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Pandemic Preparedness: Employment Law Issues Associated with the Swine Flu

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H1N1 Influenza "Swine flu"

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Seasonal Influenza
Annual Economic Impact in US

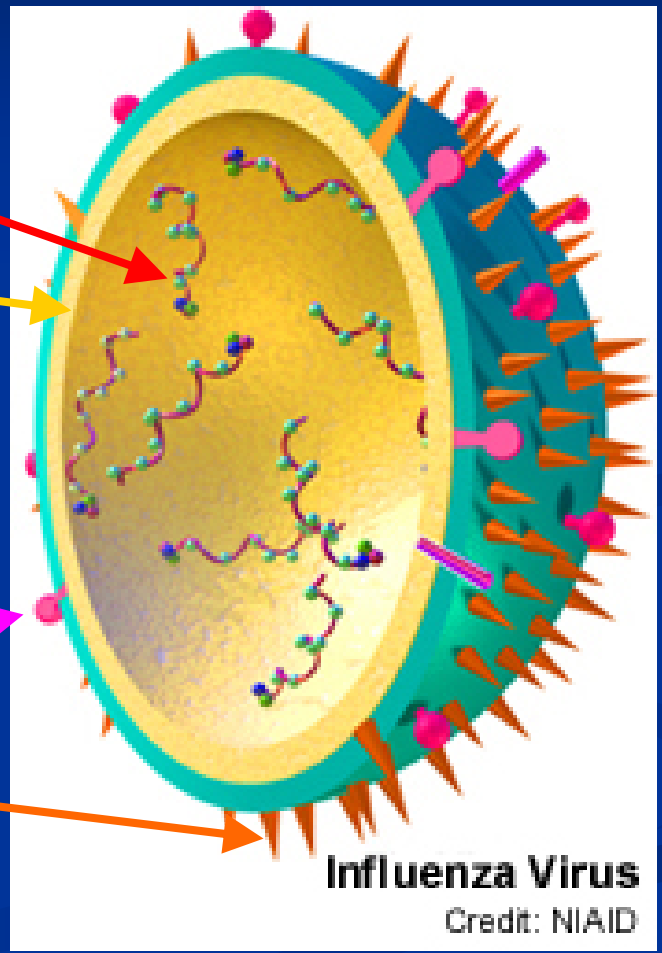
- 36,000 deaths
- 200,000+ hospitalizations
- 17 – 50 million people infected
- 70 million missed work days
- 38 million missed school days
- $3 – 15 billion in direct and indirect costs

Influenza Virus Classification

- Three Types
  - Influenza A – highly variable
    - Infects humans, birds, pigs, horses, seals
    - Most prevalent human virus
    - Cause of most human epidemics (global outbreaks in 1918, 1957, 1968)
  - Influenza B – only in humans
    - sporadic epidemic disease
  - Influenza C – infects primarily humans
    - Antigenically stable, only mild illness

Influenza Virus Structure

- Type A, B, or C
  - ssRNA + Nucleoprotein
  - **M (matrix) protein**
- Subtypes
  - **Neuraminidase (NA)**
  - **Hemagglutinin (HA)**



Flu vaccines

- Flu vaccines incorporate antigens from the three major strains in circulation.
- Seasonal influenza vaccines are **not** protective against H1N1 swine flu.

- 08–09 Vaccine Strains:

  A/Brisbane/59/2007 H1N1
  A/Brisbane/10/2007 H3N2
  B/Florida/4/2006

- 09-10 Vaccine Strains:

  A/Brisbane/59/2007
  A/Brisbane/10/2007
  B/Brisbane/60/2008

Antiviral Drugs

- **Tamiflu® (oseltamivir) & Relenza® (zanamivir)**
  - Block NA, inhibit release and spread of fresh virus
  - Shorten duration of symptoms by 1 – 3 days IF started within 48 hours of symptom onset
  - Oseltamivir – nausea & vomiting (11-30%), vertigo, insomnia
  - Zanamivir – dischaler device, bronchospasm

- **Amantadine** and **Rimantadine**
  - Not effective against H1N1 swine flu

Influenza Reservoir

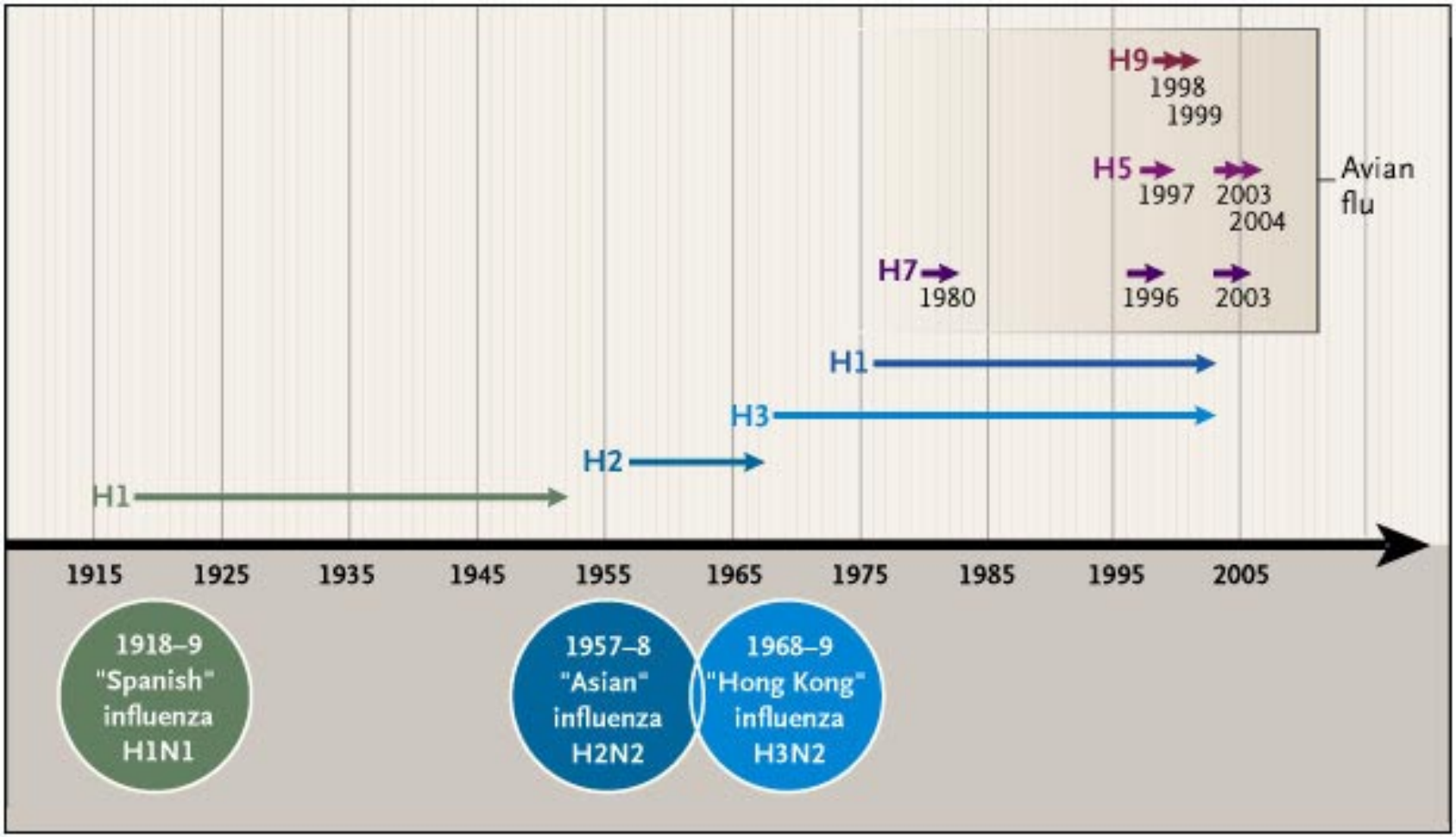
- In nature, flu virus is found in wild aquatic birds such as ducks and shore birds and does not typically harm them.

- **BUT** flu viruses can readily jump the species barrier from wild birds to domesticated ducks and then to chickens or pigs.

The Role of Pigs

- Pigs can be infected by both bird (avian) influenza and influenza that infects humans.
- Pigs can act as an influenza virus "mixing bowl".
- If a pig is infected with avian and human flu simultaneously, the two types of virus may exchange genes.
- Such a "reassorted" flu virus can sometimes spread from pigs to people.

Major Influenza Pandemics



Gerberding, J. L. et. al. HEJM 2004;350:1236-1247

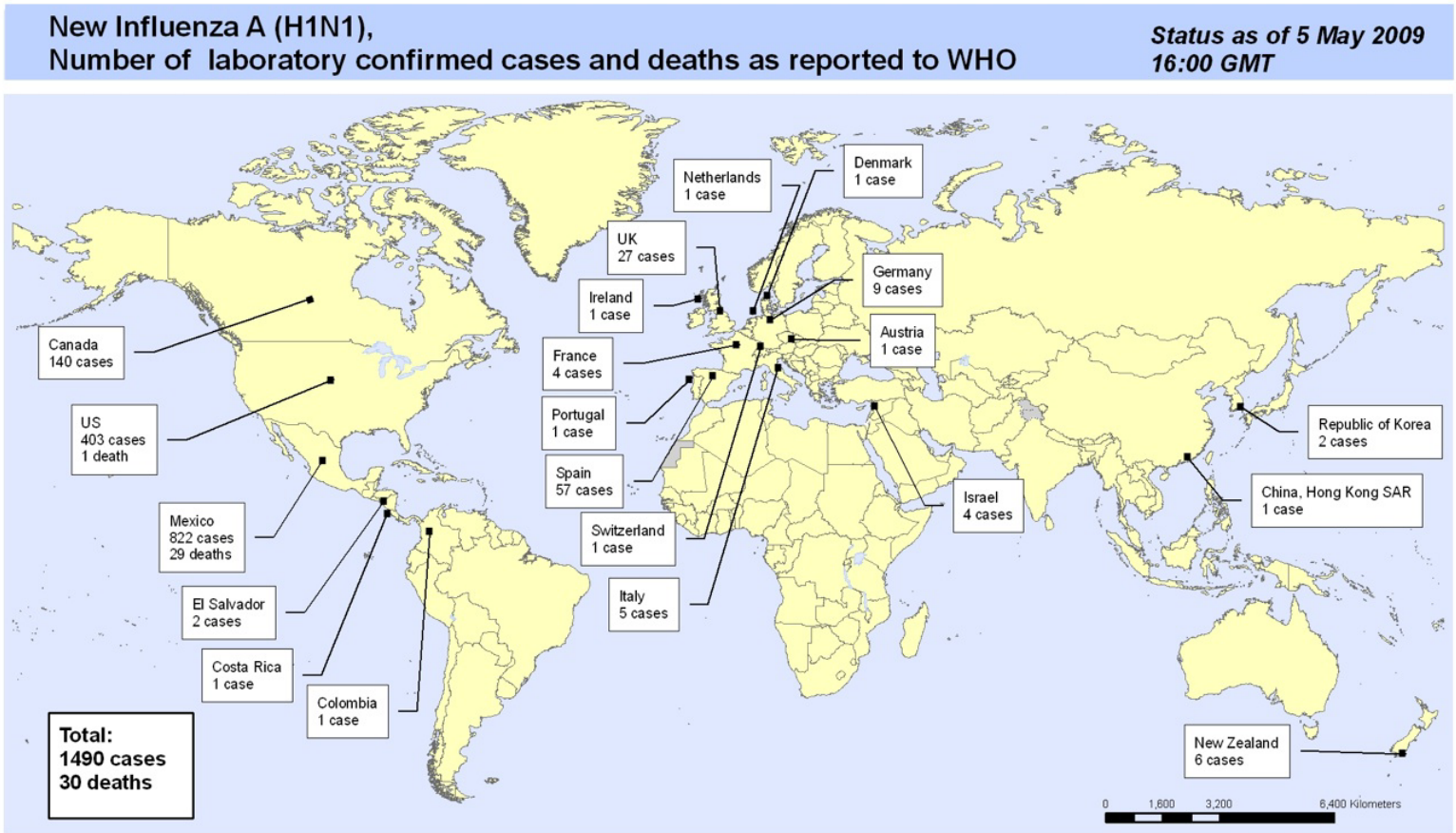
The NEW ENGLAND JOURNAL of MEDICINE

Estimates of Pandemic Influenza Impact in US

	"Ordinary" Influenza	Pandemic Influenza	
		Similar to 1957 & 1968	Similar to 1918
Deaths	36,000	92,500	1,200,000
Hospitalizations	200,000	400,000	5-6 million
Numbers Infected	17-50 million	120-180 million	120-180 million
Missed Work Days	70 million	150 million	???
Missed School Days	38 million	85 million	???
Direct/Indirect Costs	$3-15 billion	$35 billion	???

– Al DeMaria, MD, 2006

Current Influenza A (H1N1) update



The boundaries and names shown and the designations used on this map do not imply the expression of any opinion whatsoever on the part of the World Health Organization concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. Dotted lines on maps represent approximate border lines for which there may not yet be full agreement.

Data Source: World Health Organization
Map Production: Public Health Information and Geographic Information Systems (GIS)
World Health Organization

World Health Organization

Map produced: 5 May 2009 16:10 GMT

NATIONAL STRATEGY FOR

PANDEMIC INFLUENZA

HOMELAND SECURITY COUNCIL

NOVEMBER 2005

- $251M to train foreign personnel
- $1.2B for 20M avian flu vaccine
- $1B antiviral stockpile
- $2.8B vaccine technology
- Vaccine manufacturer litigation relief
- $583M for pandemic preparedness ($100M for states)

http://www.pandemicflu.gov/

BOSTON Herald

MUSIC: HOW ADELE CASTS HER SPELL Page 33

KILLER FLU STALKS MASS.

STATE BRACES FOR OUTBREAK AS FIRST CASES SURFACE IN LOWELL PAGES 4-5

EAGAN ON CRINGE-WORTHY SOX OWNER P. 8

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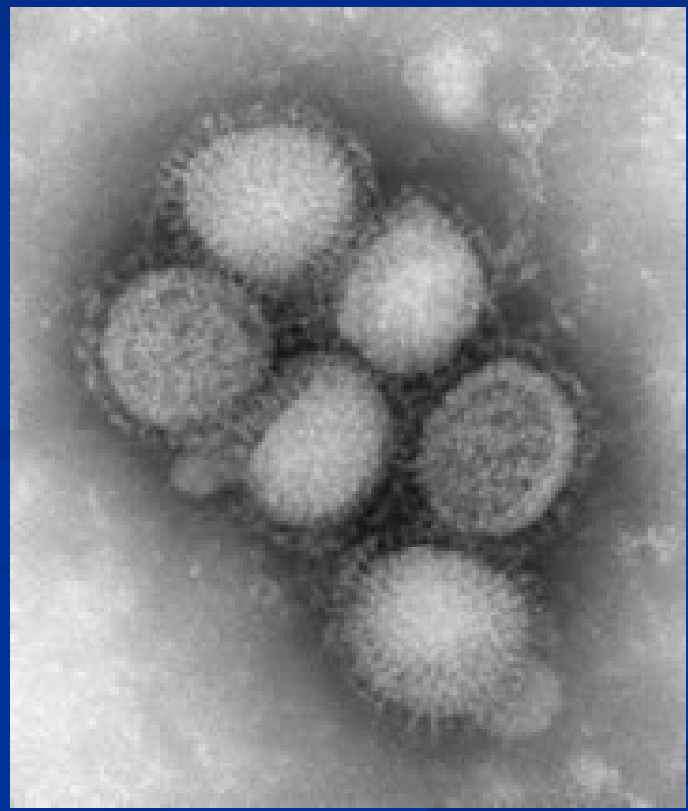
What is the swine flu?

- H1N1 virus first seen in US in April 2009
- Spreading person-to-person much like seasonal flu
- Initially called "swine flu" because genes looked like those found in pigs in North America
- Found to contain 2 genes from pigs in Europe and Asia, an avian gene, and a human gene (a quadruple reassortment virus)



Swine Flu Signs and Symptoms

- fever, cough, sore throat, body aches, headache, chills and fatigue.
- A significant number of people have also reported diarrhea and vomiting.

- SEVERITY: unknown at this time, but thus far H1N1 in the US has not been more severe than seasonal influenza

How to keep from getting the flu?

- First and most important: wash your hands.
- Try to stay in good general health.
- Try not to touch surfaces that may be contaminated with the flu virus.
- Avoid close contact with people who are sick.

How long can an infected person spread this virus to others?

- Currently, CDC believes that this virus has the same properties in terms of spread as seasonal flu viruses.
- With seasonal flu, people may be contagious from one day before they develop symptoms to up to 7 days after they get sick.
- Children, especially younger children, might potentially be contagious for longer periods.

What surfaces are most likely to be sources of contamination?

- Droplets from a cough or sneeze of an infected person move through the air.
- Germs can be spread when a person touches respiratory droplets from another person on a surface like a desk and then touches their own eyes, mouth or nose before washing their hands.
- Influenza virus can survive on environmental surfaces and be able to infect a person for up to 2-8 hours after being deposited on the surface.

What can you do to protect yourself and others from getting sick?

- Cover your nose and mouth with a tissue (or your sleeve if you do not have a tissue) when you cough or sneeze. Throw the tissue in the trash after you use it.
- Wash your hands often with soap and water, especially after you cough or sneeze. Alcohol-based hand cleaners are also effective.
- Avoid touching your eyes, nose or mouth.

- Stay home if you are sick for 7 days after your symptoms begin or until you have been symptom-free for 24 hours, whichever is longer. This is to keep from infecting others and spreading the virus further.

Issues for employers

- Travel:
  - People entering the US exhibiting symptoms consistent with swine flu and who have traveled to an affected area or have been exposed to someone possibly infected during the last 7 days should report their illness to their healthcare provider immediately.
- Sick employees:
  - Should stay home if sick for 7 days after symptoms begin or until symptom-free for 24 hours, whichever is longer.

Current issues

- Information to ask of employees that call in sick:
  - Does the employee have typical symptoms?
    - Acute febrile illness (> 100°F with recent onset of runny nose, nasal congestion, sore throat, or cough)
  - Does the employee have exposure (endemic area travel or to someone diagnosed with influenza A)?
  - Has the employee seen health care provider / been diagnosed with influenza A?

Current issues

- How does testing work?
  - Rapid ELISA testing will yield a result (influenza A or not) within hours
  - Some healthcare facilities will also perform a real-time PCR test; this result will be available within 24 hours
  - H1N1 swine flu will test positive for influenza A but negative for H1 and H3 in current RT-PCR tests
  - Positive tests in people with compatible clinical illness are forwarded to CDC for confirmation (state health departments will be able to do this soon)
  - Confirmation of H1N1 disease typically takes several days to a week

Current issues

- What does an employer need to report and to whom?
  - Employees with positive influenza A test results should be reported to local (city and state) health departments
  - In practice, the positive test results will be reported by the healthcare provider
  - Clusters of influenza-like illness should be reported

Current issues

- How many workers do you need to send home if exposed to a sick employee?
  - Generally, employees in close contact with exposure to the sick employee
  - In practice, this means employees who spent significant time within 3 to 6 feet of the sick employee (the typical range respiratory droplets can spread)
  - If there are multiple sick employees, the local health department will likely be involved in the decision

Current issues

- What should cleaning crews be doing that they are not?
  - EPA-registered disinfectants with label claims for influenza A virus should be used with non-sterile gloves for:
    - Toilets and bathrooms
    - General hand contact surfaces (door handles, telephones, keyboards, computer mice, chair arms, hand rails, table and desk tops, etc)
  - Disposable cleaning towels and gloves should be collected in a leak proof plastic bag that is tied shut and not reopened.
  - Post-cleaning, crews should clean hands with soap and water or alcohol-based hand gel

"I wouldn't go anywhere in confined places now" – Joe Biden

- Does it make sense to keep recent Mexico travelers with no symptoms out of the workplace?
  - No, asymptomatic travelers can safely return to the workplace as the epidemic in Mexico appears to be leveling off.

- WHO: "Limiting travel and imposing travel restrictions would have very little effect on stopping the virus from spreading, but would be highly disruptive to the global community. Influenza A (H1N1) has already been confirmed in many parts of the world. The focus now is on minimizing the impact of the virus through the rapid identification of cases and appropriate medical care."

Current issues

- If an employee is from a town where schools have been closed and the employee has children at the school but they are not sick, is there any medical reason to keep the employee out of work?
  - No. In this case, the employee has likely not been exposed to influenza.

Steps employers can take

- Stay informed.
- Educate your employees about steps to avoid getting or spreading influenza virus.
- Give employees the tools they need:
  - Provide hand sanitizer in public areas
  - Encourage staff to stay home if they are sick
  - Do not allow staff to bring sick children into the office.
  - Encourage people to telecommute or stay home and take care of their sick children when appropriate.

Steps employers can take

- Ensure continuity of operations:
  - Review your continuity of Operations plan and revise it to reflect any changes in your organization.
  - If you don't have a plan, begin developing one.
  - http://www.pandemicflu.gov/plan/businesschecklist.html

- http://www.mass.gov/Eeohhs2/docs/dph/cdc/flu/swine_steps_for_employers.pdf

Additional Resources

- http://www.cdc.gov/h1n1flu/
- http://www.cdc.gov/swineflu/investigation.htm
- http://www.mass.gov/dph/swineflu
- http://www.who.int/csr/disease/swineflu/en/index.html
- http://www.pandemicflu.gov/

OSHA

- "General duty" to provide workplace free from recognized hazards
- OSHA Guidelines on Preparing Workplaces for an Influenza Pandemic
  http://www.osha.gov/Publications/influenza_pandemic.html
- Protection for employees who refuse to work based on the "good faith belief" that doing so would expose the employees to "imminent danger"
- Recordkeeping Obligations

Workers' Compensation/ Common Law Negligence

- WC Coverage is governed by varying state law
- **Massachusetts** covers "infections or contagious diseases" if nature of employment is such that hazard of contracting the disease is "inherent in the employment"
- **New York** appears to cover infectious diseases where the cause of the disease can be assigned to a determinative act, identified in space or time with the workplace. Not limited to healthcare, but includes prisons, schools, *etc.*
- In **California,** contagious diseases compensated if contracted as a result of exposure peculiar to employment
- If there is no workers' compensation coverage, employers may be exposed to common law negligence claims

Compensation Issues for Employees Who Miss Work Due to a Pandemic

- Salary Basis Test for Exempt Employees
- Properly Paying Non-Exempt Employees

Salary Basis Test for Exempt Employees

- General Rule: Employer may not reduce pay for a partial week absence
- May require that exempt employees use accrued vacation or sick time
- Deductions for full-day absences for personal purposes permitted (*e.g.,* after exhausting paid time off)
- Deductions for full day absences due to illness permitted if there is a "bona fide" plan, policy or practice that has been adequately communicated to employees (*e.g.,* can make deductions before employee qualifies under the plan or practice or after employee exhausts sick leave)
- May dock a full week of pay under FLSA if no time is worked in the week

Paying Non-Exempt Employees

- “Show-up pay” required by some state laws for employees sent home
- Otherwise, only need to pay for hours worked
- Need to keep records of hours worked by telecommuting non-exempt employees
- Unemployment benefits may be triggered for employees directed to stay home without pay beyond certain point (one week waiting period in Massachusetts)

FMLA

- “Serious health condition” of employee or member of immediate family
- May not discipline for FMLA leaves under attendance policies
- Staying home with healthy child or from fear of contagion is not FMLA eligible

Other Leave Policies

- Existing policies need to be applied consistently
- Consider adopting pandemic specific policies such as a Leave in Connection with Communicable Disease Policy
- Balancing business, health, fairness and employee relations issues

ADA/FMLA
Confidentiality Restrictions

- Disclosure of medical information is generally limited to need to know for employee's own safety or accommodation purposes
- Disclosure of personal medical information to co-workers is generally prohibited
- Obtain guidance from CDC/DPH and/or qualified medical professionals on type and scope of notification to co-workers

Privacy Laws

- State privacy laws often call for a balancing test
- Public disclosure to be avoided
- HIPAA not applicable to information received as an employer but medical information obtained as a health plan sponsor is covered. However, exceptions exist for communicable disease risk.

Policy Development Issues

- Telecommuting
- Travel Restrictions (Business and Personal)
- Required Use of Vacation and other Paid Time Off
- Hygiene Policies

Telecommuting Policies

- Standards/Process for Determining Who Can and Can't
- Expectations for Working from Home
- Safeguarding Company's Confidential Information
- Non-Exempts Reporting Hours

Travel Restrictions

- Limiting/Requiring Business Travel
- Limiting Personal Travel
- Government and Employer Imposed Quarantines on Returning Travelers

Required Use and Liberal Allowance of Paid Time Off

- Understand How Existing Policies will Apply
- Consider Modifying Existing Paid Time Off Policies
- Advancing/Recovering Paid Sick and Vacation Time
- Addressing Employee Relations Issues

Hygiene Policies

- Hand Washing
- Providing Supplies
- Desk/Phones/Equipment Cleaning
- Use of Personal Protective Equipment (“PPE”) in High Risk Positions

Various "Groups" of Employees May be Affected by Swine Flu in or Around the Workplace

How is each group treated with respect to:

- Health-related protections
- Time away from work
- Compensation
- Benefits
- Employee Incentives

Group One

Healthy employees, willing and able to come to work

(a) Hygiene policies

(b) Informing employees about flu risks

(c) Mandatory precautions for employees

(d) Sharing information about other at-risk employees

Group Two

Healthy employees, unable to come to work due to quarantine

(a) Time off from work
  (i) Paid
  (ii) Unpaid

(b) Mandatory use of vacation
  (i) Accrued
  (ii) Borrowing

(c) Telecommuting
  (i) Forced or elective
  (ii) Supervision of at-home employees
  (iii) Time measurement issues
  (iv) Maintaining confidentiality of workplace information

Group Three

Healthy employees, not working due to child or dependent care issues (*e.g.,* healthy children, but school closed)

(a) Time off from work
  (i) Paid
  (ii) Unpaid

(b) Mandatory use of vacation
  (i) Accrued
  (ii) Borrowing

(c) Telecommuting
  (i) Forced or elective
  (ii) Supervision of at-home employees
  (iii) Time measurement issues
  (iv) Maintaining confidentiality of workplace information

Group Four

Healthy employees, unable to work due to illness in the family
(care for a family member with flu)

(a) FMLA? "Serious health condition"
  (1) If yes, FMLA compliance (unpaid, subject to policy).
  (2) If no, type of leave?

(b) Use of paid time off?

(c) Elective telecommuting?
  (1) Supervision of at-home employees
  (2) Time measurement issues

Group Five

Healthy employees who do not come to work because they may have been exposed to the virus

(a) Telecommuting
  (i) Forced or Elective
  (ii) Supervision of at-home employees
  (iii) Time measurement issues
  (iv) Maintaining confidentiality of workplace information

(b) Time off from work
  (i) Paid
  (ii) Unpaid

(c) Mandatory use of vacation
  (i) Accrued
  (ii) Borrowing

Group Five (continued)

(d) Keeping exposed people away from work

(i) Privacy concerns regarding questioning about health status

(ii) Medical testing

(iii) Incentives to self-identify

(iv) Potential abuse to obtain incentives

Group Six

Healthy employees who are afraid to come to work

(a) Telecommuting
  (i) Forced or elective
  (ii) Supervision of at-home employees
  (iii) Time measurement issues
  (iv) Maintaining confidentiality of workplace information

(b) Time off from work
  (i) Paid
  (ii) Unpaid

(c) Mandatory use of vacation
  (i) Accrued
  (ii) Mandatory borrowing

(d) Level of fear
  (i) Real or imagined risk of harm
  (ii) Anxiety disorders/ADA

(e) Fairness/Discrimination Issues

(f) OSHA protection

Group Seven

Sick employees

(a) Determining that an employee has Swine Flu
  (1) Privacy
  (2) Employer confidentiality obligations
  (3) Public health reporting obligations
(b) FMLA/serious health condition
(c) ADA/reasonable accommodation
(d) Sick pay
(e) Short-term disability
(f) Post-illness recovery period
  (1) How long should employees be required to stay away?
  (2) How long should employees be permitted to stay away?
(g) Notification of employees and customers in contact with employee during the incubation period

Human Resources Preparedness

- After considering the issues from the perspective of each employee group, review and consider updating policies including:
  - Vacation
  - Paid Sick Time Allowance (also STD)
  - Attendance/Absenteeism Policies
  - FMLA and other general leave polices
  - Leave for Exposure to Communicable Disease Policy
  - Information Systems Policy
  - Telecommuting Policy
  - Handwashing/Hygiene Policies
  - Travel Policies
- Retaining flexibility to adapt to evolving fact-specific circumstances

Thank You

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