



Health Law Alert

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The latest CDC guidance for health care employers for flu season

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The Centers for Disease Control and Prevention (CDC), with input from the Department of Homeland Security and other federal agencies, recently released new guidance for all employers to consider in order to decrease the spread of seasonal influenza and novel H1N1 influenza virus, also known as “swine flu.” The CDC has also issued guidelines specifically tailored for employers providing health care services, in light of the greater potential risks of occupational exposure in such environments. These guidelines serve as recommendations for employers to minimize the effects of the potential flu pandemic this coming winter. Both sets of guidance are discussed below.

Specific guidance for health services providers

Given the critical importance health care service providers play in assisting communities coping with influenza outbreaks and the greater potential for exposure and transmission in such workplaces, the CDC’s guidance addresses the ways health care providers can protect their workers and their patients, as well as protocols to limit transmission and exposure. The CDC also has issued a 10-step “action plan” specifically tailored for medical offices and other outpatient providers.

General recommendations

Special infection controls, including the placement and transport of patients, are suggested in communities where there are confirmed infections of H1N1 virus. The recommendation for patients with confirmed, probable, or suspected cases is that they be placed into individual rooms, with the doors kept closed. This directive will obviously be difficult to accommodate for many facilities. When patients are moved to different departments (e.g., radiology), they should wear surgical masks to contain secretions. Isolation precautions should be continued for 7 days from symptom onset or until the resolution of symptoms, whichever is longer.

Health care personnel entering the room of a patient in isolation due to a suspected infection of H1N1 virus should be limited to those performing direct patient care. The CDC recommends that these personnel should also wear a fit-tested disposable N95 respirator or possibly even a more protective powered air-purifying respirator. This guidance differs from infection control guidance in the event of seasonal influenza

outbreaks, which recommends only the use of surgical masks. This guidance also must be incorporated with reference to and appreciation for federal OSHA and any applicable state OSHA standards regarding the use of personal protective equipment.

Limits are also recommended on visits to patients who have been isolated due to an H1N1 infection to only those who are necessary for the patient's emotional well-being and care. Any such visitors should be advised on infection control and be screened for potential acute respiratory illness before entering the facility or room. Personal protective equipment and hygiene precautions should also be employed.

The CDC recommends that health care personnel be monitored on a daily basis for signs and symptoms of respiratory illness in any communities where the H1N1 virus has confirmed cases of transmission. The CDC recommends that workers who develop symptoms should be instructed not to report to work or, if already at work, should cease patient care activities and notify their supervisors and infection control personnel. The CDC further recommends that ill workers be instructed not to report to work for 7 days or until symptoms have resolved, whichever is longer. However, the CDC notes that workers who have had an unprotected exposure to H1N1, but who are asymptomatic, may continue to work if they start antiviral prophylaxis.

Generally, health care service providers are encouraged to implement strong hygiene/cough protocol programs wherein employees and those visiting the environment are encouraged to cover their nose/mouth when coughing or sneezing, preferably with tissues or by coughing/sneezing into one's shoulder, maintaining strong hand-washing protocols, and making hand sanitizers and tissues readily available to staff and patients.

Action plan for medical offices and outpatient facilities

The CDC also suggests a 10-step action plan for medical offices and outpatient facilities:

Develop a Business Continuity Plan. Facilities should identify their essential functions, the people who perform those functions, and the numbers needed to sustain their core activities in the event of significant absenteeism.

Inform employees about the plan. Facilities should provide clear and frequent communication to ensure that staff are aware and understand the plan and any policies or procedures that will be in place to protect staff and patients.

Plan to operate even if there is significant staff absenteeism. Cross-training and other actions should be taken now so that facilities can still operate even in the event of 20% to 40% absenteeism of the workforce.

Ask sick employees to stay home. Personnel should be encouraged to self-monitor their symptoms, and any individuals developing respiratory illness symptoms should be encouraged or instructed to stay home.

Plan for a surge of patients and an increased demand for services. This planning may include implementing new procedures for providing information over the phone to triage which patients should come in and which should be treated at home, as well as altering messages that callers receive when they call the offices to provide helpful information, examples of which can be obtained from the CDC's website.

Be prepared to treat patients with H1N1 flu. This preparation includes implementing screening and infection control procedures, as discussed above. The CDC also recommends considering a separate waiting or exam room for treating possible H1N1 flu patients.

Protect the workforce during an outbreak. The infection control procedures and protocols discussed above are recommended for implementation in the event of an outbreak in the facility's community. Facilities should also begin to stockpile sufficient personal protective equipment for staff.

Immunize the staff. The CDC's Advisory Committee on Immunization Practices recommends that health care providers be among the priority groups to receive the H1N1 vaccine once it becomes available. Health care personnel should also be provided with the seasonal influenza vaccine.

Know what others are doing. Facilities are encouraged to coordinate with other providers in their areas and to know how other facilities plan to manage their operations in the event of an outbreak.

Know where to go for reliable information. Staff should be allocated to monitor developments regarding outbreaks both nationally, at the CDC's website, and at the state and local level, using information provided by state and local health departments.

Please note that prudent employers may want to make some or all of the CDC's recommendations mandatory, where possible—especially for nonessential personnel. However, any such decisions should first be discussed with counsel.

Guidance for non-health care employers

The CDC's guidance for employers that do not provide health care is broken into two categories or possible scenarios: (1) a typical seasonal flu, as occurs in most years; and/or (2) a more severe outbreak caused by H1N1 or by the combination of H1N1 and the seasonal flu. Many of the recommendations apply equally to both scenarios, with some more extensive recommendations made in the event of a severe outbreak. Many of these recommendations apply equally to health care providers and deserve the same attention as the more specific guidelines discussed above.

The CDC currently anticipates that more communities may be affected than were affected in spring/summer 2009 and/or will be more severely affected due to wider transmission and possibly a greater impact of the flu. Given the unpredictable nature of the H1N1 flu virus, however, employers are encouraged to be flexible and be prepared to respond to the varying levels of severity of a potential outbreak in the fall.

Employers' responses to be based on local events

We have previously recommended that employers develop a written communicable illness response program containing a number of elements (http://www.nixonpeabody.com/publications_detail3.asp?ID=2707, http://www.nixonpeabody.com/publications_detail3.asp?ID=2892, http://www.nixonpeabody.com/publications_detail3.asp?ID=2903). The latest CDC guidance is consistent with that recommendation, with additional emphasis on basing strategies and response to specific outbreaks on local information from local and state public health authorities. Whereas the CDC will publish updated national and international information at its website, the communication of outbreaks and the appropriate response are expected to be a very localized decision. Employers with more than one business location are encouraged to provide local managers with the authority to take appropriate actions outlined in their business pandemic plans based on the condition in each locality.

Recommendations in the event of a moderate season

A. Keep sick workers home.

In the case of both seasonal flu and the H1N1 flu, the CDC is recommending that sick workers be encouraged to stay home and away from the workplace. Workers who have symptoms of flulike illness are recommended to stay home and not come back to work until at least 24 hours after their fever (typically 100 F° or greater) has resolved. We believe that the CDC has used the phrase “encouraged to stay home” given the obvious political sensitivity of an alternative and stronger statement that employers “require” sick employees

to stay home. We recommend that employers consider making this recommendation mandatory.

Interestingly, the CDC is advising employers not to require a doctor's note for workers who are ill with flulike illness to validate their illness or to return to work, because doctors' offices and medical facilities may be extremely busy and may not be able to provide such documentation in a timely way. Similarly, employers are advised not to require employees to be tested for H1N1, particularly given that at present there is no reliable test for the illness.

The CDC suggests that employees who are well but who have an ill family member at home with influenza go to work as usual. However, the CDC recommends that these employees monitor their health everyday and notify their supervisor and stay home if they become ill. We note that, as a practical matter, such employees may need to stay home for all or part of the day. Also, we note that employers may want to have employees who have been exposed to a serious communicable illness stay home until it is certain they are not affected.

B. Be prepared if schools dismiss students or child care programs close.

Employers are encouraged to plan now to determine how they will operate if absenteeism spikes from increases in sick workers or those who stay home to care for ill family members, and for those who must stay home to watch their children if dismissed from school. Employers should prepare to institute flexible workplace and leave policies for these workers.

C. Consider telecommuting and possible "social distancing" practices.

If severity increases, public health officials may recommend a variety of methods for increasing the physical distance between people ("social distancing") to reduce the spread of illness. This practice can include dismissing schools, closing child care programs, canceling large community gatherings, canceling large business-related meetings, spacing workers farther apart in the workplace, canceling nonessential travel, and recommending work-from-home strategies for workers who can conduct their business remotely. Indeed, the CDC appears to be strongly suggesting telecommuting as a good option for employers, where appropriate.

Employers are specifically encouraged to explore whether they can establish policies and practices, such as telecommuting and staggered shifts, when possible, to increase the physical distance among employees and between employees. As a side note, this is an opportune time to explore whether employers have the information technology and infrastructure necessary to support multiple workers who may be able to work from home.

D. Know your operating thresholds.

Employers are encouraged to know their normal seasonal absenteeism rates and to monitor their personnel for any unusual increases in absenteeism through the fall and winter. Employers should also assess their essential business functions to determine at what threshold those functions would be threatened.

E. What should you do in the event of potential exposure in the workplace?

The CDC recommends that workers who appear to have a flulike illness on arrival or become ill during the workday be separated from other workers and be advised to go home and stay for at least 24 hours after they are free of fever (100° F or greater). If an employee becomes ill at work, the CDC is encouraging employers to inform fellow employees of their possible exposure, but maintain confidentiality as required by law and as appropriate. What this really means in practice is that disclosure of the identity of the source individual should be made only on a need-to-know basis—or as specifically permitted by the source individual without any coercion. Employees exposed to a sick coworker should monitor themselves for symptoms of flulike illness and report any symptoms to their employers.

Once again, it appears to us that the CDC guidance is written with careful sensitivity to some obvious political concerns. As a practical matter, however, prudence dictates that an employee with symptoms of a serious communicable illness that is readily transmittable in the workplace should be directed not to come to work until there is reasonable certainty he or she is unlikely to infect others—and employees who come to work anyway with such symptoms should be sent home.

F. General hygiene is important.

Employees should be instructed to wash their hands often with soap and water or use an alcohol-based hand cleaner, especially after coughing or sneezing. Employers should provide soap and water and alcohol-based hand sanitizers in the workplace, wherever possible. Also, all commonly touched surfaces in the workplace, such as workstations, countertops, and doorknobs should be frequently cleaned. Employees should be taught appropriate coughing and sneezing protocols.

G. What other actions recommended by the CDC should employers consider taking now?

Review or establish a flexible communicable illness response plan.

Conduct a focused discussion or exercise using the plan to find out ahead of time whether the plan has gaps or problems that need to be corrected before flu season.

Talk with companies that provide contract or temporary workers to the employer's workplace about the importance of sick workers staying home, and encourage them to develop nonpunitive leave policies.

Share the communicable illness response plan with employees, and explain what human resources policies, workplace and leave flexibilities, and pay and benefits will be available to them.

Make sure that human resources policies and practices are consistent with public health recommendations and are consistent with existing state and federal workplace laws.

Identify essential business functions, essential jobs or roles, and critical elements within your supply chains (e.g., raw materials, suppliers, subcontractor services/products, and logistics) required to maintain business operations.

Plan for how your business will operate if there is increasing absenteeism or these supply chains are interrupted.

Establish a process to communicate information to workers and business partners on your response plans and latest information. Anticipate employee fear, anxiety, rumors, and misinformation, and plan communications accordingly.

Encourage employees to get vaccinated. In the case of both seasonal flu and H1N1 flu, prioritized lists for those individuals most at risk are prepared by the CDC and are available on the CDC's website.

Additional recommendations in the event of a severe outbreak

The CDC's guidance also considers the possibility of a more severe outbreak. In addition to all of the above recommendations, the CDC adds a few additional recommendations to consider in the event of such an occurrence:

A. Actively screen workers at the beginning and end of workdays.

Screen for symptoms of the illness, including fever or chills AND cough or sore throat. Any such screening must be done in a neutral, nondiscriminatory manner.

B. Provide alternative work environments for employees at higher risk.

Such environments limit the contact these higher-risk employees have with others. This arrangement could include allowing telecommuting or assigning such workers to other duties with less coworker contact or in less crowded situations.

C. Increase social distance.

The goal is to create six feet of distance between people at most times. (This is obviously not an easy or simple strategy to implement for most employers). Other measures may simply involve avoiding crowded work settings, canceling large staff meetings and other face-to-face meetings, and staggering work schedules.

Conclusion

Although the impact of the upcoming flu season is impossible to predict, the federal government has identified the H1N1 flu as a potential threat to both the economy and national security. In this possible “calm before the storm,” employers still have time to take prudent steps so that they are prepared to respond quickly and effectively to an outbreak.

If you have further questions about communicable illness response preparation or need further assistance in this regard, please contact your regular Nixon Peabody attorney or:

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