

## Workplace Challenges of Swine Flu

April 30, 2009

The reality of swine flu has now reached the American workplace, and employers are struggling to implement responses that protect their healthy employees, guard the privacy of stricken employees, and comply with applicable national, state, and common law requirements. Because appropriate employer responses require knowledge of several different areas of employment law such as employment, OSHA, employee benefits, and insurance law, it is essential that employers do not permit overexcited media coverage to push them into taking actions that may be illegal and frightening to employees.

Much has been written about immediate and longer-term emergency preparedness plans, including the need for assigning responsibilities, communication, quarantine and attendance matters, travel restrictions, supply chain continuity, and insurance review. While these topics are indeed very important planning steps, employers must deal with a number of emergent issues and immediate questions that arise when confronted with a possible or confirmed case of swine flu within the workforce. This LawFlash addresses those issues.

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

An employer is not entitled to medical confirmation from an employee's healthcare provider (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 Family and Medical Leave Act (FMLA) as a matter of statute provides for medical certification. 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 right of employers 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 the employer require that a symptomatic employee have a swine flu test?**

No. The decision to administer a swine flu test is a *medical* decision that can only be made by a medical professional who is the employee's treating 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 employee medical inquiries.

### **May an employer send home a symptomatic employee?**

Yes. However, given that the symptoms of swine flu are similar to 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 spring allergies. The risk for an employer could arise if the employee loses pay for the time away from work or if the time off goes against the employee under a no-fault absence policy.

### **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/PTO plans.

### **Should an employer notify its employees that a coworker has been diagnosed with swine flu?**

Such a notification can be problematic for employers on several grounds. 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 swine flu have a legal obligation to report 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 TB and meningitis, the public health authorities have the notification and decision-making responsibility. These officials may direct the employer as to the actions to take or the employee notification to make. 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.*

That said, if an employer learns that an employee has been confirmed for swine flu 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. Once the employer acts at the direction of the public health authorities, it will have 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 of an irrational response by employees to a perceived threat of a hazardous workplace exposure—particularly when the nature and extent of the threat is unclear. The combination of the media attention to swine flu 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 Center for Disease Control (CDC) guidelines for good hygiene techniques to reduce 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 swine flu’s latency and incubation period. However, to allow an employee to work from home solely based on a generalized fear of societal exposure may soon become unworkable, and leave the employer in the position of inconsistent treatment or a diminished workforce. If an employer receives such a request, the use of vacation or unpaid time off should be considered.

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Without doubt, the current swine flu epidemic 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 compel 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. The comments above are only a brief guidance about possible employer responses. If you have a case of swine flu in your workplace, you should consult with counsel experienced in handling these multidisciplinary occupational health law matters.

**Employer Response to Swine Flu Webcast**

In response to the urgency of this topic, Morgan Lewis will hold a 90-minute webcast on Monday, May 4 and Thursday, May 7. The webcast, titled “Appropriate Employer Responses to Swine Flu,” will take an in-depth look into how employers can deal with the emergent issues and immediate questions that arise from the swine flu epidemic within the workforce. It will also focus on creating long-term emergency preparedness plans for future crisis situations.

To register, please go to

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

If you have any questions about the information contained 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:

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