

## Protecting the Workplace Against H1N1 Influenza Legal Liability

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Can an employer ask an employee with influenza-like symptoms to go home until the symptoms pass? Is an employee whose child's school is closed temporarily due to the H1N1 eligible for FMLA leave? Can an employee refuse to work because of his or her fear of contracting H1N1? These are among the many potential concerns for employees as a result of the H1N1 influenza pandemic.

H1N1 has prompted many employers to create preparedness plans to address work flow, communications and the health and safety of workers. Part of any effective plan must also include how to manage the workforce and respond to questions such as those above.

### STATE AND FEDERAL DISABILITY DISCRIMINATION LAWS

When analyzing an employer's response to a H1N1-related concerns, compliance with the Americans with Disabilities Act, (as amended, 42 U.S.C. § 12101 *et seq.*), and state anti-discrimination law, N.H. RSA 354-A, (collectively "ADA") must be considered. One ADA issue that will constantly arise is how much information an employer legally can request from an employee who reports feeling sick at work. Under the ADA, a covered employer is prohibited from making a "disability-related" inquiry (i.e. an inquiry that is likely to elicit information about a disability), unless the inquiry is job-related and consistent with business necessity.

An inquiry that is not likely to elicit information about a disability is permissible under the ADA. Thus, asking an individual about the symptoms of the seasonal flu is not likely to elicit information about a disability, and therefore would be legal under the ADA. Similarly, requiring that an employee go home if he/she displays influenza-like symptoms (akin to the seasonal flu or the 2009 spring/summer H1N1) is permissible during a pandemic because the action is not disability-related.

Even when an employee appears to exhibit flu symptoms severe enough to constitute a disability, an employer may still be able to make a disability-related inquiry or medical examination of an employee if the employer has a reasonable belief that the employee will pose a "direct threat" due to a medical condition. The reasonable belief must be based on objective, factual information about the specific disability.

Simply because the influenza rises to the level of a pandemic does not mean that it is a "direct threat." A pandemic describes how widely spread the influenza is around the world; it does not relate to the severity of the symptoms. To determine whether the influenza pandemic rises to the level of a direct threat, employers should rely on the health assessments from the Centers for Disease Control, as well as state and local public health officials. Seasonal influenza and the H1N1 of spring/summer 2009 did *not* rise to the level of a direct threat and would not have justified disability-related inquires and medical examinations.

The Equal Employment Opportunity Commission has provided guidance that can assist employment counsel navigate this area: *Pandemic Preparedness in the Workplace* and *The Americans with Disabilities Act*. (See [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html))

## **FAMILY AND MEDICAL LEAVE**

An employer covered by the federal Family and Medical Leave Act (FMLA), (29 U.S.C. § 2601 *et seq.*) must provide FMLA leave to an otherwise eligible employee who has a “serious health condition” (as defined by the FMLA) related to H1N1 or if the employee must care for his or her child, spouse or parent with an H1N1-related “serious health condition.” (See 29 C.F.R. § 825.113.) However, simply wanting to stay home to avoid exposure to H1N1 is not an FMLA-qualifying reason for leave. (See 29 C.F.R. § 825.112.) Moreover, an employee may not be eligible for FMLA leave when he or she must stay home to care for a well child, whose school or child-care has been closed as a precautionary measure or due to a quarantine because caring for a well child is not an FMLA-qualifying reason for leave. *Id.*

Although an employee who misses work for an H1N1-related reason may not be protected by the FMLA, before taking any disciplinary action against the employee for missing work, employer’s counsel should consider whether such action against the employee may give rise to a common law claim that he or she was terminated in violation of “public policy” under New Hampshire case law.

## **OTHER CONSIDERATIONS**

In addition, because a pandemic influenza has the potential to create a significant public health concern, employers should review their sick/personal leave and telework/work-from-home policies, and/or collective bargaining agreements, to consider providing flexibility for employees, who must be absent from work for an H1N1-related reason. In fact, though not mandated by state or federal law, employers may want to encourage employees who are ill with H1N1 or who have been exposed to family members with H1N1 to work from home. In all circumstances, any such policies must be administered in a non-discriminatory manner.

Employers that implement work-from-home arrangements must also consider reviewing applicable wage and hour laws. For example, if an employer can no longer afford to pay sick time according to its policy due to the volume of employees taking sick time, it may change its policy so long as it provides advance written notice to employees. (See N.H. Lab. R. 803.03(c).) An employer must also evaluate whether it can charge the employee for any additional expenses due to a work-from-home accommodation. (See RSA 275:48 *et seq.*)

Employers’ counsel must consider all employment laws and any collective bargaining agreement in legally managing a workforce in the face of the H1N1 pandemic.

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## **RELATED LINKS**

By reacting too quickly to an employee’s request for accommodation or acting too aggressively to protect other employees, an employer may inadvertently end up facing legal liability in addition to the other costs incurred from dealing with the H1N1. For more information practitioners may consult:

Human Resources Policy Index: <http://answers.flu.gov/>

Preparedness Guide for Small Businesses: <http://www.flu.gov/professional/business/smallbiz.html>

Q&A About CDC’s Guidance: <http://www.flu.gov/professional/business/toolkitfaq.html>

Updated Guidance for Business: <http://www.flu.gov/professional/business/index.html>

New Hampshire DHHS Swine Flu: [http://www.dhhs.state.nh.us/DHHS/DHHS\\_SITE/swineflu.htm](http://www.dhhs.state.nh.us/DHHS/DHHS_SITE/swineflu.htm)

New Hampshire: <http://www.211nh.org/>