



EEOC Provides Technical Guidance on Pandemic Planning in the Workplace and the Americans with Disabilities Act

The Equal Employment Opportunity Commission (EEOC) recently issued technical guidance to help employers plan how to manage their workforce before, during and after a pandemic without running afoul of the Americans with Disabilities Act.

Background

The first case of the H1N1 influenza virus (also known as swine flu) was identified in Mexico last April. (See our May 6, 2009 [For Your Information](#).) In June 2009, the World Health Organization ([WHO](#)) categorized the virus as a Level 6 global pandemic (i.e., sustained community-level transmission in more than one region of the world). Since then, influenza activity has continued to increase in the United States and is now widespread in 48 states, an unprecedented level of activity according to the Centers for Disease Control and Prevention ([CDC](#)).

On October 24, President Obama declared the swine flu outbreak a national emergency, an administrative action intended to allow hospitals to speed treatment and slow the spread of the H1N1 virus. As flu-related visits to doctors, hospitalizations and deaths continue to mount nationwide, employers are trying to minimize the impact of the outbreak on their employees and business operations. (See our October 22, 2009 [InsightOut®](#).) To assist employers meet a challenging fall and winter flu season, the EEOC recently issued [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#).

The EEOC Guidance

Title I of the Americans with Disabilities Act (ADA) protects job applicants and employees from disability discrimination. Against that backdrop, the new EEOC guidance identifies ADA principles that employers must take into account when dealing with an influenza pandemic, and answers frequently asked employer questions about ADA-compliant practices before, during and after the pandemic.

Relevant ADA Requirements

The ADA regulates employers' disability-related inquiries and medical examinations for applicants and employees, prohibits employers from excluding disabled individuals from the workplace unless they pose a direct safety or health threat to themselves or others, and requires reasonable accommodations for individuals with

disabilities. Each of these requirements is relevant to pandemic preparedness and continuing business operations during a pandemic.

Disability-Related Inquiries and Medical Examinations. The ADA generally prohibits disability-related inquiries (i.e., likely to elicit information about a disability) and medical examinations of employees unless they are job-related and consistent with business necessity. In the pandemic context, asking about cold or flu symptoms would be permissible, but asking whether an individual's immune system is compromised would be disability-related as the condition is associated with cancer or HIV/AIDS. Whether a procedure or test seeking information about an individual's physical or mental impairment qualifies as a medical examination depends on various factors including whether it is invasive, involves the use of medical equipment, or is given or interpreted by a medical professional.

Employers have a bit more leeway to make disability-related inquiries and require medical examinations before new hires actually begin employment. Although prohibited by the ADA before a conditional offer of employment, employers may make inquiries and conduct medical examinations after a conditional job offer but before the individual starts working as long as they do so for all new hires in the same job category.

Direct Threat and Pandemic Influenza. The ADA nondiscrimination provisions do not allow an employer to exclude an individual with a disability from the workplace unless he or she poses a direct threat (i.e., a significant risk of substantial harm to the individual or others even with a reasonable accommodation), as determined by objective facts. To determine whether the swine flu rises to the level of a direct threat, employers should look to the assessment by the CDC or other public health authorities. An assessment that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza would mean that it does not pose a direct threat or justify disability-related inquiries or medical examinations. However, a CDC assessment that the swine flu is "significantly more severe" could justify those inquiries or examinations.

BUCK COMMENT. *Because CDC and public health assessments can be expected to change during a pandemic and differ by locality, employers must monitor developments and use up-to-date public health advice from national, state and local authorities to evaluate conditions in their workplace.*

ADA-Compliant Employer Practices for Pandemic Preparedness

In a series of questions and answers, the EEOC provides guidance to employers on how they can manage employees in an ADA-compliant manner before, during and after a pandemic. It clarifies what an employer can ask and do when dealing with employees who have, or may have, the swine flu.

Before the Pandemic. For contingency planning, employers would like to be able to anticipate absenteeism by identifying employees particularly susceptible to complications from the swine flu. While asking employees to disclose health conditions that put them at risk of complications would likely violate the ADA, employers could –

- use an ADA-compliant employee survey designed to elicit information from employees about their inability to come to work during a swine flu outbreak. The EEOC has provided a sample survey that would allow

employers to secure this information without asking individual employees to provide specific medical or non-medical reasons for any expected absence.

- require post-offer medical examinations for new employees as long as all entering employees in the same job category must undergo them. An EEOC example illustrates that an employer's program may require examinations even if they include procedures to identify medical conditions that the CDC associates with an increased risk of complications from the flu.

BUCK COMMENT. *Employers that require post-offer medical examinations must ensure that information acquired from the examinations is collected and maintained in separate medical files and treated as a confidential medical record. Importantly, an employer may not rescind a job offer based on results that show an applicant is at increased risk of complications from swine flu unless he or she would pose a direct threat to himself or herself or others.*

During the Pandemic. The EEOC clarifies actions the employer can take when the WHO and CDC report an influenza pandemic. The employer may –

- send employees home if they exhibit flu-like symptoms at work
- ask employees who report feeling ill or call in sick if they have symptoms such as fever or chills and cough or sore throat, provided all information about the illness is maintained as a confidential medical record under the ADA
- ask employees questions about exposure to swine flu during travel, even if the travel was personal
- measure an employee's temperature if the CDC determines that the flu outbreak becomes significantly more severe or widespread in the community
- require employees to adopt infection control practices (e.g., regular hand washing)
- require employees to wear personal protective equipment to reduce the spread of infection (e.g., gloves)
- ask an employee why he or she has been absent from work, even if the employer suspects there was a medical reason.

As an infection control strategy, employers may encourage employees to telecommute, and employees with disabilities that put them at high risk of complications from influenza may request telework as a reasonable accommodation during the pandemic. If an employee voluntarily self-identifies a medical condition or disability that puts him or her at greater risk of complications, the employer must keep this information confidential but may ask the individual what assistance he or she may need (e.g., work from home). The EEOC reminds employers covered by the ADA and Title VII of the Civil Rights Act of 1964 that they may not be able to compel all their employees to be vaccinated because some employees may be entitled to an exemption based on medical reasons or religious beliefs. The EEOC generally recommends that employers consider encouraging employees to get the vaccine rather than requiring it.

BUCK COMMENT. *Employees who do not earn or have exhausted their sick leave may resist taking time off if it means the loss of pay. To make it easier for workers to comply with an employer's "stay home" recommendation, companies may want to consider temporary changes to their leave policies or PTO programs, relaxing their attendance policies, and instituting or expanding telecommuting and flexible work arrangements.*

In light of the current economic climate, political pressure to enact sick leave mandates may increase if a significant portion of the workforce is financially impacted by the swine flu. In Maine, for example, the Senate President has already announced her intent to introduce legislation that would guarantee workers paid sick leave.

After the Pandemic. An employer may require a doctor's note certifying fitness-for-duty from employees who have been out during the pandemic. The EEOC suggests that doctors and other health professionals may be too busy to provide such certifications, in which case employers may have to consider other ways to certify that the individual does not have the swine flu (e.g., form, stamp or email from local clinics).

Conclusion

As the 2009-2010 flu season progresses, employers can expect to face increased employee absenteeism and greater challenges in responding to workplace issues associated with the pandemic. Employers must identify what work is critical and ensure that plans are in place to keep essential functions running if employees heed the advice of public health officials to stay home when they are sick. The EEOC guidance is particularly useful in setting out specific questions employers can ask and actions they can take without violating the ADA to respond to the heightened concerns posed by the H1N1 virus.

Buck's consultants are available to answer any questions you may have about pandemic preparedness and to help you determine how to address H1N1 issues in your workplace.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.