

## Labor and Employment Client Service Group

To: Our Clients and Friends

May 2009

### H1N1 FLU CONCERNS: WORKPLACE PRIVACY AND EMPLOYEE ILLNESSES

In the wake of the H1N1 Flu outbreak (initially named swine flu), many employers will be asked to balance employee privacy rights with public and company health concerns.

For example, an employee who calls in sick with the flu (or with a family member who has the flu) may trigger rumors that the sick employee must have contracted the H1N1 Flu. The supervisor wants to tell everyone in the company - especially those who work directly with the sick employee - about what is going on. How do you balance the privacy concerns of the sick employee and their family against the health interests of co-workers?

The legal analysis related to this issue involves the interplay of the Americans with Disabilities Act (ADA); the Family and Medical Leave Act (FMLA); the Health Insurance Portability and Accountability Act of 1996 (HIPAA); and state and local laws. Common sense and good HR skills will also help.

Please consider the following guidelines for balancing the privacy interests of potentially infected workers and the health interests of co-workers and the public.

**Investigate and Interview The Possibly Infected Employee:** Learn the facts. Do not rely on rumors. If the facts indicate that an employee might be infected, designate a manager with the appropriate level of responsibility to get more information directly from the employee.

**Request Written Consent To Disclose:** Ask the employee for written permission to inform co-workers that they may have been exposed. If the employee refuses to consent, tell the employee that the company may have no choice but to share information about the infection with others, but will do so only to the extent permitted or required by law.

**Consult Counsel On How To Handle A Non-Responsive or Uncooperative Employee:** If the employee is non-responsive or refuses to disclose information, consult legal counsel regarding whether the employee can be required to provide health information and how it should be provided

before taking any adverse action against the employee. If the employee already has been sent home, promptly involve counsel to minimize or resolve any possible liability risks.

**Provide Written Notice Of Disclosure:** If it becomes necessary to disclose certain information about the employee’s infection, provide written notice to the employee that: (a) the employer may need to disclose limited information about the employee’s health condition to those with a need to know, such as government health officials and health care providers of co-workers, to take precautions against the spread of the infection and to facilitate any needed treatment of others; and (b) the employer appropriately will limit disclosure and then will disclose only the minimum information necessary.

**Avoid Using Identifiable Information:** When disclosing information about the potentially infectious employee, avoid specifics that may provide reasonably identifiable information about an individual or identification by name except when necessary to protect the health of co-workers who might have been infected or as required by law.

**Instruct Supervisors On Confidentiality And Retaliation Risks:** Instruct supervisors about the need to maintain the confidentiality of employee health information and provide guidance on how to respond to questions from other employees and supervisors so as to avoid undue panic and further rumors. Supervisors should be reminded of the need to avoid any retaliation against the possibly infected employee. Educate supervisors on the spread of infections, types of treatment, and the company’s planned preventative steps.

**Provide Time Off:** Remind the employee and co-workers that they have available time off to seek medical attention. Ask for releases to return to work from the employee’s physician. On a case-by-case basis, if potentially impacted employees do not have paid time off available, offer limited unpaid time off.

There is no one answer to the many complicated privacy and health issues that this type of situation in the workplace can raise. As with most employment issues, prompt and sensitive investigation, documentation, and consultation with your counsel are your best protections.

For further information about the H1N1 Flu outbreak, consult the Centers for Disease Control and Prevention (CDC) at [www.cdc.gov](http://www.cdc.gov) or 1-800-CDC-INFO.

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