

H1N1 Influenza and the Vermont Workplace

The Status of H1N1 in Vermont Today

H1N1 influenza or flu is now a pandemic according to President Obama's official declaration of a National Emergency, announced on Saturday, October 24, 2009. The World Health Organization ("WHO"), an arm of the United Nations, has considered H1N1 as a worldwide pandemic for some time.

The H1N1 virus is a contagious acute respiratory disease in pigs, caused by one of several swine influenza A viruses (most commonly of the H1N1 subtype, but other subtypes - like H1N2, H3N1, and H3N2 - also circulate in pigs). Transmission to humans was occasionally reported prior to early 2009 when cases of human infection with swine influenza A (H1N1) were reported, the first of which occurred in Mexico, followed by several other countries, including the United States. Confirmed deaths due to the disease have also been reported. H1N1 in humans resembles seasonal influenza and other acute upper respiratory tract infections but disease symptoms can also range broadly from showing no symptoms of infection to severe pneumonia resulting in death. A novel vaccine for H1N1 Influenza is currently developed and is available in some areas although it is in short supply.

Vermont's Health Commissioner Wendy Davis declared that Vermont has joined 41 (now 45) other states with confirmed "widespread" H1N1 influenza activity on October 21, 2009. While Vermont has not reported any deaths from the virus and only sporadic hospitalizations, in an ordinary flu season 36,000 Americans die from influenza and its complications. High Schools across the state are reporting high rates of student absenteeism due to the flu and Davis says that 90% of all flu strains in Vermont should

be assumed to be H1N1. There are many unanswered questions because health experts are waiting to see if the virus is more virulent than the strain that appeared in the spring. There is hope that this will not be the case, as most Vermonters have recovered well from the virus so far, according to Davis. However some experts fear that the strain of H1N1 to emerge this fall and winter may be as deadly as the “Spanish Influenza” that killed so many around the world in 1918.

Practical Considerations

Some Vermont employers are taking steps to make sure their business will continue to run during a pandemic of the H1N1 influenza. Policies are drafted; Vermont Department of Health posters and alcohol based hand sanitizing dispensers are on the workplace walls. While many employers are reluctant to treat their employees in a parental manner, it may be worthwhile in this atmosphere to remind employees of proper coughing and sneezing techniques to avoid the spread of the virus. The Vermont Department of Health posters attached to this paper do just that.

Employees who are understandably afraid of contracting H1N1 should be educated on its symptoms and on the methods to avoid contracting the illness. These employees’ fears may also be reduced if the employer has a comprehensive policy in place to manage H1N1 and if the employee is reassured that the employer is doing everything reasonably possible to keep the workplace safe and healthy. When H1N1 is present in the workplace, cleaning workers should be informed so that they can take precautions, such as by wearing latex gloves, frequent hand washing and avoiding hand to mouth and hand to nose contact. In addition, cleaning workers should be instructed to

thoroughly clean workplace surfaces including door knobs, computer key boards, kitchen surfaces, photocopying machines, fax and scanning machines and the like.

Telecommuting and flex-time work rules are relaxed to permit those who can productively work from home to do so while recovering from the flu or in order to avoid contracting the virus in the workplace. Attendance and sick pay rules are also relaxed to make sure workers who have flu-like symptoms or who have children with flu-like symptoms who need care, do not fear discipline or termination if they stay home instead of potentially infecting their fellow workers and their families by coming into work. As someone once said, “an ounce of prevention is worth a pound of cure.” Teleconferencing and videoconferencing will be used more often to avoid travel, planning in the event of a temporary shut down is in place and union officials are involved in all of the planning stages in the organized workplace. In high risk workplaces such as health care facilities, respirators and other personal protective equipment (“PPEs”) should be made available to employees in frequent contact with infected individuals.

Of course, there is also a philosophical divide between some employers, employment law experts and public health officials. For example, the Center for Disease Control (“CDC”) is urging employers not to require doctor’s notes for those returning to work from the flu to avoid overwhelming physician offices while others are insisting on such medical releases. *See generally*, www.cdc.gov. One New York lawyer is telling his clients to revise their policies so that knowingly going to work with the flu is a terminable offense. This type of aggressive posture toward H1N1 is legally suspect and may cause significant repercussions among employees and their families.

There are also a surprising number of potential legal pitfalls that Human Resource professionals need to ready themselves for in the event of a widespread outbreak. Below we summararily look at some of the legal issues.

Legal Considerations

What to do with employees who you reasonably believe may have the H1N1 virus?

Suppose a co-worker informs HR that her colleague is exhibiting flu-like symptoms. The co-worker does not want to work next to the potentially sick worker and the potentially sick worker wants to work. This scenario raises a host of issues including the “safety defense” under the Americans with Disabilities Act (“ADA”) and its Vermont equivalent if we assume that the potentially infected worker is “disabled” or “regarded as disabled” within the meaning of the ADA. The safety defense requires the employer to prove that the potentially ill employee poses a direct threat “of significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by a reasonable accommodation.” If there is an objective basis to believe that the employee does have flu-like symptoms (consult the CDC website), and if the CDC has determined that there is a pandemic (The President has already done so), the employer has the right under Equal Employment Opportunity Commission (“EEOC”) and CDC Guidelines to segregate the employee from other workers, make medical inquiries (do you have a fever or chills and a cough and sore throat) and send the worker home for a recommended seven days. (Experts say that the incubation period for H1N1 is between 6 hours and 2-3 days. During that period, the infected individual is contagious.) Talk to the employee about working from home and the availability of paid sick leave. This medical information must be kept confidential and not shared with coworkers. Employers are not

recommended to take the temperature of employees as they arrive at work every morning or every shift because this type of procedure is a medical examination under the ADA and generally impermissible unless there is a severe pandemic environment. An additional reason not to take the temperature of members of the workforce (besides running afoul of the ADA) is that many workers with H1N1 will not have a temperature.

Can you require employees to be vaccinated against the H1N1 virus? While an employer can offer free and voluntary vaccinations to its employees, mandatory vaccinations are ordinarily prohibited by law. Many employees object to vaccinations because of feared complications, and some have religious grounds or other medical conditions that may prohibit the vaccination. Employers may require the vaccination of certain health care workers and first responders in very limited situations.

One of my employees refuses to come into work or perform work-related travel because he is scared of catching the virus. What, if anything, can I do? Both the National Labor Relations Act (“NLRA”) and the Occupational Safety and Health Act (“OSHA”) and its Vermont equivalent VOSHA give an employee the right to go on a “safety strike” when the employee has a “reasonable belief” that they would be in danger at work. For instance, if the employer is just ignoring the threat of H1N1, this would be a good example where the employer may be violating OSHA’s general duty clause and could be fined failing to take reasonable precautions under OSHA/VOSHA. Both the NLRA and OSHA/VOSHA have anti-retaliation provisions which prohibit employers from retaliating against employees who refuse to work because of “reasonable” health concerns. While the NLRA does not cover public sector employers, OSHA/VOSHA does.

This does not mean that you can not counsel the employee of efforts made in the workplace to prevent or reduce infection of H1N1, the steps the employee can take on his own behalf to protect himself and any CDC or other government data that may indicate that the virus is under control. Obviously, such an employee could work from home and be required to do so if possible.

OSHA/VOSHA says it will be issuing a directive in the very near future concerning H1N1 in the workplace. The agency stated that it will follow the CDC guidance “very closely.” Failure to show “good faith” efforts to protect workers from H1N1 may result in citations. In health care settings where workers are within six feet of infected individuals, OSHA is recommending the use of disposable N95 respirators. Further guidance on the use of PPE and engineering and administrative controls in the health care setting is contained in CDC’s “Interim Guidance on Infection Control Measures for 2009 H1N1 Influenza in Healthcare Settings, Including Protection of Healthcare Personnel.” Should an employee claim he or she contracted H1N1 in the workplace and missed work or required medical attention, that incident must be recorded in the employer’s OSHA 300 log.

I have an employee who wants workers’ compensation benefits for his bout with H1N1? Is he entitled to workers compensation? The first thing you should do in this scenario is to contact your workers’ compensation insurer and to make sure the Department of Labor is properly notified within 72 hours of a potential work-related disease. Also, as noted above, record the occurrence of the virus in the workplace in your OSHA 300 log if the employee missed work or required medical attention. Usually an employee will not make such a claim because his or her incapacity will be short lived,

there should be no permanent impairment and his or her health insurance would presumably cover any healthcare required. However, work-related diseases are covered under Vermont's workers compensation law and an employer needs to treat this report like any other report of a workplace injury or illness. Workers compensation experts continue to debate this issue; however, both sides seem to agree that if a health care worker is infected with H1N1 and there is a significant complication, permanent impairment or death, this individual or his family is likely to recover benefits under Vermont's workers compensation laws.

Do we need to treat H1N1 absences as FMLA or VPFL eligible? There is no legal reason to treat absences due to H1N1 influenza differently from any other type of flu under the Family and Medical Leave Act ("FMLA") or under Vermont's analogue, the Vermont Parental and Family Leave Law ("VPFL"). A covered employer must evaluate each incidence of H1N1 flu on a case by case basis for FMLA/VPFL eligibility. Neither federal nor state leave law ordinarily cover garden variety, short-term bouts of the flu. However, H1N1 or its symptoms may qualify as a "serious health condition" or "serious illness" in cases where there is hospitalization, ongoing in-home care by a physician or other health care provider and in certain cases where the employee or a covered family member is incapacitated in excess of three (3) days. An employer should begin its FMLA/VPFL documentation and certification process with employees who are out of work due to H1N1 and who appear to merit coverage under the applicable leave laws. Otherwise, the employer may simply treat the absence as a non-qualifying illness.

Is an employee with H1N1 disabled and entitled to rights under the Americans with Disabilities Act (ADA) and Vermont’s Fair Employment Practices Act (“FEPA”):

Because the flu is an acute, short-term condition, it is unlikely employers would have to provide reasonable accommodations — that is, unless the flu resulted in the substantial limitation of a major life activity. There is also the issue of whether an ill employee may be sent home because he or she is a “direct threat” to the employee or to others. What follows is the Equal Employment Opportunity Commission’s analysis of “direct threat” in the H1N1 context:

DIRECT THREAT AND PANDEMIC INFLUENZA

Direct threat is an important ADA concept during an influenza pandemic.

Whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would not pose a direct threat or justify disability-related inquiries and medical examinations. By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination.

During a pandemic, employers should rely on the latest CDC and state or local public health assessments. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

It would seem, based on the current available information and the most recent pronouncement of the federal and local authorities, that an employer may have enough objective evidence and leeway at the moment to consider H1N1 to be a “direct threat” to the health and safety of other employees, triggering the availability of the “safety defense” for workplace decisions designed, in good faith, to protect employees from infection by others. Thus, an employer can send an employee with H1N1 symptoms home, or require an employee returning from a vacation in an area with high levels of H1N1 to stay home until the incubation period is over (up to 2-3 days). It is important to keep in mind that these activities may also be required by OSHA/VOSHA. It is imperative during the pandemic for HR professionals to stay on top of OSHA pronouncements, CDC guidelines and any new statements from the EEOC or the Vermont Department of Health, all available on line. You can also visit www.flu.gov for general information on the H1N1 virus.

Another likely ADA issue to arise in this context would be confidentiality of medical information gathered in connection with H1N1. The ADA prohibits disclosure of an employees’ medical information except on a strict “need to know” basis. Those with a “need to know” normally means the employee’s direct management, HR or medical personnel, or the government when investigating compliance with ADA or OSHA. The ADA does not authorize disclosure of medical information to an employee’s co-workers.

As noted above, contagious diseases often present problems because of co-worker concerns. An employer taking steps to prevent or contain H1N1 should do so while making every effort to avoid disclosing the identity of any individuals who have H1N1, have symptoms of the illness, or who were exposed to the illness.

You may require employees to adopt infection control practices (e.g., regular hand washing, coughing and sneezing etiquette, and tissue usage and disposal) or wear personal protective equipment (e.g., face masks, gloves) designed to reduce the transmission of the pandemic virus. You may also require employees to telecommute as an infection-control strategy.

Does the federal Fair Labor Standards Act require that I pay my salaried, overtime exempt employees their full weekly salary when they are too ill to work? The general rule is that any exempt salaried employee is entitled to receive her full weekly salary in any week in which she performs any work. On the other hand, provided the employer provides some sort of sick leave plan, should the exempt, salaried employee exhaust all of her sick and other accrued leave and go out sick again, the employer can pay the employee on a per diem basis: meaning the salaried employee is only entitled for a full day's pay for any day in which she performs any work. The employer need not pay the employee for days when she was too sick to work.

Non-exempt employees do not need to be paid when on leave because of the flu if the employee does not perform any work. If the employee works from home, they need to be paid for all hours worked, including overtime, as applicable.

If you have any questions on these issues or any other labor and employment matter, or are interested in employee or manager training in an employment or labor area, please contact Kerin Stackpole or Tom Somers at Bergeron Paradis Fitzpatrick in Burlington.