**H1N1 flu preparedness drives reexamination of employment policies**

2009 was the year of the swine – flu, that is. The H1N1 flu virus emerged in March and by June was declared a global pandemic. And, in October, President Barack Obama declared the H1N1 flu a national emergency. With the H1N1 threat came a flurry of guidance on what employers should do about it. Employer preparedness implicates a host of practical and legal considerations including absenteeism, “presenteeism,” paid sick leave, vaccination programs, employee cross-training, telecommuting, travel, disability and employee communications.

**Employee education.** Employers’ primary focus appears to be on employee education. In a CCH Web poll taken in May 2009, 32 percent of respondents said that they were making efforts to keep employees informed. By October 2009, 46 percent of poll respondents indicated a focus on employee education. They’re getting a lot of help!

The Occupational Safety and Health Administration (OSHA) created a "Workplace Safety and H1N1" Web site with information geared to all workplaces and more extensive guidance for those involved in higher-risk health care activities. A communication toolkit for businesses and employers to help them implement recommendations from Centers for Disease Control and Prevention’s (CDC) Guidance for Businesses and Employers to Plan and Respond to the 2009-2010 Influenza Season provides a poster for workplace entrances to remind sick employees to go home, e-mail and text message templates, and widgets (an application that displays featured content directly on a Web page with automatic updating).

**Limiting the spread of the disease.** OSHA says all employers need to implement a combination of control methods to protect workers and reduce the transmission of the 2009 H1N1 virus in the workplace. These would include:

- encouraging sick workers to stay home,
- promoting hand hygiene and cough etiquette,
- keeping the workplace clean,
- promoting vaccination and addressing travel, and
- planning for additional actions if the severity of the pandemic increases.

Sick workers, or sick family members for whom workers must provide care, create dual problems for employers. Higher absenteeism rates put productivity at risk. On the other hand, “presenteeism” (sick employees showing up to work) creates the potential for greater infection rates and ultimately more absences.

“Presenteeism” is more likely to be seen among lower-earning, non-exempt and part-time workers who are not paid if they don’t work. Many of these workers may feel that they can’t afford to be sick or fear for their jobs if they take time off. It is this concern that has prompted the introduction of emergency temporary legislation in Congress calling for paid sick leave for employees who have, or who are believed to have, a contagious illness such as the H1N1 flu virus.

**Paid sick leave bills.** The Emergency Influenza Containment Act (H.R.3991), introduced on November 3, 2009, would guarantee a maximum of five paid sick days for employees sent home or directed to stay home because their employer believes they have symptoms of a contagious illness, or have been in close contact with an individual who has symptoms of a contagious illness, such as the H1N1 flu virus. The amount of paid sick leave would be calculated based on the employee's regular rate of pay and the number of hours the employee would otherwise be normally scheduled to work. The bill would cover both full-time and part-time workers (on a pro-rated basis) in businesses with 15 or more employees;
employers that already provide at least five days’ paid sick leave would be exempt. If enacted, the bill would take effect 15 days after being signed into law and sunset after two years.

A second emergency bill, Pandemic Protection for Workers, Families, and Businesses Act (S. 2790/H.R. 4092), was introduced on November 17, 2009. Workers would be given up to seven paid sick days to use for leave due to their own flu-like symptoms, medical diagnosis or preventive care, to care for a sick child, or to care for a child whose school or child care facility has been closed due to the spread of flu. Part-time employees would also be entitled to paid leave on a pro-rated basis. Like the Emergency Influenza Containment Act, the Pandemic Protection for Workers, Families, and Businesses Act would take effect 15 days after being signed into law and sunset after two years.

The state legislatures also have been active in the area of paid sick leave. According to the National Conference of State Legislatures, at least 15 states considered mandatory sick leave legislation in 2009.

Legal compliance considerations. The H1N1 pandemic and employers’ responses implicate various employment laws, including the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and the Fair Labor Standards Act (FLSA). Accordingly, the Equal Employment Opportunity Commission (EEOC) and the Department of Labor’s Wage and Hour Division (WHD) released “Question and Answer” documents regarding pandemic flu.

ADA. The EEOC explains that there are ADA-compliant ways for employers to identify which employees are more likely to be unavailable for work in the event of a pandemic and offers a sample ADA-compliant survey that employers can give to employees to anticipate absenteeism. The EEOC also says that employers may:

- send employees home if they display influenza-like symptoms during a pandemic
- encourage employees to telework (i.e., work from an alternative location such as home) as an infection-control strategy during a pandemic (and employees with disabilities that put them at high risk for complications of pandemic influenza may request telework as a reasonable accommodation to reduce their chances of infection during a pandemic)
- require employees to adopt infection-control practices, such as regular hand washing, at the workplace
- require employees to wear personal protective equipment during a pandemic (absent undue hardship, employers should provide a related reasonable accommodation to an employee with a disability who needs an accommodation, as for example, non-latex gloves or gowns designed for individuals who use wheelchairs)
- require employees who have been away from the workplace during a pandemic to provide a doctor’s note certifying fitness to return to work.

However, employers may not:

- ask an employee to disclose if he or she has a compromised immune system or chronic health condition that the CDC says could make him or her more susceptible to complications of influenza
- rescind a job offer made to an applicant based on the results of a post-offer medical examination if it reveals that the applicant has a medical condition that puts her at increased risk of complications from influenza
- compel all employees to take the influenza vaccine during a pandemic, regardless of their medical conditions or their religious beliefs.

FMLA. According to the WHD, leave taken by an employee for the purpose of avoiding exposure to the flu would not be protected under the FMLA, which protects eligible employees who are incapacitated by a serious health condition (which may be the case with the flu where complications arise) or who are needed to care for covered family members who are incapacitated by a serious health condition.
Nor does the FMLA require employers to provide leave to employees caring for dependents that have been dismissed from school or child care. However, the WHD encourages employers to review their leave policies to consider providing increased flexibility to their employees and their families, keeping in mind that any flexible leave policies must be administered in a manner that does not discriminate against employees because of race, color, sex, national origin, religion, age (40 and over), disability, or veteran status.

If leave qualifies as FMLA-protected leave, federal law does not yet require that the leave be paid, but the employee may elect, or the employer may require, the substitution of paid sick and paid vacation/personal leave in some circumstances. State laws may require the leave be paid and should be consulted.

Employers may institute a nondiscriminatory plan or policy to send employees home if they show symptoms of pandemic influenza. Company policies on sick leave, and any applicable employment contracts or collective bargaining agreements would determine whether employees who are not at work should be paid.

Should an employer find itself in a situation where a number of employees are out and the employer can't afford to pay them all, federal equal employment opportunity laws do not prohibit employers from changing their paid sick leave policy if it is done in a manner that does not discriminate between employees because of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status. However, limitations may be imposed by state and local laws, employment contracts, and/or collective bargaining agreements.

**FLSA.** If a business has a shortage of workers and is looking to “volunteers” to help out, the WHD warns that the FLSA has stringent requirements with respect to the use of volunteers. In general, covered, nonexempt workers working for private, for-profit employers have to be paid at least the minimum wage and cannot volunteer their services.

Employers may encourage or require employees to telework as an infection-control strategy, based on timely information from public health authorities about pandemic conditions. If telework is being provided as a reasonable accommodation for a qualified individual with a disability, or if required by a union or employment contract, then the same hourly rate or salary must be paid. Under the FLSA, employers generally have to pay employees only for the hours they actually work, whether at home or at the employer’s office. When not all employees can work from home, the agency encourages employers to consider additional options to promote social distancing, such as staggered work shifts.

Under the FLSA, employers may require that employees perform work outside of their job descriptions. The law does not limit the types of work employees age 18 and older may be required to perform. However, there are restrictions on what work employees under the age of 18 can do. This is true whether or not the work asked of the employee is listed in the employee’s job description. The WHD suggests that if you expect to assign employees work outside of their job description during an influenza pandemic, you may want to consult your human resource specialists and, in unionized environments, bargaining unit representatives as part of your pre-pandemic planning.

**Is the threat over?** In United States, active influenza virus transmission persists but overall influenza-like-illness activity continues to decline for the 5th consecutive week, the World Health Organization reported on December 11, 2009. After eight weeks of increases, proportional mortality due to pneumonia and influenza has begun to decrease but remains elevated above the epidemic threshold.

As of mid-November, the CDC estimated that nearly 1 in 6 Americans (or about 15 percent of the country) have been infected by the H1N1 flu virus. This brings the total U.S. cases to approximately 50 million. The CDC estimates that there have been 200,000 hospitalizations, and 10,000 deaths since the outbreak of the H1N1 flu last Spring.

CDC Director Thomas Frieden notes “that still leaves most people not having been infected and still remaining susceptible to H1N1 influenza.” The threat of infection is still very high, and it can cause
significant harm if it becomes more widespread. He indicated that getting vaccinated is the best protection from greater infection – particularly as supplies are more available. As of Friday, December 11, more than 86 million doses were available.