

Client Alert

H1N1 'Swine' Flu: employer FAQs (Frequently Asked Questions)

With the onslaught of the Swine Flu, employers are struggling to know what the respective rights of employer and employee are with respect to the first true pandemic in recent history. Although swine flu is not new, this particular strain—H1N1—is particularly virulent due to its highly contagious nature and its global reach.

This document is not intended to be a medical analysis of this flu or to render opinion as to the health care basis of the pandemic or its treatment. Rather, it seeks to provide a handy guide to the employer as to the nature of employee rights and appropriate employer protocol during this difficult time.

- **What is H1N1?** The H1N1 flu virus – also known as human swine influenza – is a respiratory illness that affects the nose, throat and lungs. This virus usually affects pigs, but has been transferred to humans.
- **Who is at risk?** The H1N1 flu virus is a new strain of pandemic influenza different than the seasonal flu. People may have limited or no natural immunity to protect against this virus. H1N1 emerged in April 2009. It is affecting more young and healthy people than seasonal flu. People with underlying medical conditions such as asthma and pregnant women may be at a greater risk for severe illness.
- **How is it spread?** H1N1 flu is highly contagious, spread when an infected person coughs or sneezes, air-borne germs entering the nose, eyes, or throat of another person, but can also rest on hard surfaces and through human contact, transmitted to the respiratory system when someone touches their mouth and/or nose. Contrary to prevailing rumour borne of its name, swine flu is not transmitted through pork.
- **What is the length of contagion?** 1 day prior to indicators of infection and 7 days thereafter.

- **What measures for containment?** Hand washing, avoidance of inter-personal contact, use of alcohol hand sanitizers (antibiotic where infection present), vaccination, quarantine.
- **What are the symptoms?** Cough and fever, fatigue, muscle aches, sore throat, headache, decreased appetite, runny nose, nausea, vomiting, diarrhea.
- **Is vaccination available/required?** Many countries and certain employers have stockpiled vaccine for *voluntary* vaccination of citizens. To date, no government has mandated vaccination by law. However, Canada for example is in the process of delivering sufficient quantities of approved AREPANRIX, an adjuvant vaccine for every citizen, free of charge. The vaccine is a “deadened” version of the virus that was “short-tested” due to urgency. The release of the vaccination was originally viewed by some with suspicion due to the relatively benign effect of infection in most instances, but this ennui has been replaced with enormous demand resulting in line-ups and frustration regarding availability, and prioritization of special need patients.
- **Are anti-virals available?** Most countries have stock-piled millions of units of anti-viral medicines that mitigate the effect of infection once diagnosed.
- **What is an employer’s workplace responsibility?** All employers owe various forms of workplace protection to their employees under various statutory and common law regimes. Occupational health statutes provide for an employer duty to maintain a safe work environment. Generally, under both minimum employment standards and occupational health provisions, employers have an overarching duty to provide a safe and healthy work environment. There are no specific obligations regarding H1N1 *per se*. Certain industries are subject to accelerated obligations, as in the case of health care workers. Equally, retail workers and others who are regularly in contact with the general public are entitled to rudimentary protections arising from the employment relations and the overarching obligation of a safe workplace.
- **What safety protocols are recommended for the workplace?** Many employers were prepared for the onslaught of H1N1 as a result of its early arrival in the Spring of 2009. Proactive measures include the ubiquitous presence of hand sanitizers throughout common areas, educational communications to workers regarding prophylactic measures such as regular hand-washing, coughing into sleeves, avoidance of contact, throw-away glasses and cutlery, and increased hygiene (especially in the food services and retail industries), onsite medical support, and in some instances private availability of vaccine. Employers should proactively communicate with the established health & safety committee by engaging and mandating that committee to work closely with employer and the workforce to implement and maintain a plan of action regarding the inevitable complications, exigencies and potential emergency situations that will flow from the H1N1 pandemic.

- What is a recommended employer attitude towards employee fears?** It is clear that despite its relatively benign impact on most individuals, H1N1 can cause serious, life-threatening infection in vulnerable groups. The death of a few relatively healthy vibrant young people has left parents concerned and has led to what has been described as hysteria regarding vaccination and avoidance of infection. Most governmental authorities are recommending tolerance and flexibility regarding enforcement of employer rights in the context of employee reaction to the pandemic. This would entail allowing adequate time off for purposes of medical attention including vaccination of family members, encouraging respectful understanding in the workplace such as avoidance of handshakes, a proactive communication campaign, and potentially a lightening of the usual documentary support necessary for absence from the workplace for medical reasons.
- What are my rights as an employer?** While the employer remains responsible for a safe work environment, it is equally entitled to responsible behaviour and performance from employees. It is also entitled to rely upon established workplace protections regarding wages in the context of sick leave, disability coverage and lieu days. Employees can and should exhaust their entitlement to such coverage before the employer is required to consider additional measures to accommodate workplace absences. Equally, employers must respect emergency family leave provisions of applicable legislation.
- Can an employer send an employee home?** In keeping with its obligation to maintain a safe workplace, an *apparently* infected person can be told to absent himself/herself from work. There is no room for the “hero” employee who insists that he or she will stay at work “to the bitter end”. Incidental contact without manifestation of infection should not result in absenting an employee from the workplace. An employer will evaluate the issue of wage support during such forced absence.
- Can an employee be quarantined?** During the SARS crisis, many employers successfully established a protocol for quarantine, whereby employees suspected to be infected would be asked to work from home when and where available as is increasingly the instance with internet-based ‘virtual’ attendance.
- What is the employer’s right of inquiry?** Most jurisdictions have legislation that limits an employer’s unqualified right to medical information. However, the countervailing obligation to protect the workforce militates in favour of reasonable inquiry of any affected employee, whether in the context of fielding a phone call from an employee absent due to illness of self or family member, an employer’s concern regarding the health and welfare of an employee in attendance, or any other complication owing to myriad issues arising in the context of the pandemic. Employers must carefully balance an employee’s right to privacy and confidentiality with its ‘right to know’ in furtherance of a safe and healthy workplace.

- **Can a medical note be compelled?** An employer's extant protocol can be maintained regarding absence from the workplace. However, it is strongly recommended that latitude be granted to employees dealing with the uncharted territory involved with a pandemic. Some medical associations are requesting that over-worked physicians not be asked for notes or reports during this period of acute service demands.
- **Can a care-giver demand time off to care for a dependent?** In addition to regular established protocols in the workplace, most jurisdictions countenance statutory emergency leave that must be honoured by the employer. In addition, employers are encouraged to demonstrate flexibility and understanding in these extra-ordinary circumstances whereby care-givers are mandated by public health officials and medical personnel to facilitate such processes as vaccination, quarantine and the like.
- **Is an employer liable to third parties for transmitted infection?** We are not aware of any recorded instance of liability for the transmission of virus to third parties. For example, a recent court ruling threw out a case brought against a medical employer regarding exposure of nurses during the SARS outbreak. Of course, it is possible to envisage that in the realm of negligence, an employer could be liable for failure to provide adequate safeguards for both employees and third parties such as customers in the right legal circumstances. Accordingly, employers should act in a circumspect and proactive manner in order to protect against allegations regarding failure to institute proper protocols and safeguards.
- **How does an employer deal with potential demands on the workforce due to absences?** Most employers have implemented contingency plans regarding potential strain due to workplace absences. This involves encouraging flexibility from all business 'partners' including customers, clients, suppliers, employees and service providers. Understanding can be achieved through communication and proactive planning. Increasing trends towards 'virtual' web-based attendance and interactive business dealing can soften the blow of absenteeism. Equally, attaining some understanding with the workforce regarding extra load, cross-populating function, lieu time for extra effort, and the like is recommended as a possible deflection of what some experts contend will be upwards of a forty per cent infection rate in the general population.

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