

Workplace Challenges of Influenza (Seasonal and H1N1)

September 25, 2009

As the annual influenza season approaches, the U.S. Department of Health and Human Services' Centers for Disease Control (CDC) has released its *Guidance for Business and Employers to Plan and Respond to the 2009-2010 Flu Season*, and the Department of Homeland Security has released its *Planning for 2009 H1N1 Influenza: A Preparedness Guide for Small Businesses*. The publications encourage employers to review their policies designed to protect their healthy employees, guard the privacy of stricken employees, and comply with applicable national, state, and common law requirements. Such policies require familiarity with the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act of 1990 (ADA), the Fair Labor Standards Act (FLSA), the Health Insurance Portability and Accountability Act (HIPAA), attendance policies, workers' compensation, and the Occupational Safety and Health Act (OSH Act), as well as collective bargaining obligations, employee benefits, and insurance law, as well as state and local laws.

Morgan Lewis has formed a cross-practice and multidisciplinary team of lawyers to help employers comply with these legal requirements and formulate practical workplace policies. In addition, we have prepared the following resources to assist employers.

H1N1 (Swine Origin) Influenza Workforce Resources Webpage

Morgan Lewis has created a webpage that collects our online communications and resources relevant to this issue, as well as providing links to the CDC, www.flu.gov, and other government resources. This information, which will be updated throughout the fall influenza season, is available at www.morganlewis.com/H1N1resources.

Employer Responses to Influenza Webcast

Due to the immediate urgency of this topic, Morgan Lewis will hold a 60-minute webcast at 1:00 p.m. ET on Wednesday, October 7. The webcast, "H1N1 (Swine) Flu Pandemic Preparations for Employers," will take an in-depth look into how employers can deal with the emergent issues and immediate questions that arise from the influenza epidemic within the workforce. It will also focus on creating long-term emergency preparedness plans for future crisis situations.

To register for this webcast, please go to

<https://morganlewisevents1.webex.com/mw03051/mywebex/default.do?siteurl=morganlewisevents1>.

Answers to Frequently Asked Questions

May an employer send home a symptomatic or sick employee?

Yes. However, given that the symptoms of influenza are similar to those of a variety of other illnesses, the safer procedure is to send the employee to the employer's occupational health clinic for examination. This avoids the potential risk from a layperson involuntarily sending an employee home from work when the employee may simply be suffering from seasonal allergies. Potential risks relate to claims for lost pay and the implications of the time off under a no-fault absence policy.

May an employer require that a symptomatic employee have an influenza test?

No. The decision to administer an influenza test is a *medical* decision that can only be made by a medical professional who is the employee's treating healthcare provider (HCP) or another HCP vested with public health authority. If an employer seeks to require a specific medical procedure or test and to be advised of the result, it may be violating state or federal laws relating to the practice of medicine and impermissible medical inquiries.

What medical confirmation can an employer demand from a sick employee?

An employer is not entitled to medical confirmation from an employee's HCP unless such information is authorized by statute or an employer's policies or plans. Most employer short-term disability (STD) plans provide for medical certification when a claim is filed. A leave request under the FMLA provides for medical certification as a matter of statute. However, employer sick day policies may be different. Some are silent on medical certification because employers have not felt compelled to address the issue, given the limited duration of these programs before STD is triggered. Other sick day programs expressly reserve the employers' right to request that medical certification be provided. However, even where the right to request medical certification is preserved, depending on state law, an employer may not be entitled to request the actual diagnosis.

May an employer require a medical release before an employee returns to work after a confirmed or suspected illness?

Yes. When an employee has been absent from work due to illness, the employer may request a release to return to work from an HCP so long as such a request is otherwise in accordance with any governing collective bargaining agreement or sick day/STD/paid time off plans.

It should be noted that CDC has requested that employers **do not** ask employees to provide medical releases. The CDC is concerned that such requests will overburden healthcare providers at a time when they will be needed to interact with sick patients. The CDC has recommended that employers accept employees back without clearance after the employee has gone 24 hours without fever, and is not presently using medication to reduce a fever.

Should an employer notify its employees that a coworker has been diagnosed with influenza?

Such a notification can be problematic for employers for several reasons. First, there is the risk of panic among the workforce. Second, the notification may be an invasion of the stricken employee's privacy, thereby opening the employer to the potential of a breach of privacy tort claim. Third, the employer may be at risk of disseminating incorrect information.

HCPs who have a patient with influenza are primarily responsible for reporting the case to the local public health authorities. It is not the employer's obligation to report. In the normal circumstance of a highly contagious disease in the workplace such as tuberculosis and meningitis, the public health authorities have the notification and decision-making responsibility. These officials may then direct the employer to take certain actions or make appropriate employee notification. They may elect to come into the workplace themselves to talk to employees and/or to perform medical screening. In extreme cases, the public health officials can make the decision to close the facility or even quarantine the exposed employees.

These are decisions that should be made by the public health authorities.

However, if an employer learns that an employee has been confirmed for influenza and believes that coworkers may have been exposed, and has not heard from the public health authorities, it is prudent for the employer to contact local public health officials to advise them of the incident and to get their direction as to how the public health officials wish the matter handled. By acting at the direction of the public health authorities, the employer then gains protections from some of the claims that could arise for breach of privacy or the dissemination of misinformation.

What can employers do to reduce the potential for employee hysteria?

Unfortunately, there have been numerous incidents over the years in which employees responded irrationally to a perceived threat of a hazardous workplace exposure—particularly when the nature and extent of the threat is unclear. The combination of media attention to influenza and rumors of a stricken coworker may well create such a situation.

To stabilize the workforce in such circumstances employers may wish to issue a statement to employees providing the CDC's guidelines for good hygiene techniques to aid in reducing the spread of infection. Such a notice should also contain a link to the CDC website. Some employers are distributing hand sanitizers to employees and enhancing normal cleaning procedures. Others have brought in an HCP to talk to employees, answer their questions, and help them with their concerns.

What actions should employers take in response to healthy employees who wish to work from home due to fear of contagion?

Employers should very carefully consider their response to such requests because it may well create the proverbial "slippery slope." Certainly, symptomatic employees should be told to stay at home. It is also prudent to allow asymptomatic employees who have realistically been exposed to someone who is already symptomatic to work from home, if that is possible, during the influenza's latency and incubation period. However, allowing employees to work from home solely based on a generalized fear of exposure may soon become unworkable, and leave the employer in the position of inconsistent treatment of employees or a diminished workforce. If an employer receives such a request, the use of vacation or unpaid time off should be considered.

*

*

*

*

Without doubt, the current influenza pandemic has the potential to be a singularly challenging health concern for employers. Its notoriety in and out of the workplace should not distract employers from their legal obligations or prompt them to make decisions that do not take into account broader workplace consequences. A useful approach is to look to an emergency preparedness plan before problems arise in the workplace.

These comments are only a brief guidance about possible employer responses. If you have a case of influenza in your workplace, you should consult with counsel experienced in handling these multidisciplinary occupational health law matters.

If you have any questions or would like more information about any of the issues discussed in this LawFlash, please speak with a member of the firm's Labor and Employment Practice, or with any of the following Morgan Lewis attorneys:

Chicago

Nina G. Stillman 312.324.1150 nstillman@morganlewis.com

Dallas

Ann Marie Painter 214.466.4121 annmarie.painter@morganlewis.com

Irvine

Barbara J. Miller 949.399.7107 barbara.miller@morganlewis.com

New York

Edward Cerasia II 212.309.7011 ecerasia@morganlewis.com

Palo Alto

Carol R. Freeman 650.843.7520 cfreeman@morganlewis.com

Philadelphia

Thomas Benjamin Huggett 215.963.5191 tbhuggett@morganlewis.com
Dennis J. Morikawa 215.963.5513 dmorikawa@morganlewis.com

Washington, D.C.

Joyce A. Cowan 202.739.5373 jcowan@morganlewis.com
Jonathan L. Snare 202.739.5446 jsnare@morganlewis.com

About Morgan Lewis's Labor and Employment Practice

Morgan Lewis's Labor and Employment Practice includes more than 300 lawyers and legal professionals and is listed in the highest tier for National Labor and Employment Practice in *Chambers USA 2009*. We represent clients nationwide in a full spectrum of workplace issues, including drafting employment policies and providing guidance with respect to employment-related issues, complex employment litigation, ERISA litigation, wage and hour litigation and compliance, whistleblower claims, labor- management relations, immigration, occupational safety and health matters, and workforce change issues.

About Morgan, Lewis & Bockius LLP

Morgan Lewis is an international law firm with more than 1,400 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered Attorney Advertising in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

© 2009 Morgan, Lewis & Bockius LLP. All Rights Reserved.