of employment or continued employment, but to do so without regard for employees' objections based on medical condition(s) or religious beliefs may violate the ADA and/or Title VII.

Employers may require all new, prospective employees to undergo post-offer medical testing to determine general health status, but an employer may not rescind a job offer if the medical exam reveals the applicant has a medical condition that puts her at increased risk of contracting the virus (such as a lack of immunization history) or developing complications from the virus unless the applicant would pose a direct threat to himself or to others. The determination of whether an applicant poses a direct threat should be made by a medical professional, not the employer. But employers need to remember that, with the onset of the Genetic Information Nondiscrimination Act, medical histories may contain genetic information, which may expose employers to potential liability under GINA. Therefore, employers should exercise care in deciding to gather applicants' medical histories.

If you have any questions regarding this E-Flash, the ADA, the GINA, the FMLA, or the EEOC's technical guidance, or to discuss employee training programs available, please contact Post & Schell, P.C. Labor and Employment Attorney Darren Creasy or Claudia Williams. Darren can be reached at 215-587-6632 or dcreasy@postschell.com. Claudia can be reached at 717-612-6021 or cwilliams@postschell.com.

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