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What's an Employer to Do? Understanding the Employment Law Implications of Swine Flu

Employers face an array of potential legal issues associated with the influenza A (H1N1) infection, also known as "swine flu." As of May 1, 2009, 331 cases of swine flu in eleven countries have been reported and 109 of these cases are in the United States. Moreover, the World Health Organization has rated the swine flu as a phase 5 on the influenza pandemic alert level – revealing "a strong signal that a pandemic is imminent and that the time to finalize the organization, communication, and implementation of the planned mitigation measures is short." Health organizations and the government are not the only entities that need to prepare plans. Employers also need to determine how they will deal with the problems associated with a potential influenza outbreak. With people avoiding anyone seen coughing, school districts closing with limited advance notice, and 24-hour media coverage heightening awareness and anxiety, the current and expected issues are abundant. If these issues are handled improperly, employers may find themselves facing a variety of legal challenges, including unsafe workplace complaints, unpaid overtime reports, unfair labor practice claims, and discrimination charges. Employers need to be prepared to address these issues in a manner that minimizes liability under the myriad of employment laws implicated by a potential influenza pandemic.

The Occupational Safety and Health Act ("OSHA")

Employers have an obligation under OSHA to provide a safe workplace for employees and not subject them to recognized hazards. Swine flu may present challenges to these duties, potentially forcing an employer to balance its obligations under OSHA with its obligations under other employment laws. Employers should consider what steps they will take to protect their employees and clients from the possible spread of swine flu and minimize influenza's impact on their workforces and businesses.

The Family Medical Leave Act ("FMLA")

The swine flu has FMLA implications as well. Employees affected by the illness may request time off for treatment, and employees who have immediate family members affected by the illness may request time off to care for their family members. If the swine flu is considered a "serious health condition" under the FMLA, it will entitle eligible employees to FMLA leave and the attendant protections associated with an employee requesting or taking leave under the FMLA.

Title VII, The Americans with Disabilities Act ("ADA"), and The Fair Labor Standards Act ("FLSA")

Employers and employees may have concerns regarding the health risks posed by potentially infected employees or employees who frequently travel to countries with a high number of reported swine flu cases, such as Mexico or Canada. However, requiring an employee to avoid reporting to work or otherwise treating employees of Hispanic origin who traveled to or from Mexico differently could fuel national origin, disability or "regarded as" disabled disparate treatment claims under Title VII and the ADA. Similarly, requesting such employees to obtain medical releases before returning to work, if done improperly, could lend support for these types of claims. A request to work from home by an employee with a chronic lung, immunity deficiency or similar condition could trigger the ADA's accommodation provisions.

Other potential problems are presented when employees are allowed to work from home. Employers should monitor how employees are paid for time worked in compliance with the FLSA and the workers' compensation treatment of any injuries incurred by employees while working at home. The FLSA and the employers' leave policies also affect the payment status of non-exempt and exempt employees who take time off or are requested to

take time off due to the swine flu. All of these situations must be handled carefully to allow employers to protect their workforce, while minimizing liability under Title VII, the ADA, and the FLSA.

The National Labor Relations Act (“NLRA”)

Employees may also begin expressing concerns and asking or demanding that employers take action regarding other employees who they believe may be infected by the swine flu. If these employees express concerns or make demands in a way that the employer considers improper or insubordinate and the employer disciplines the employees, the employer may run afoul of the NLRA. The NLRA, among other things, gives employees the right to join together and seek to modify their working conditions and prohibits employers from interfering with this right. Thus, for example, if an employer disciplines employees who demand that another allegedly infected employee be required to stay home and threaten that, if this is not done, these employees will not appear for work, the act of disciplining these employees for these demands and threats may violate the NLRA. This is a risk present for employers with unionized and non-unionized workforces and should be considered before an employer determines how to respond to these actions.

Alternative Work Arrangements

If the swine flu continues to affect more individuals, some employers may be faced with a sudden loss of their workforce. Employers may consider hiring temporary employees or having work performed by independent contractors to fill gaps in their workforce. However, hiring temporary employees and contracting with independent contractors must be handled with care to reduce the potential for breach of contract and other tort claims from temporary employees and claims by independent contractors and governmental agencies that the independent contractors are, in actuality, employees.

If you have any questions about these employment-related issues concerning the swine flu outbreak, please contact:

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