

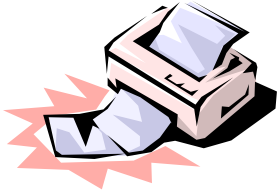
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ALERTING MANAGEMENT TO BREAKING LABOR AND EMPLOYMENT LAW DEVELOPMENTS

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## “SWINE FLU” AND MORE: HOW TO PREPARE FOR A COMMUNICABLE ILLNESS PANDEMIC

- By Attorney Corie J. Tarara



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### Think Long Term

The government would like us to call the “swine flu” the “Novel Influenza A (H1N1)”. Concerned that the public will continue to call it the swine flu and that this name will affect pork sales, some have suggested it be called the “Mexican Flu,” ignoring the fact that not even the Centers for Disease Control (“CDC”) knows where the virus originated. This mindset, however, certainly highlights the possible disparate impact that a H1N1-specific policy may have on employees of Mexican nationality or origin. A knee-jerk workplace policy that simply prohibits travel to Mexico or contact with those who have had contact with people returning from Mexico, may unintentionally violate several laws, including but not necessarily limited to:

- Title VII of the Civil Rights Act (prohibits national origin discrimination)
- Title I of the Americans with Disabilities Act (regulates medical examinations and disability-related questioning of employees; the EEOC published a H1N1 technical assistance guidance document on May 4, noting an employer may require employees to adopt infection control practices during a pandemic)
- FMLA (implicated if this flu is considered a “serious medical condition” by the physician)
- HIPPA (regulates privacy of certain health information)
- OSHA (employers must keep workplace free from recognized hazards likely to cause death or serious physical harm)

Employers desiring a H1N1 policy should first consider adopting a broader Communicable Illness Policy, to remain in place long after this flu virus has abated. The H1N1 flu is simply the most recent communicable illness (HIV/AIDS in 1981, SARS in 2003, Avian flu in 2006) and unfortunately happens to have the ability to potentially impact a disproportionate amount of Mexican

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workers. However, it is not irrational to adopt the CDC's travel recommendations against non-essential travel to Mexico, and perhaps even adopt a 14 day wait period from returning to work following: (1) a trip to Mexico; or (2) contact with anyone who has had such a trip (the CDC reports the incubation period may be up to 7 days). Regardless, such a policy should be incorporated along with a larger communicable illness policy, so that it does not disproportionately target one group, and also lasts beyond the H1N1 pre-pandemic and hype.

### **Everything We Need To Know, We Really Did Learn In Kindergarten**

Don't call people names. Treat everyone as you want to be treated. Wash your hands. Cover your mouth when coughing or sneezing. Keep your hands out of your eyes, mouth and nose. Although some comedian has certainly made a joke about taxpayer dollars paying for the government to create posters stating "Wash your hands!" now is the time to cash in and print them off (you can find them at: <http://www.health.state.mn.us>). During this pre-pandemic stage, employers should also consider the following:

- **Educate employees.** Educate employees about the location of hygiene items and good hygiene practices such as frequent hand washing, covering coughs and sneezes, and staying home when sick. Posting hand-washing reminders, are also a good idea.
- **Review leave policies.** Consider whether your company's sick or other leave policies may needlessly discourage employees for calling in sick, thus, encouraging them to come to work when ill.
- **Enact a broad communicable illness policy.** Address all communicable illnesses. If desired, attach an addendum addressing the current flu.
- **Review collective bargaining agreements.** Determine if they include terms related to a pandemic emergency and review sick and other leave provisions in the agreement.
- **Prepare and plan for reduced operations.** Determine essential positions to maintain business functions and operations, and prepare to cross-train employees or change how business is conducted to minimize disruptions by absences.
- **Employee communications.** Ensure you have current contact information for employees; consider implementing a telephone tree.
- **Telecommuting.** Determine if any positions may be performed from home, consider if employees should be encouraged or required to work from home and consider the logistics of implementation.

- **Stockpile personal hygiene items.** Soap, hand sanitizer, tissues, cleaning supplies, and other PPE (such as face masks) should be kept in stock and current.
- **Review availability of hygiene items to employees.** Ensure that employees know where hygiene items are. At job sites, add portable hand sanitizer stations if no sink is available for hand washing.
- **Monitor public health information.** Continue to review public information from the CDC, WHO, U.S. Food and Drug Administration, and the Department of Health and Human Services [pandemicflu.gov](http://pandemicflu.gov) website.

Although there will always be a subjective element to enforcing a communicable illness policy, by creating a comprehensive policy and properly educating those enforcing the policy, the reward of keeping the workplace healthy should outweigh the risks.

Please contact Corie Tarara or any attorney at the firm (952-896-1700) if you would like to implement any of the above policies, or simply like more information regarding a communicable illness policy or other workplace policies.

### **REGISTER NOW! FOR BENEFITS SEMINAR**

**May 19, 2009 | 8:00 A.M.—10:00 A.M.**

*[Registration/Continental Breakfast begins at 7:30]*

**Park Plaza Hotel, Bloomington**

**Cost: \$25 payable at the door**

Experienced employee benefits attorney Scott A. Becker will be leading a seminar to update employers on recent developments in employee benefits laws. This update will include information about the recent COBRA subsidy, how to maximize your health plan options with cost effective solutions and important information about recent changes in benefits laws. For more information and to register, go to our website at [www.seatonlaw.com](http://www.seatonlaw.com), fax back the attached registration form or call us at 952.896.1700.

### **DOL Reverses Decades-Long Rule: Employees Are Not Entitled to 1-2 Business Days to Request FMLA Leave**

On May 5, 2009, the U.S. Dept. of Labor released an Opinion Letter (FMLA2009-1-A) reversing its previous policy (FMLA-101, 1/15/99) that employees "ordinarily" should be given 1-2 business days to provide employers with notice of a need for FMLA leave. The new guidance states employees are not guaranteed any set number of days in which to provide notice of the need for leave, and employees "must comply with their employers' usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances". This new ruling is expected to relieve the burden on employers for enforcing internal call-in policies and disciplining employees for failing to show for work or call-in.