SPECIAL ISSUES FOR EMPLOYERS

H1N1 FLU SUMMIT II

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Origin of swine (H1N1) flu . . .

The turkeys have bird flu. The cows have mad cow disease. I'm telling you, boys... unless we want to see more ham served on Thanksgiving, we're going to have to get our own disease!
KEY ROLE

“Businesses and employers . . . play a key role in protecting employees’ health and safety, as well as in limiting the negative impact of influenza outbreaks on the individual, the community, and the nation’s economy.”

CDC Guidance for Business and Employers to Plan and Respond to the 2009-2010 Influenza Season
AGENDA

- **EMPLOYERS NEED WRITTEN PANDEMIC PREPAREDNESS PLAN**
  - PURPOSE
  - UPDATE POLICIES / PROCEDURES
  - COMPLIANCE WITH FEDERAL AND STATE LAWS

- **MANDATORY FLU VACCINES FOR HEALTHCARE WORKERS**
  - REASONS FOR MANDATE
  - OBJECTIONS TO MANDATE
  - MANDATE IN NEW YORK
  - MANDATE IN HOSPITALS
PLAN HAS TWO-FOLD PURPOSE

- PROTECTS EMPLOYEES IN THE WORKPLACE
  - Develop/update policies:
    - Infection control techniques
    - Reduce transmission of communicable illness
    - Use of personal protective devices

- ALLOWS EMPLOYER TO MAINTAIN OPERATIONS
  - Develop/update policies:
    - HR policies on sick leave, flexible work hours, staffing
PLAN MUST COMPLY WITH LAWS

- **FEDERAL LAWS/ REGULATIONS**
  - OSHA
  - ADA
  - NLRA
  - FMLA
  - FLSA

- **TEXAS STATE LAWS/ REGULATIONS**
  - Texas Workforce Commission
  - Texas Health & Safety Code
OSHA
Occupational Safety & Health Act of 1970

- Purpose is to assure a safe and healthy workplace
- Applies to all employers
- Imposes duty to create safe work environment
  - Must implement measures to reduce exposure of pandemic flu in workplace
  - Must monitor and follow public health guidance
OSHA
MEASURES TO REDUCE FLU EXPOSURE

**ADMINISTRATIVE MEASURES**
- Policies for ill workers to stay home without reprisal
- Policies for flexible work hours
  - To allow care for ill family members at home
  - E-mails, webinars, teleconferencing for work
  - Minimize face-to-face contact to limit exposure

**WORK PRACTICE MEASURES**
- Provide resources to promote personal hygiene
- Provide education/updates on protective behaviors for coughing, sneezing, etc...
- Provide personal protective equipment
- **Encourage flu vaccine**
OSHA COMPLIANCE

Follow Guidance:

www.osha.gov
www.cdc.gov/h1n1flu/business
www.flu.gov/plan/workplaceplanning/index.html
www.dol.gov

Monitor for Updates. . . .
ADA
AMERICANS WITH DISABILITIES ACT OF 1990

- Purpose is to protect employees from disability discrimination

- Applies to state and local governments, unions, agencies, private employers with 15 or more employees

- Has relevance to pandemic flu
ADA

- **ADA “disability”**
  - physical or mental impairment
  - that substantially limits one or more major life activities
    - What average person can perform with little or no difficulty - walking, breathing, seeing, hearing, speaking, learning, and working.
**ADA**

- “**Qualified Individual with Disability**”
  - Has legitimate skill, experience, education or other requirements for job and can perform the essential functions of the job.
  - If can perform essential job functions except for limitations, employer required to provide reasonable accommodation if employee requests it.
“Reasonable accommodation” -

- Change in the work environment that allows a person with a disability to have equal opportunity to perform the job’s essential function.
- If poses “undue hardship,” employer not required to provide it.
- “Undue hardship” is if it causes significant difficulty and expense for employer.
ADA

Relevance to Pandemic Flu Preparedness

- ADA regulates disability-related inquiries and medical examinations of employees
- ADA prohibits employers from excluding employees with disabilities from workplace for health and safety reasons unless pose direct threat to others
- ADA requires reasonable accommodations for employees with disabilities (absent undue hardship) during pandemic.
ADA
Prohibits disability-related inquiries and medical examinations of employees

- "Disability-related" inquiry
  - One likely to elicit information about disability.
  - If employee calls in sick-
    - OK to ask if have flu or cold symptoms
    - Not OK to ask if immune system is compromised (may implicate disability).

- EEOC has issued guidance documents for employers on what can ask.
ADA
Prohibits from Excluding Employees with Disabilities from the Workplace unless Pose “Direct Threat”

- “Direct threat”–
  - Significant risk of substantial harm to the health and safety of the employee or others
  - Cannot be eliminated or reduced by reasonable accommodation.
  - If employee poses direct threat despite reasonable accommodation, not protected by ADA.

- CDC/local health department will determine whether pandemic flu is “direct threat.”
  - Depends on the severity of the flu illness.
ADA - hypothetical

- Nurse with disability (COPD) and cannot get vaccine due to egg allergy.
  - Needs to wear protective N95 mask
  - Mask impairs her ability to breathe
  - Without mask – risk to herself and patients
- Employer to provide reasonable accommodation?
  - Telephone triage, other options?
  - If “direct threat” – then no anti-discrimination protection.
ADA – EEOC Guidance

“Pandemic Preparedness in the Workplace and the Americans with Disabilities Act”

“ADA – Compliant Employer Preparedness for H1N1 Flu Virus”

What to do before, during, and after pandemic?
- Cannot compel flu vaccine if ADA disability prevents from getting the vaccine.
- Cannot compel flu vaccine if employer gets notice of religious beliefs that prevent from getting vaccine (Title VII of Civil Rights Act of 1964)
NLRA
National Labor Relations Act

- Governs relationship among unions, employees, and employers
  - Protects rights of employees and employers
  - Encourages collective bargaining
  - Curtails labor and management practices that could harm employees, businesses, and the economy

- Applies to private sector employers

- Plan should address special emergency circumstances (in advance) for existing collective bargaining agreements:
  - Overtime, lost wages, work related rules, conditions of employment, mandatory vaccines, etc...
FMLA 
Family Medical Leave Act

- **Purpose**
  - Gives employees up to 12 workweeks of unpaid, job-protected leave a year
  - Requires group-health benefits to be maintained during leave

- **Covered employers**
  - All public agencies
  - Private sector employers with 50 or more employees

- **Eligible employees**
  - Worked for 12 months
  - Worked at least 1250 hours prior to starting leave
FMLA Cont.

- Leave entitlement
  - Can’t work due to serious health condition
  - Needs to care for immediate family member with serious health condition
- “Serious health condition” means illness, impairment, physical condition that involves:
  - In-patient care in hospital
  - Period of incapacity requiring absence of more than 3 calendar days under care of health care provider
FMLA

- Employer may require medical certification supporting leave for serious health condition
  - ADA compliant – “Fit-to-Return” certification

- FMLA may pose staffing issues
FLSA
Fair Labor Standards Act

- Regulates the hours and wages of employment

- Applies to governmental agencies, hospitals, schools, and businesses engaged in interstate commerce, etc...

- Overtime pay - not less than 1-1/2 times regular rate of pay for more than 40 hours in a work week.
  - Not apply to exempt employees
  - Nurses are partially exempt if have agreement to work 14 day work week in lieu of 7-day work week
  - Different formula for calculating overtime for nurses
Texas Regulatory Control of Healthcare Workers

- **Staffing Issues:**
  - Texas Health & Safety Code § 258.003
    - Prohibits mandatory overtime for nurses
  - Exceptions -- § 258.004
    - Health care disaster
    - Declaration of emergency
    - Unforeseen emergency
  - Hospital must use good faith effort to meet staffing through voluntary overtime, per diem, and agency nurses
Texas Workforce Commission Laws

- Texas Workers’ Compensation laws could be implicated if:
  - Employee contracts illness on the job during course of public health emergency
  - Employee is injured when rendering aid during crisis
  - Employee is injured due to vaccine

- Preparedness plan should address:
  - What injuries are compensable
  - Applicable to temporary/borrowed staff
TO MANDATE OR NOT TO MANDATE FLU VACCINES?
Reasons for Mandatory Flu Vaccinations

- CDC says H1N1 vaccination is key to curbing pandemic H1N1 flu
- Healthcare workers on priority list to get vaccine
  - Risk of exposure from patients
  - Risk of transmitting to patients
- Healthcare workers historically have low vaccine rates
  - 42% rate during 2007 flu season
- High rates of staff immunity limit institutional outbreaks
- Healthcare workers owe professional duty of care to patients
  - Healthcare workers overriding concern should be best interests of patients, not own sensibilities about mandate
  - Canada – imposes standard of care
Opposition to Mandated Flu Vaccination

- Medical reasons
  - Egg allergy
  - Other contraindications

- Conscientious objectors
  - Religious beliefs
  - Violation of civil rights – right to choose
  - Safety and efficacy concerns
  - Moral and personal beliefs
Who Is Pushing Mandated Flu Vaccinations

- No mandate by WHO
- No mandate by CDC / HHS
- No mandate by State of Texas

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State of New York passed emergency regulation mandating flu vaccines for healthcare workers

Some hospitals/health care systems have issued mandated flu vaccine policies
New York Mandate

- Issued by N.Y. Department of Health (08/13/09)

- Requires healthcare facilities to provide flu vaccinations for all healthcare personnel by November 30th each year
  - Facilities must keep records and document why person not vaccinated

- Exceptions
  - Medical contraindication
  - Inadequate vaccine supplies (suspend or change deadline date)

- No monetary penalty or job termination for non-compliance.
NEW YORK MANDATE

- Nurses and unions filed 4 lawsuits
- Judge issued TRO (10/16)
- Hearing set for permanent injunction (10/30)
- Governor suspended regulation due to inadequate vaccine supplies (10/22)
- Only 23% of anticipated doses
- One nurse said she would continue suit
Other Mandated Flu Vaccine Policies

- Hospitals
  - Issued policies on mandatory seasonal flu vaccinations
    - Some may do for H1N1 flu
  - Require direct care workers to get vaccine
- Exceptions
  - Medical contraindication
  - Personal beliefs
- Must wear mask or may face termination
Texas - Can Employer Mandate Vaccination?

- Texas - “at will” employment state

- Employer can terminate employee “at will” unless employment contract in place
  - Terminate for any reason as long as not illegal

- If have contract, it must include employer’s right to terminate without cause and must state circumstances for termination
  - Mandatory vaccination as condition of employment
    - Must have vaccination policies in place
Mandatory Flu Vaccination

- Unanswered question - needs further review:

  Interplay between “at will” employment doctrine, anti-discrimination statutes, and civil rights laws.
TRY BACK ON THANKSGIVING...
Take Away . . . .

- Develop/update written pandemic preparedness plan.
- Preparedness plan must comply with federal and state laws.
- Monitor and follow guidance from CDC, HHS, EEOC, local health officials.
- If mandate flu vaccines, should have written policy in place.
Resources

- OSHA  www.osha.gov
- ADA  www.eeoc.gov/facts/pandemic_flu.html
- FMLA  www.dol.gov/esa/whd/fmla
- FLSA  www.dol.gov/compliance/laws
- NLRA  www.nlrb.gov
- EEOC  www.eeoc.gov/facts/pandemic_flu.html