

PUBLICATION

Government Responds To Growing H1N1 Pandemic

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According to recent estimates released by the Centers for Disease Control and Prevention (CDC), approximately two million people in the United States have been infected with the H1N1 flu since April, and some 4,000 Americans, including 540 children, have died from the virus. President Obama declared the 2009 H1N1 pandemic a national emergency on October 24, 2009, and various government agencies are taking steps to guide and govern employers' efforts to minimize the potential for exposure in the workplace.

To help employers navigate H1N1 issues without violating the Americans with Disabilities Act (ADA), the Equal Employment Opportunity Commission has published new guidance with its "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act." The guidance reminds employers of the ADA's restrictions on disability-related inquiries and medical examinations, as well as its standards for when an employee poses a "direct threat" and when a reasonable accommodation must be provided. It goes on to address 16 questions employers might face before, during and after a pandemic, such as how employers can identify which employees are more likely to be unavailable for work in the event of a pandemic, whether ADA-covered employers can send employees home if they display influenza-like symptoms, and whether employers can encourage employees to telecommute as an infection-control strategy. The guidance also addresses whether employers can require employees to wear personal protective equipment or mandate the influenza vaccine to reduce the transmission of pandemic infection. While the guidance is not legally binding on employers, it is instructive as to how the EEOC will construe the ADA's application to employers' conduct when investigating claims of discrimination.

Avoiding workplace transmission of the H1N1 virus is particularly important in the health care setting, and the CDC published a revised 2009 H1N1 influenza guidance for health care workers on October 14, 2009. Therein, the CDC identifies health care and emergency medical personnel as a priority group for receiving the H1N1 vaccine, and recommends infection control practices such as respiratory hygiene and cough etiquette infection control measures. The guidance also continues to recommend the use of N95 respirators for those in close contact with suspected or confirmed infected patients, and it makes recommendations for addressing anticipated shortages.

Many of the CDC's recommendations were given greater force on November 20, 2009, when the Occupational Safety and Health Administration (OSHA) issued a compliance directive to ensure uniform procedures when conducting inspections to identify and minimize high to very high risk occupational exposures to the H1N1 virus. The OSHA directive closely follows the CDC guidance, and is designed to ensure that health care employers use proper controls to protect employees. While there is a particular focus on the health care setting, the directive also applies to other institutional settings where some workers may be at similarly high risk of exposure, such as schools and correctional facilities.

Additional controls of employer responses to the H1N1 pandemic may be on the way. On November 3, 2009, Rep. George Miller (D-Calif.) introduced legislation that would require covered employers to provide at least five paid sick days to employees sent home or told to stay home by the employer because of a "contagious" illness such as the H1N1 virus. Under the proposed legislation, employees who stay home at the direction of their employer because of a contagious illness could not be fired, disciplined or otherwise retaliated against for their absence. The legislation would apply to full- and part-time employers in businesses that employ 15 or

more employees and do not currently provide at least five days of paid sick leave. Covered employers who fail to provide the leave or retaliate against employees would be subject to penalties under the Fair Labor Standards Act. The legislation is currently in hearings in the House Education and Labor Committee.

As the number of cases of H1N1 influenza continues to increase, so too do the directives and guidances on employers' responses. Employers are well advised to follow legal updates closely to ensure that their efforts to minimize workplace exposure to the H1N1 virus are in compliance with the latest requirements and best practices.

Baker Donelson stands ready to assist you with these and other labor and employment-related challenges. Contact any one of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.*

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