



Spring 2009

Flu and the Workplace

The outbreak of the H1N1 virus, commonly known as the swine flu, has raised a number of questions with regard to the workplace. Some of these concerns are addressed here.

What can I do to protect my employees? It is most important for all individuals to use common sense and follow general guidelines for hygiene. Remind employees to wash their hands often and thoroughly and to cover coughs. If the work environment allows for it, you should have your employees avoid close contact with one another. You can also provide employees with masks or respirators, although this is not currently required.

Encourage employees to stay home if they have the flu or have been exposed to it. [Requiring employees to do so is discussed below.] You may want to make your attendance policies more flexible, at least temporarily, so that employees who need to stay home for longer periods are not subject to disciplinary action.

If possible, restrict business travel, particularly to countries or areas where there have been a significant number of cases of this flu.

Can I require an employee to come to work? If an employee has the flu (or has a family member with the flu) you must (at a minimum) follow your current guidelines with regard to absences. If you have a paid sick leave policy, you are required to allow an employee to use up to one-half of the annual accrual to care for a sick child, parent or spouse (including a domestic partner). Additionally, in some cases, this flu may qualify as a serious health condition under the FMLA/CFRA and (if you are subject to their coverage) you would be required to allow time off under those laws.

In some instances employees have refused to come to work for fear that they will be exposed to the flu virus. Generally, you can require that employees come to work or face disciplinary action. Under OSHA and Cal-OSHA guidelines employees can refuse to perform work if they reasonably believe they are in serious and imminent danger. Unsubstantiated fears based on rumor or minimal information will usually not be sufficient to cause an employee to believe his health and safety are threatened.

Recommendation: Require your employees to come to work unless their absence is protected by law or company policy.

Can I require an employee to stay home? The general rule is that an employer can decide whether or not the employer wants the employees to work each day and, thus, can instruct an employee not to come to work. However, this action cannot be

taken if it violates state or federal law. For example, an employer cannot act in a way that discriminates against an employee on the basis of race, sex, age, etc. Additionally, if an employer refuses to allow an exempt employee to come to work, the employee may nonetheless have to be paid for the entire week.

Most employers do not want their employees to come to work if they are sick (whether with this flu or for any other reason). This would normally constitute a non-discriminatory reason for the action. Additionally, allowing the employee to work could result in a danger to the health and safety of others. Thus, if an individual has the flu the employer can most likely prohibit that employee from entering the workplace and require a doctor's note to return (particularly if this is a current practice). A more difficult question arises if the employer does not want an employee to come to work if the employee may have been exposed to the virus. This becomes a matter of degree. If the employee has a child or lives with a family member with a confirmed case of this flu, it is probably reasonable to require the employee to stay home. What if the employee has recently been in a country or area with high incidence of the flu? It would be difficult to base this on the "health and safety" standard since the possibility of infection is minimal. Additionally, since the employee may have traveled to Mexico there could be a question as to whether the employer is taking the action based on an employee's national origin. Furthermore, Section 96(k) of the Labor Code prohibits an employer from retaliating against an employee for engaging in lawful off-duty activities. Although it is generally thought that this section will only apply to specific legal rights (engaging in political activities, etc.) there has been only minimal judicial interpretation of this provision.

Recommendation: Do not allow employees who have (or live with someone who has) a confirmed case of the flu to come to work. However, in situations in which employees may have traveled to an area in which there are generally reported cases of the flu, but the employee has not had any specific contact with individuals who have the flu, it may be unwise to prohibit the employee from coming to work, although you may want to discourage attendance by letting the employee know you will not impose disciplinary action for the absence.

For additional assistance, contact Jeanne Flaherty or Lynn Ryder at Employer's Legal Advisor, Inc.



Jeanne Flaherty is the President and Managing Attorney of Employer's Legal Advisor, Inc., which represents and advises employers on all employment matters. The firm specializes in conducting employment practices compliance reviews and advising employers on day-to-day legal issues in the workplace.

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