

## Understanding Workplace Policies Amid Flu Season

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According to the Weekly U.S. Influenza Surveillance Report, as of the February 10, 2018 week's end, influenza activity remained elevated across the United States. The 2017-2018 flu season has been intense – so much so that more than 80 pediatric deaths have been reported across the country since October 1, 2017. While a vast majority of cases have been linked to young children and individuals 65 and older, the severity of this season's flu outbreak should call the attention of employers with respect to costs and workplace policies.

The U.S. Centers for Disease Control and Prevention's (CDC) records show that, in comparison to recent seasons, this year's flu outbreak is more widespread as a result of the H<sub>3</sub>N<sub>2</sub> strain. As flu cases continue to increase, employers may see a rise in costs due to loss of productivity and health care. Based on the number of flu cases reported by the CDC, one firm estimated that if employees took approximately four sick days to recover, employers could see resulting costs well into the billions. The mere potential of prohibitive costs often tempts employers to create hardline rules to combat such flu-like pandemics.

In many instances, policies meant to tackle the flu season center on mandatory vaccinations and workplace leave. Employers should be wary of stringent workplace rules, understanding that how the policies and rules are crafted can be critical. For instance, this past January, in *EEOC v. Mission Hosp., Inc.*, a hospital in North Carolina found its way to settlement after it fired Christian and Muslim employees who refused to take the flu vaccination due to their religious beliefs. As can be seen through this case, though employers may think they are taking a proactive approach by requiring mandatory vaccines, such a hard fast rule can result in the following:

- Violation of privacy claims;
- Worker's compensation issues and obligations for any type of medical reaction triggered by the vaccination;
- Failure to reasonably accommodate claims for those employees seeking to be exempt for religious reasons; and
- Union organization attempts.

Thus, rather than requiring employees to get vaccinations, employers should recommend that their employees get a flu vaccine each season and even consider promotion of flu-shots such as hosting workshop-styled programs prior to the flu season.

Employers should also be aware of workplace rules regarding job leave during the flu season. Particularly, employers covered by the Family Medical Leave Act (FMLA) may be required to provide job-protected leave and other benefits to an eligible employee, depending on the circumstances. Whether an employee with the flu qualifies as having a serious health condition under the FMLA is a

fact specific question. However, unless complications arise, an employee who misses work due to the flu is often considered to not have a serious health condition under the FMLA. If this is the case, an employer should be careful not to count the absences against the time an employee is allotted under the FMLA. Doing so could expose the employer to liability.

In contrast, illness as a result of the flu can amount to a serious health condition if the employee experiences complications such as hospitalization or incapacitation. If this is the case, an employer covered under the FMLA must provide an eligible employee with the requisite job protections/benefits and reinstatement rights while the employee is out on leave. Therefore, the time that the employee is absent should be deducted from the amount of time allotted for an eligible employee under FMLA leave.

It is an unfortunate reality that many employees with the flu go to work despite knowing they are sick, the magnitude of the sickness, and how it spreads. For that reason, employers should understand ways they can respond while minimizing their exposure to legal claims. Employers should consider the following:

- Encouraging employees to refrain from coming to work when sick to eliminate the fear of being penalized;
- Sending home employees that exhibit flu-like symptoms;
- Implementing guidelines for sick employees regarding how soon they should return to work; and
- Reviewing policies with respect to accrued sick leave and those employees needing to care for sick children.

Whereas the above are just a few helpful tips for employers to take an offensive approach to respond to flu season, it is important that employers remember the simple, yet extremely effective tactic of hand-washing. Whether individuals choose to get their flu shot for the season or not, employers must aggressively encourage employees to wash their hands frequently as this year's flu season continues to be bigger than those in recent years.

**To discuss further, please contact:**

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