

As Influenza Season Nears, Employers Need to Be Prepared

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In June 2009, the World Health Organization (WHO) officially categorized the H1N1 influenza virus as a Level 6 global pandemic. In response, the United States has embarked on a massive vaccination campaign intended to protect millions of Americans from the H1N1 flu. Employers, too, are in varying stages of preparation for the effects of a pandemic on their workforce and operations.

Although most employers are not mandating vaccinations, (See *Recent Responses* below) it is imperative that they proactively engage in pandemic preparedness to limit the impact the H1N1 flu could have on their businesses, employees, and society in general. As an employer, you play a key role in protecting your employees' health and safety and preventing the spread of the virus in the workplace and community. This *InsightOut* outlines policies and issues that require employers' immediate attention.

PLAN AHEAD WITH YOUR HEALTH CARE VENDORS

Many health care and health management vendors are working in concert with public health authorities to take steps to facilitate and encourage vaccinations. Many have provided their clients with educational materials and are advising them that H1N1 vaccinations will be paid in full under their insured arrangements. They are also recommending to their self-funded clients that they pay for the full cost of H1N1 vaccinations. However, this precautionary measure will have little impact on behavior if your employees are not aware of the benefits. Ongoing communications to your employees is essential to getting the message across.

Most organizations rely on their health care and health management vendors to provide a broad variety of services to manage employee benefit plans and Human Resources programs. What will happen to these services if the H1N1 pandemic accelerates? How can you be sure your vendors are adequately prepared to meet your company's needs under

emergency circumstances? It is crucial to discuss with your health care and health management vendors how their risk management programs have been fortified to address the various risks associated with a flu invasion. Depending on your business, these risks may include contract employees and offshore contractors who may be at a higher risk of disruption.

REVIEW YOUR TIME-OFF PROGRAMS

The full impact of the H1N1 flu is still unknown, but preliminary estimates indicate that as many as 30 to 50 percent of the population may be affected, causing massive disruptions in schools, businesses, and travel. Employees may need to stay at home to care for sick children, elderly parents, and other family members. Day care centers and other facilities may close down for extended periods of time requiring employees to stay at

RECENT RESPONSES

By August 2009, the New York State Department of Health mandated seasonal flu and H1N1 flu vaccinations for all hospital employees, including doctors, nurses, intake clerks, and administrative employees who provide direct care to patients. Those who refused to be vaccinated for other than medical reasons were threatened with termination. In October 2009, the Public Employees Federation, New York's second largest public employee union, won a temporary restraining order blocking mandatory flu vaccinations for health care workers. Other jurisdictions and states continue to require flu vaccinations for health care workers.

home with children and/or other family members. Discussions around alternative work arrangements, telecommuting, flexibility, and taking on additional responsibilities when others are unavailable should be taking place.

Business continuity needs to be ongoing and fluid as the H1N1 impacts different geographies and businesses. Telecommuting and alternative work arrangements can be used as an effective infection-control strategy. Under the Americans with Disabilities Act (ADA), employees with disabilities who are at high risk of complications from the flu may request telecommuting as a reasonable accommodation to reduce their exposure to the virus. If such an accommodation is requested and reasonable, it cannot be withheld unless it poses an undue financial burden or is inconsistent with business necessity.

Employers are encouraged by The U.S. Department of Health and Human Services (HHS) to identify a “pandemic coordinator” and/or team with clearly defined roles and responsibilities to carry out preparedness and response planning. This team, as well as all managers, should be educated on how to manage their workforce in an ADA-compliant manner prior to and during the H1N1 flu season. These coordinators will also need to be strategic thinkers who can help change corporate policies to accommodate H1N1 flu sufferers whether or not they are protected by the ADA. They will need to communicate updated policies to their staff and to reinforce the employer’s position on sick leave and staying home while recovering.

Communication is a critical factor in making sure that appropriate safety measures are implemented for everyone. The pandemic team should also provide employees and customers or clients

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in the workplace with easy access to infection control supplies such as soap, hand sanitizers, tissues, office cleaning supplies, and personal protective equipment such as gloves or surgical masks, if appropriate. Understanding and cooperation at all organizational levels will help everyone make informed decisions.

Employers should be aware that the anticipated severity of the 2009 H1N1 flu could change rapidly; therefore, local public health recommendations to communities and businesses may be revised quickly. Planners should identify sources of timely and accurate information so they are aware of changes to recommendations and can promptly implement revised or additional measures recommended by local public health officials.

Organizations must determine if they are offering the right types and amount of time off, i.e. sick and vacation vs. paid time off (PTO). Employers may need to review and revise their leave policies to permit extended leaves and continuation of benefits and pay during such leaves, in order to encourage sick and/or exposed workers to stay at home. Those with PTO programs may consider adding days or changing the structure of the plan so that employees do not come into work sick in an effort to save vacation days. Employers will also need to consider the Family Medical Leave Act (FMLA) and ADA concerns affecting their disaster contingency plans. All new policies and procedures must be consistently compliant with federal, state, and local laws.

CAREFULLY CONSIDER ALL PRIVACY AND LEGAL RAMIFICATIONS

Workplace safety law requires employers to provide a workplace free from recognized hazards that are likely to cause death or serious physical harm. Contingency plans to protect employees during a flu season can trigger benefit and employment law issues. As an employer you must be concerned with how you will detect H1N1 symptoms among employees and communicate information to affected employees and others without violating, among other things, HIPAA, the ADA, and privacy laws. For example, employers must be careful not to assume that every employee who sneezes, coughs, or has watery eyes has the H1N1 flu. HIPAA may permit uses or disclosures of protected health information that are necessary for public health reasons to prevent or control the spread of H1N1.

The New York State Department of Health mandated seasonal flu and H1N1 flu vaccinations for all doctors, nurses, and health care providers who provide direct care to patients. Those who refuse to be vaccinated for other than medical reasons are threatened with loss of their job. Most non-health care employers are encouraging their employees to get the vaccine rather than requiring them to take it. Employers who are seriously considering mandating the vaccine must carefully consider that an employee may be entitled to an exemption under the ADA and, similarly, there may be exemptions for religious belief, practice, or observance under Title VII of the Civil Rights Act of 1964.

If your employee contracts influenza at work, there could be allegations of increased liability, particularly if steps were not taken to minimize the risk. Similarly, if you are providing on-site H1N1 vaccinations or strongly encouraging or mandating vaccinations and there is an incident or adverse reaction, there could be increased liability if the vaccine produces dangerous or unwanted side effects.

Health officials tout the safety of the H1N1 vaccination for all targeted groups. However, many employees are concerned about the immediate and potential long-term side effects of the vaccine. Some recall the 1976 swine flu immunization campaign that vaccinated 40 million Americans and the associated injury claims that erupted from the paralyzing Guillain-Barre syndrome complications. Others are concerned about thimerosal, a mercury-based preservative, used in more than 50 percent of the H1N1 doses. Thimerosal in vaccinations has been implicated by autism advocacy groups as a contributor towards the high and growing incidence of autism in children in the United States, which has become its own epidemic.

BUILD ALTERNATIVE BUSINESS TRAVEL ARRANGEMENTS AND CONTINGENCIES

In light of the fragile economy, companies must reassess how domestic and international travel can best be accomplished while mitigating the risks associated with exposure to H1N1 flu in public areas, crowded airports, and the like. Some employers have banned company travel or established stringent guidelines and restrictions on travel. Many provide their

business travelers with travel kits which include a mask, hand sanitizer, and flu tips. As an alternative to travel and in-person meetings, which present the opportunity for germs to spread in enclosed spaces, employers are going virtual and utilizing webinars and web seminars for meetings.

Unlike natural disasters and other emergencies affecting large numbers of people, an influenza pandemic is widespread, affecting multiple areas of the United States and other countries at the same time. A pandemic is an extended event, with multiple waves of outbreaks in the same geographic area; each outbreak could last from six to eight weeks. Waves of outbreaks may occur over a year or more. Employers must be prepared to revise travel policies if governmental authorities issue travel advisories or restrictions. Recognize that employees may resist assignments requiring travel in areas perceived to be at greater risk for the H1N1 virus. Employees who are ill should not be asked to travel.

Access to international health care takes on increased importance during a pandemic. Health care coverage should be reviewed to assess the adequacy of coverage associated with travel. Some travel insurance policies include a pandemic clause, which nullifies all coverage once a pandemic is declared. Health care vendors should be contacted to discuss how care outside of the United States will be handled. Employers should monitor any evolving situation on a country-by-country basis to make informed decisions about the potential risk to their employees' health and their business continuity. Employers should provide their business travelers with information on the steps to take if they are exposed to or contract the H1N1 flu during travel abroad. For example, travelers heading to China from the United States or Mexico may face quarantine if they or other passengers exhibit fever or flu-like symptoms. Thousands of travelers have reportedly been held in isolation,

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some for as long as seven days. In some instances, individuals displaying flu-like symptoms were even separated from their families.

COMMUNICATE, COMMUNICATE, COMMUNICATE ... IT'S THE SAME STORY, BUT DIFFERENT THIS TIME

Proactive communication will create an environment that motivates and engages employees to take all the necessary steps to avoid the flu, act responsibly if they or their family members' contract the flu, and deal with the fallout from the pandemic, all within the context of business continuity. Well-crafted communications with Q&As will make it easier for employees to choose what is best for themselves, their families, and society. Such communications also send the message that their employer's leadership is committed to their organization's health culture and their employees' health and overall well-being.

Consider all of the audiences that will need to be contacted during a pandemic: employees and their families, sub-contractors, customers, suppliers, and vendors.

PREPARE FOR THE WORST-CASE SCENARIO

Employers committed to developing an effective preparedness planning and monitoring program need to address difficult and complex issues in a practical manner. Has your company or organization considered the following?

- Have you reviewed all company policies and procedures including travel, sick leave, and family leave and revised them to accommodate H1N1 illness?
- Have you identified a "pandemic coordinator" and/or team with clearly defined roles and responsibilities to carry out preparedness and response planning and monitoring?
- Do your leave policies provide adequate coverage and flexibility to allow employees to stay at home if they are sick and/or exposed to the flu or if they need to care for children or elderly family members?
- What is your company's position on vaccinations? How are vaccines covered under the medical plan? Will they be provided on-site?
- How will domestic and international travel be handled for your business travelers? What information and resources

have you provided to them so they can most effectively deal with exposure and illness on the road?

- Are all policies, procedures, communications, and practices compliant with HIPAA, FMLA, ADA, and other federal, state, and local regulations?
- Have you considered the aspects of employment risk and how to mitigate the risks associated with the H1N1 flu?
- Has the company taken this opportunity to communicate with employees and demonstrate their commitment to their health and well being?

SUMMARY

Employers strike a delicate balance when dealing with their employees' health, wellness, and freedom of choice. The unique challenges presented by a pandemic can have a disastrous effect on business continuity and society. Employers are encouraged by health officials to prepare for the worst-case scenario which involves a review of current policies, procedures, and coverages. All action items must be compliant with HIPAA, FMLA, ADA, and other laws. Finally, without appropriate communication that addresses employees' understanding and awareness of the issues, business needs will be left to chance.

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