

## **GUIDANCE FOR EMPLOYERS PREPARING FOR A POSSIBLE SEVERE FLU OUTBREAK**

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By all accounts, the state and federal agencies charged with supporting and maintaining public health are predicting that the upcoming flu season will impact the general population dramatically. In fact, the World Health Organization (WHO) recently declared that the H1N1 flu virus has reached the global pandemic level. (To be clear, however, this designation speaks to the number of cases expected, not to an anticipated increase in the overall fatalities caused by the flu strain.) More specifically, President Obama's Council of Advisors on Science and Technology recently reported that swine flu will likely cause 1.8 million U.S. hospital admissions this flu season.

Should the flu materialize in the workplace as predicted, the consequences of absenteeism and employee or customer anxiety could become severe. Ensuring that employees remain healthy and productive requires employers to navigate a legal minefield. This guidance identifies the primary legal issues that arise during flu season, the risks associated with various policies, and general recommendations that balance employer needs and employee protections. This guidance, however, does not displace the need for employers to review policy decisions with legal counsel before implementation.

### **I. What Must An Employer Do?**

The financial reasons for maintaining a safe workplace are likely sufficient to prompt employers to take adequate measures to limit employee exposure to the influenza virus. But it is important to be aware of the primary legal issues that an employer may face if it fails to take adequate preventative measures.

The Michigan Occupational Safety and Health Act (MIOSHA) requires all employers to provide a safe and healthy working environment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to employees. This requirement comes from the Act's "general duty clause." The federal Occupational Safety and Health Act (OSHA) contains virtually identical language.

MIOSHA has said that it will use the "general duty clause" to keep employees safe from a pandemic flu. To prove a violation of the general duty clause, the agency would need to show:

- A. The employer did not provide a hazard-free workplace (i.e., that pandemic flu was actually present in the workplace); and

- B. That the employer failed to implement a feasible and useful method to abate the hazard (i.e., the specific steps that would have prevented/stopped the hazard from existing in the workplace).

MIOSHA has not created “standards” regarding influenza or infectious disease. But OSHA has promulgated non-binding guidance (which MIOSHA has endorsed) on preparing for an influenza pandemic. Even though these recommendations are non-binding, employers can expect MIOSHA to use them when issuing citations under the “general duty clause.” The recommendations, listed from most effective to least effective are:

- A. **Engineering Controls.** These controls involve making permanent changes to the physical layout of the work environment. The primary example of such a control is installing physical barriers, such as clear plastic sneeze guards.
- B. **Administrative Controls.** These controls involve scheduling work tasks in a way that minimizes exposure levels. Examples of such controls include: developing policies that encourage ill employees to stay home without fearing discipline; discontinuation of non-essential travel; limitations on visitors; and using practices that minimize face-to-face contact between employees (e.g., telecommuting or increased use of e-mail/telephone conferences).
- C. **Work Practice Controls.** These controls are active measures used to educate and promote safe work practice. Examples include: promoting vaccination and providing current education and training on influenza risk factors and proper hygiene.
- D. **Personal Protective Equipment (PPE).** The agencies find PPE to be the least effective control because it is most subject to misuse by employees. Nonetheless, the agencies believe that in the most extreme cases PPE can be effective in preventing exposure to influenza. But PPE should never take precedence over other control methods. And employers should note that some PPE is already governed by other standards. Therefore, before using any PPE, employers should ensure that all existing standards for the use of PPE have been satisfied.

To the extent feasible, the engineering, administrative and work practice controls detailed by the agencies should be part of any organization’s influenza planning. Failing to take such basic steps would not only risk OSHA/MIOSHA violations, but such inaction could also form the basis for negligence-based claims (e.g., premises liability) by non-employees.

By taking such steps, employers foreclose an employee’s ability to refuse to come to work for fear of contracting a pandemic flu. With very limited exceptions, employees are not protected from disciplinary action if they refuse to work based on a minimal risk of contacting the flu that cannot be eliminated by reasonable measures.

## II. What May An Employer Do?

Considering the importance of maintaining a healthy and productive workforce during flu season, the issue that employers need to consider most is not doing too little, but doing

too much. Before taking more drastic action than that recommended by OSHA/MIOSHA, employers must consider the following guidance.

A. **Mandatory Flu Shots**

Are employers allowed to require flu shots as a condition of employment?

The answer is yes. There is no federal or state law that prohibits an employer from requiring employees to be immunized for influenza as a condition of employment. But an employer considering mandatory vaccinations should consider the following potential legal concerns.

1. **No Non-Essential Medical Inquiries.** The Americans with Disabilities Act (ADA or, as amended, the ADAAA) prohibits an employer from asking employees about medical conditions unless the inquiry is “job related and consistent with business necessity.” Therefore, if employees are asked questions about medications or medical conditions in the course of receiving a flu vaccination, there is a risk that those questions could be considered unlawful. Questions limited to determining whether an employee has a condition that could cause a flu vaccine to be dangerous are unlikely to violate this rule.
2. **Medical Exclusions.** An employee who cannot safely receive a flu shot due to allergies, medications, or other medical reasons must be excluded from the requirement. Employees are responsible to report such a condition either to the employer or the providers administering the vaccine. (The employee may be required to provide medical documentation to support the exclusion.)
3. **Sincere Religious Beliefs.** If an employee has a “sincere religious belief” that prohibits vaccination, the employee may refuse vaccination based on that belief. In a few specific instances, however, courts have held that an employer need not accommodate an individual’s religious beliefs if that accommodation would adversely affect the rights of others. If an employee offers a religious belief as a reason to refuse vaccination, the employer should make a case-by-case determination of whether the employee’s refusal would adversely affect others, and if so whether another form of accommodation would be appropriate. It would be prudent to obtain legal advice on the specific facts if such a case arises.
4. **Unionized Employers.** A unionized employer generally has a duty to bargain with the union over the implementation of work rules that could affect employees’ working conditions and potentially their continued employment. This bargaining obligation would likely apply to a policy requiring flu shots, because employees who fail to comply would be subject to disciplinary action. The duty to bargain does not require that the employer obtain the union’s consent to the policy.

## B. Managing the Workforce During Flu Season

Not even mandatory vaccinations will keep an entire workforce flu-free. A comprehensive policy must therefore address how to deal with employees who contract the flu or show symptoms of the flu.

### 1. What Medical Information Can an Employer Obtain Regarding a Potentially-Exposed Employee?

In preparation for the first full H1N1 flu season, the Center for Disease Control (CDC) has issued guidance for influenza pandemic preparations. The CDC states that if the flu season becomes more severe than during the spring and summer of 2009, employers should consider actively screening all employees. In other words, according to the CDC, employers should ask all employees reporting for work about symptoms consistent with an influenza illness (e.g., fever or chills and cough, sore throat or body aches).

Such proactive medical inquiries can violate the ADA. Before asking any disability-related question (i.e., a question likely to elicit information about a disability), an employer would need to have a reasonable belief, based on objective evidence, that the particular employee has or has been exposed to a medical condition that would impair her ability to perform essential job functions (i.e., fundamental job duties) or pose a direct threat (i.e., significant risk of substantial harm) in the workplace. And the “active screening” policy suggested by the CDC prompts employers to ask disability-related questions arguably without any evidence.

Notwithstanding the objective evidence requirement, recent guidance from the Equal Opportunity Commission (EEOC) on medical inquires under the ADA adopts the CDC recommendation in part, stating that employers may ask employees “who report feeling ill at work or who call in sick” if they are experiencing influenza-like symptoms such as a fever or chills and a cough or sore throat. See, EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, available at [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html) (Pandemic Preparedness) (last updated October 9, 2009). The guidance does not address the full recommendation by the CDC, which seeks to obtain such information from all employees, regardless of whether they show any symptoms.

Given this legal background, if employers seek to obtain information beyond that approved by the EEOC guidance, they should balance the justifiable reason for obtaining such information (i.e., how much direct interaction does the employee have with the general public?) with the inquiry concerns (i.e., how much objective evidence has the employee already provided regarding his or her current health?). To tip the scale in favor of further inquiry, employers should consider adopting policies that educate employees on flu-like symptoms and encourage employees to report their specific symptoms to the appropriate management personnel.

### 2. Can An Employer Require Sick Employees To Stay Home?

In response to frequently asked questions regarding a possible influenza epidemic, the federal government has created a question and answer section on its influenza preparedness website, [www.flu.gov](http://www.flu.gov). One question asks: can an employer require employees to stay home if

they or members of their family are known or suspected to have pandemic influenza or been exposed to someone with pandemic influenza? In response, the government states as follows:

**Yes.** Even if an employer believes that individual would pose a direct threat in the workplace due to a disability, the employer would not violate the Americans with Disabilities Act (ADA) if it required a qualified individual with a disability to stay home. A direct threat is a significant risk of substantial harm to safety that cannot be eliminated or reduced by a reasonable accommodation. A determination of direct threat must be based on the most recent and reputable medical information. If a pandemic illness did not rise to the level of a disability, then a decision to require infected employees to stay home would not implicate the ADA. *See* [http://www.pandemicflu.gov/faq/workplace\\_questions/human\\_resource\\_policies/e2.html](http://www.pandemicflu.gov/faq/workplace_questions/human_resource_policies/e2.html) (last updated January 24, 2008).

Similarly, the recent EEOC guidance posits that:

**Yes.** The CDC states that employees who become ill with symptoms of influenza-like illness at work during a pandemic should leave the workplace. Advising such workers to go home is not a disability-related action if the illness is akin to seasonal influenza or the 2009 spring/summer H1N1 virus. Additionally, the action would be permitted under the ADA if the illness were serious enough to pose a direct threat. *See Pandemic Preparedness, supra.*

It should be noted, however, that these positions fail to discuss possible liability for “regarded as” disabled claims under the ADA. Generally, an employer “regards” an employee as disabled when it takes an unlawful employment action based on an actual or perceived physical or mental impairment. Unless the actual or perceived physical impairment is transitory (i.e., expected duration of less than 6 months) and minor (undefined; case-by-case basis), such action would violate the ADA. Given the anticipated number of hospital visits prompted by influenza this season, it is possible that influenza would not be considered minor.

At the same time, however, if the influenza strain turns out to be severe, the “direct threat” defense would become stronger. Thus, while a minimal risk of liability does exist when an employer requires employees to stay home, the risk of having them report to work, especially in employment settings that involve significant direct client interaction, likely justifies such action.

To further minimize the risk, employers should focus on making individualized inquiries when determining the appropriate time to return to work. A standard for such inquiries that many governmental entities promote, including the CDC, is to allow the employee to return to work 24 hours after his/her fever permanently breaks without anti-fever medicine.

Unfortunately, the CDC ultimately recommends a uniform period of leave – healthcare employees with influenza symptoms should remain off work for a minimum of 7 days. Such uniform policies provide evidence that the “perceived or actual” impairment (i.e., influenza) is not minor, thereby strengthening a “regarded as” claim. At the same time, uniform periods undermine the “direct threat” defense. For example, an employee who recovers more quickly than 7 days could present evidence indicating that the full leave period was unnecessary to avoid the threat. Therefore, any period of mandated leave should correspond with the observable symptoms in each specific case, not any (seemingly arbitrary) uniform period of time.

### 3. How Can An Employer Account for the Employee’s Missed Time?

#### FMLA

Generally, even severe flu does not require medical treatment. Under such circumstances, the FMLA would not cover the days an employee misses because of his or her own sickness or to care for a sick family member. In some exceptional cases, however, the flu could be a “serious health condition” under the FMLA. The two most likely situations are:

- The illness incapacitates the employee or his/her family member for more than three consecutive calendar days and results in two or more treatments (i.e., examinations or evaluations) from a health care provider; or
- The illness incapacitates the employee or his/her family member for more than three consecutive calendar days and results in a regimen of treatment prescribed by a health care provider (i.e., antivirals).

Considering these caveats, the need to minimize administrative burden, and the amount of evidence suggesting that the 2009-2010 flu season will result in significant additional hospital visits, employers should conditionally designate leave of more than three days due to flu-like symptoms as FMLA leave, pending medical certification.

#### Use of Paid Time-Off to Compensate Sick Employees

Regardless of whether the leave is covered by FMLA, employers may require employees to use accrued and unused sick or paid time off to cover flu-related absences so long as such a requirement is consistent with the employer’s policy on the issue. To further limit any potential economic damages, employers might consider whether their policy would allow an employee to borrow future sick or paid time off in order to cover any flu-related absences that exceed the sick or paid time off available to the employee in the current year.

#### Unpaid Personal Leaves of Absence or Emergency Provisions

The uniform position from governmental agencies charged with influenza preparation guidance is that, in the absence of FMLA or sick or paid time off, employers should develop policies that encourage employees to stay home without fear of losing their job. This practice is rational and reasonable, especially considering that no employer can predict the quality or number of employees who will need a miscellaneous unpaid leave of absence to recover from the flu. Employers should also note that the need for such a leave might not relate

to any actual flu exposure. For instance, an employee may need to care for a child after the school the child attends shuts down out of fear, whether rational or not, of a pandemic flu outbreak.

Another possible method for dealing with employees who do not qualify for FMLA and who have exhausted paid time off is to include a provision in the attendance policy that suspends some or all attendance requirements when the employer declares a state of emergency. This requirement would allow attendance issues to become secondary to effective management of production and/or service requirements without creating risk of discriminatory application claims down the road.

4. Can an Employer Require a Fitness for Duty Certifications Following Sickness?

The EEOC has also clarified whether an employer may require a doctor's note or physical examination before returning from the flu, stating:

**Yes.** Such inquiries are permitted under the ADA either because they would not be disability-related or, if the pandemic influenza were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees.

As a practical matter, however, doctors and other health care professionals may be too busy during and immediately after a pandemic outbreak to provide fitness-for-duty documentation. Therefore, new approaches may be necessary, such as reliance on local clinics to provide a form, a stamp, or an e-mail to certify that an individual does not have the pandemic virus. *See Pandemic Preparedness.*

Employers should note, however, that the information obtained in the examination, including on-site examinations, would be considered protected health information under the Health Insurance Portability and Accountability Act (HIPAA). Under HIPAA, the examining health professional would be required to obtain the employee's authorization to release the information before the employer could receive it.

5. How Should Employers Treat Medical Information Obtained From an Employee?

Whether voluntarily revealed or obtained through a medical inquiry by the employer, state and federal law requires that employee medical information remain confidential. In other words, employers may not use such information for third party purposes, including but not limited to quelling co-worker rumors regarding an employee's absence.

**If you have any questions regarding this guidance or other related topics, please feel free to contact your Miller Johnson employment lawyer or one of the authors for more information:**

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