



OSHA Alert

Recent developments in Occupational Safety and Health law

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Swine flu and other communicable illnesses in the workplace: A proactive response

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On Sunday, April 26, 2009, the U.S. government declared a public health emergency concerning the outbreak of swine influenza A (H1N1; “Swine Flu”). As of the date of this Alert, only a limited number of cases of swine flu infection in the United States have been confirmed. The largest outbreak has occurred in Mexico.

The declaration of a public health emergency is obviously important and indicates that public health officials view this outbreak as a potential serious threat. However, it is also important for employers to put the declaration in perspective and help employees avoid undue fear. This declaration does not mean that the outbreak has become a pandemic or that a pandemic is imminent. In fact, the declaration is actually a standard early step procedure that results in monitoring and testing of suspect cases, triggers additional reporting protocols, and increases media and public outreach to get information and warnings out.

Employers should likewise now take early stage action to educate employees and prepare for the impact of a swine flu outbreak in the workplace. This recommendation is particularly true for high-risk workplaces such as hospitals, medical offices, schools, and workplaces that provide services to high-risk populations. However, it is prudent for all employers now to take precautionary steps. Most employers can best do so through a written communicable illness response plan, which then serves as a guide for management and employees. For those employers who have such a program in place, now is the time to review and update your program and activate it. For those employers who do not yet have a program, now is the time to implement one. Waiting until a crisis occurs is waiting too long. It is virtually impossible to develop and effectively implement such a program under crisis conditions, and by waiting, you will miss the opportunity to take proactive preventative steps.

Background

Swine flu viruses do not normally infect humans. However, there are documented cases of human infections with swine flu, and cases of human-to-human spread of swine flu viruses have been documented. The World Health Organization (WHO) recently raised its threat level for the current outbreak of swine flu from Phase 3 (documented cases of human infection) to Phase 4 (evidence of sustained human-to-human transmission). The next step, Phase 5 would indicate that a pandemic may be imminent. The Centers for Disease Control (CDC) recently issued a travel advisory discouraging nonessential travel to Mexico.

Prudent employers should regularly monitor developments here from reputable sources. Two of the best are the CDC at www.cdc.gov and the WHO at www.who.int.

Although the number of confirmed cases is still relatively small, employers can and should now be taking proactive steps to help protect their employees and prepare for the potential impact of swine flu on the workplace. This plan is best done through implementation of a communicable illness response program that provides a structure for responding to the current swine flu outbreak, as well as future outbreaks of other communicable illnesses.

Implementing a communicable illness response program

An effective communicable illness response program will be simple and clear, and should cover each of the elements listed below. Of course, high-risk work environments will need a more comprehensive program, and lower-risk environments will need only a limited program. However, the same eight fundamental elements are a necessary part of all programs. Please note that if you are implementing a new program or making revisions that change working conditions, you may have a bargaining obligation if you have a unionized workforce.

1. *Scope:* The program should cover any communicable illnesses or diseases that pose a credible threat of transmission in your particular workplace. Examples might include swine flu, active TB, SARS, seasonal flu, etc. And the program should not be limited to currently known illnesses and diseases. Typically, the program would exclude any communicable illnesses that do not pose a credible threat of transmission in the particular workplace (e.g., HIV in an office environment). Such exclusions will help avoid violations of the ADA and, with proper explanation, should help alleviate any unnecessary employee concerns and fears.
2. *Responsibility:* The program should assign responsibility to one or more individuals to maintain and implement the program and to keep it updated as necessary. This responsibility would include regular monitoring of developments through news reports and information from the CDC, WHO, local public health authorities, and other appropriate governmental agencies and health organizations.
3. *Following applicable regulations and instructions by appropriate governmental agencies:* Typically, the program would note that the company will follow all applicable regulations or instructions issued by appropriate agencies, but might distinguish between a government regulation and a non-mandatory guideline. The program might also specifically provide discretion for the company to modify guidelines to best fit the needs of the particular workplace.
4. *Information and education:* The program should provide a method for distributing appropriate information to employees about communicable illnesses generally and about particular outbreaks specifically.

With specific regard to the current swine flu outbreak, we recommend early communication now. This quick dissemination will help ensure that employees understand that you are monitoring the situation and are prepared to respond. We recommend providing employees with information that will help them keep not only themselves but also their families safe and healthy. The safety of one's family is often the number one concern of employees in a communicable disease outbreak, and you should address it early. At this early stage, you should provide employees with a list of credible resources, such as the CDC and WHO websites, so they can readily access good information. You should specifically instruct them to be alert for symptoms and encourage them to consult with their own medical providers if they have any questions or concerns. Here, swine flu symptoms have been very similar to

seasonal flu (fever, sore throat, cough, stuffy nose, chills, aches and pains, and fatigue). Severe diarrhea and vomiting have also been reported.

You should also instruct employees to take universal precautions as noted below, and instruct them as to their reporting obligations, also noted below.

5. *Requiring universal precautions:* The program should mandate the use of universal precautions. Although every illness is different, there are certain simple, yet very effective, steps that every employee can follow to minimize the potential for infection and the potential for transmission of swine flu and other communicable illnesses. These universal precautions include the following:

- a. Frequent hand washing. Since access to soap and water is not always convenient (and some employees are allergic to antibacterial and/or other soaps), ready access to a hypoallergenic hand sanitizer should be provided. As an example, in an office environment, a company might provide containers of such hand sanitizers at workstations. In other environments, employers might put wall hand sanitizer dispensers in convenient locations. Employees should be instructed to wash or sanitize their hands frequently, and particularly to do so after shaking hands, using a phone, handling money, etc. Employers may want to provide sanitizing towelettes so that employees can wipe down phones, chair arms, and the like before use.

- b. Minimizing exposure to others who are ill. Minimizing exposure to others who are ill is obviously critically important. Employees who appear ill when they are at work should be sent home. And, when employees are ill, they should be encouraged, or perhaps required, to stay home. This approach can, of course, create an enforcement problem with employees who try to take advantage of this policy. But the cost of having a widespread illness in the workplace can be very high. And employees who attempt to misuse the policy can be subject to discipline, up to and including discharge. To further minimize misuse, an employer may also want to have a policy requiring medical certification when an employee calls in ill for an extended period. Clear absenteeism policies can often serve to minimize misuse. All applicable leave laws (FMLA, etc.) must also be followed, as well as the terms of any applicable collective bargaining agreement.

6. *Reporting requirements:* The program should require employees to report to the company when (a) they are experiencing symptoms or are diagnosed with an illness communicable in the workplace, or (b) they believe they may have been exposed to a person so diagnosed, or (c) they have recently visited a location where there has been an outbreak of a communicable illness. The policy should note that the information reported will be kept confidential to the extent reasonably possible, but must make clear that full confidentiality cannot be guaranteed. The policy should also urge employees to consult with their medical providers under these same circumstances.

The program should also describe when the employer will make a report of a known or suspected communicable illness to local health authorities.

7. *Travel Procedures:* Typically, a communicable illness response program would note that the company will generally follow the travel advisories issued by the CDC or other appropriate agencies. Distinctions can be made between work travel and personal travel, for example, with regard to whether employees will be paid during a period of incubation and quarantine.

In the case of swine flu, it appears there may be a period of up to seven days between infection and the appearance of symptoms. This period should be taken into account in setting policies for return to work after travel to an area where there has been an outbreak.

8. *Return-to-work procedures:* The program should require certification from a medical provider that it is safe for an employee to return to work after (a) being diagnosed with a communicable illness, (b) returning from an area where there has been an outbreak of a communicable illness, and (c) being quarantined in association with such an illness.
9. *Business continuation preparation:* The program should include critical business continuation plans. These plans would vary widely from employer to employer, but should generally include backup plans for supply and distribution chains, and contingent workers in the event of mass absences.

Conclusion

We are just now observing the early stages of a swine flu outbreak, and it is unclear how quickly or far it will spread. However, it is prudent for employers to adopt or update a written communicable illness response program now. Doing so will allow an employer to address current employee concerns and respond quickly and effectively to the outbreak, should it affect the workplace.

If you would like more information about responding to swine flu in the workplace or developing, revising, or activating your communicable illness response program, please contact your NP attorney or:

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