

EMPLOYMENT LAW CLIENT E-ALERT  
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MANAGE YOUR LEGAL EXPOSURE BEFORE THE H1N1 VIRUS HITS YOUR WORKPLACE

With the flu season upon us and H1N1's renewed threat, employers need to prepare themselves and their employees for a rocky period. In addition to concerns about employee absences, work coverage issues, and employee anxiety about potential exposure at work, several legal issues must be addressed.

Under the Occupational Safety and Health Act, an employer has a legal obligation to provide a safe and healthful workplace. The Occupational Safety and Health Administration (OSHA) has a handout available, "Guidance on Preparing Workplaces for an Influenza Pandemic," which lists a number of measures employers at low, medium, and high risks should take to protect employees in the event of a flu pandemic. It is available on [OSHA's website](#). Measures range from those such as encouraging proper hand washing and minimizing crowded spaces for employees with low risk to those such as requiring surgical masks and providing barrier protection at high-risk workplaces. OSHA states in its Guidance that it is "important for all businesses and organizations to begin continuity planning for the pandemic" and that even in the lower exposure risk operations, "employers should be cautious and develop preparedness plans to minimize employee infections."

Both OSHA and the [Centers for Disease Control \(CDC\)](#) provide details about what these preparedness plans should contain, such as a continuity plan, the name and duties of those responsible to implement the plan, a method to communicate the plan to employees, and an emergency communication protocol. The CDC guidance can be found on its website, as can its recently issued [preparedness guide for small businesses](#).

Under the Family and Medical Leave Act (FMLA), employers who have more than 50 employees may be required to provide up to 12 weeks of unpaid leave to a qualified employee in order to care for themselves or for a spouse, child, or parent affected by a severe flu or the H1N1 virus. If an employee contracts the H1N1 virus, the disease will most likely be considered a "serious health condition" under the FMLA, warranting up to 12 weeks of unpaid or, depending upon the employer's FMLA policy, paid leave. Because the CDC has recommended that sick employees be removed from the workplace to prevent transmission of the disease, employers should consider placing such employees on an FMLA leave or providing some other form of leave even when an employee desires to continue working.

The Americans with Disabilities Act (ADA) also provides certain protections to employees who may have physical, mental, or emotional disabilities but who are otherwise qualified to perform the essential functions of their jobs. The H1N1 virus typically involves a temporary infection, which would not appear to qualify as a disability. The ADA may become a factor, however, if an employee develops a disability as a result of the disease and cannot return to former work duties because of such an impairment. The Equal Employment Opportunity Commission (EEOC) has also issued a bulletin on its website, "[ADA – Compliant Employer Preparedness for the H1N1 Flu Virus.](#)" It answers questions such as whether employers may require sick employees to go home (yes) and whether they can, in high-risk workplaces, require use of surgical masks or respirators (yes).

Finally, if an employee contracts the H1N1 virus as a result of occupational exposure, the employee may be entitled to worker's compensation coverage. If an employee contracts the disease and it is not occupationally related, the employee may be entitled to disability benefits provided by the employer.

To prepare for and to minimize potential legal exposure, we suggest that every employer take certain steps set forth below. Our employment practice attorneys are available to assist with questions and in developing preparedness plans. These steps are:

1. Review your current policies concerning telecommuting, absenteeism, sick or other medical leaves, FMLA Leave, and ADA accommodation requests. Consider whether any of these policies need adjustments. For example, you may want to modify or expand your telecommuting or sick leave policies to accommodate the rate of expected illnesses and resulting absenteeism.
2. Evaluate whether you have adequate worker's compensation insurance coverage limits and coverage and that includes occupational diseases.
3. Ensure that employees responsible for implementing your policies have adequate training to implement them properly.
4. Follow your policies and document any requests for FMLA or other leaves that may be required to treat the H1N1 virus and any resulting chronic health conditions.
5. Document any employee requests for accommodations and the interactive process with the employee for any H1N1 related disability.
6. Review the websites of the CDC and OSHA daily for updates on steps to take during an outbreak.
7. Communicate to your employees that you are taking all steps necessary to ensure their safety and health. Encourage employees to stay home if they experience any flu-like symptoms and to see their supervisors immediately if they start to experience symptoms while at work. Remind employees of the need to wash hands frequently and to use other good hygiene practices.
8. If you have an Employee Assistance Program, remind employees that these services are available to help them cope with additional stress that might result from the flu outbreak.

If you have any questions about this alert, please contact the author, [Laurie Alexander-Krom](#), or a [Davis Malm employment attorney](#).

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