

# HALL | FARLEY

HALL, FARLEY, OBERRECHT & BLANTON, P.A.

## Swine flu: That's "some pig"

By Leslie M. G. Hayes

*H1N1, or swine flu, has continued to dominate the headlines since its first reported case in April of this year. The news media's coverage of "flu watch 2009" has generally lead to an environment of fear that culminated in November with the introduction of the Emergency Influenza Containment Act being introduced by Representative George Miller in the House of Representatives. The bill requires most employers to provide employees with five days of paid sick leave for influenza type illnesses or exposure to such. Due to the general "panic" surrounding swine flu many employers are left wondering what obligations may exist under the law when an employee, or worse, an entire workforce, falls victim to an illness. In this article, we will discuss the legal requirements of an employer under the proposed bill, along with existing requirements pursuant to the Family and Medical Leave Act, and the Fair Labor Standards Act; we'll also address tips for reducing the spread of influenza at your company, and general advice regarding the proven cost advantages towards employing a healthy workforce.*

### **Understanding H1N1: the Fear and the Facts**

H1N1 first made headlines last spring and has quickly reached pandemic proportions, figuratively and literally. The panic began when the first cases of swine flu were diagnosed; the diagnosis usually occurred after or immediately prior to the death of the inflicted. An H1N1 vaccine was developed, and before a full sigh of relief was exhaled, shortages of the vaccine were announced. Visions of thousands of pregnant women standing in line in the rain to get vaccinated flooded the news stations. No one has been immune to this wide spread media exposure and, when paired with the deadly nature of swine flu, a culture of fear regarding contraction of the disease was created.

The Center for Disease Control (CDC) rates the disease as "widespread" in forty-seven states, with over 40,000 cases reported nationally. Since August 30, 2007, there have been 877 laboratory confirmed influenza associated deaths.

In Idaho, the first shipments of vaccines were only available to a select group of individuals: children, caregivers of children, medical personnel, and the elderly. The availability of vaccines has expanded, and currently, vaccines are recommended for children under five, adults over 65, pregnant women, and any person with a chronic medical condition or weak immune system. Idaho has received over 200,000 H1N1 vaccines. To date, there have been less than 750 reported cases of H1N1 in Idaho.

The sole reason for the wide spread harm caused by H1N1 is that there are no natural immunities to the disease. Unlike the seasonal flu, there has not been long-term human exposure, which accounts for the severe negative reactions that people have experienced. With time, H1N1, like the seasonal flu, will just be the "flu;" however, at this point in time, it still remains a very real and potentially harmful threat to you and your employees. However, awareness of the disease and the implementation of a preventative plan will help your company avoid prolonged financial hardship should your employees be infected.

The symptoms for swine flu and seasonal flu are essentially indistinguishable; a laboratory test is needed to confirm or deny whether a person is inflicted. Health care providers have been inundated by people with “flu-like” symptoms seeking confirmation of whether they have contracted swine flu. Generally, the seasonal flu does not warrant a doctor’s visit. However, with H1N1, if the person is at “high risk for complications” the CDC recommends a visit to a health care provider when symptoms first appear. Swine flu is treatable with antiviral medication. The treatment is most effective if given within one to two days of the on-set of symptoms.

## **Your Legal Responsibilities**

Employers are aware of the current wage, hour and leave policies and laws which affect their work force. Due to the widespread panic surrounding swine flu, the U.S. Department of Labor has requested that employers liberally apply any current leave policies. Currently, there is legislation proposed in the House of Representatives which, if enacted, could drastically change an employer’s current leave policies and requirements under the law. The proposed legislation and all potentially applicable current laws are outlined below.

### **Compensation for Employees: The Fair Labor Standards Act**

The Fair Labor Standards Act of 1938 (FLSA) addresses employee minimum wage requirements, child labor laws, and prohibits pay differentials which are based on sex. Pursuant to the FLSA, hourly employees are only compensated for actual hours worked. There is no legal requirement, pursuant to the FLSA, to compensate an hourly employee who requests leave due to illness. Depending on your company policies and contracts, salaried employees, contract employees and union employees may still receive compensation while on sick leave.

The FLSA does not prevent an employer from temporarily reassigning employees to tasks outside of the employee’s job description, offering staggered work shifts, or offering employees the option to telecommute. These all remain viable options for employers who face a workforce shortage as a result of an H1N1 outbreak.

### **Mandatory Leave for Employees: The Family and Medical Leave Act**

To prevent the spread of pandemic influenza, the U.S. Department of Labor is strongly encouraging employers to liberally apply any leave policies, including leave protected under the Family and Medical Leave Act (FMLA). Employees qualify for leave under the FMLA if they have been employed with you for at least twelve months, have worked at least 1,250 hours over the last twelve months, or about 25 hours per week, and you employ at least fifty people within seventy-five miles. The FMLA allows covered employees to take up to twelve weeks, or sixty days, of unpaid job protected leave for a serious medical reason. This could include complications arising from the swine flu with the employee or a member of the employee’s family.

It is illegal to discriminate or retaliate against employees requesting leave pursuant to the FMLA. An employee is required to provide advance notice of leave, but only if the leave is foreseeable. This means that most of your employees seeking to use FMLA leave as a result of the pandemic flu may not provide you with any notice. An employee may not use FMLA leave to avoid being exposed to the flu. In the case of school closures due to a flu outbreak, employees may not use FMLA leave to provide care for healthy children.

The FMLA and FLSA allow employers to institute a company-wide plan requiring all sick employees to be sent home; under current Federal law there is no requirement for paid leave. However, employees who have accrued paid leave under any company policies may use paid leave in lieu of FMLA leave.

The plan may include a medical examine or doctor’s note prior to allowing an employee to return to work. Any requirement for a doctor’s note or medical examination must be based on objective evidence and a reasonable belief that the employee’s medical condition, (1) would impair his/her ability to perform the essential functions

of the job with or without reasonable accommodation, or (2) poses a direct threat to the safety of the work place. In over-crowded doctor's offices, appointments may be difficult to schedule, which may cause an increased burden on employers and employees alike. Any plan requiring sick persons to stay home may not discriminate on the basis of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status.

### **Proposed Legislation: The Emergency Influenza Containment Act**

The Emergency Influenza Containment Act (EICA) was proposed "[t]o ensure that American workers are able to follow, without financial harm, the recommendations of their employer and public health authorities to stay home when they have symptoms of a contagious disease that may put co-workers, customers, or the public at risk." The bill would require an employer to provide up to five days of paid sick leave annually to employees whom the employer believes to have symptoms of a contagious illness, or to an employee who has been in close contact with an individual with a contagious illness. Somewhat unusually, the proposed legislation will terminate two years after its enactment.

The proposed bill only applies to employers who employ more than fifteen employees and do not provide employees with at least five days of paid sick leave over a twelve-month period that may be used at the employee's discretion. As pointed out by some of the critics of the bill, this rigid definition of paid sick leave fails to take into account several ways in which employers provide employees with paid time off.

Critics of the proposed bill feel that the legislation places too much burden on businesses. Some accuse the bill of legislating "common sense," while others propose changes to the bill to alleviate a company's financial burden.

Although this bill has wide-spread effect on all employers, the general concern is focused on the 50 million Americans who do not have access to paid sick leave. Congressional findings indicate that most of these people work in service industries, such as restaurants, where the presence of a contagious disease could affect a large number of the population. It is for this reason that both the House of Representatives and Congress are concerned with whether these employees have the financial freedom to stay home sick.

The proposed legislation would make it a violation of the Act to discharge, discipline or discriminate against employees who comply with the Act or file a complaint pursuant to the Act. Failure to comply with EICA equates to a violation of the minimum wage provision of the FLSA. These penalties include any unpaid wages doubled, including any overtime wages, and attorney's fees and costs. An employer who willfully violates the act, or takes any retaliatory action against an employee for filing a law suit pursuant to the act may face up to six month imprisonment and/or a \$10,000 fine.

A contagious illness is not readily definable under the Act. "The term 'contagious illness' includes influenza-like-illnesses such as the novel H1N1 virus." Therefore, we know one specific sub-set of contagious illnesses that are covered under the act, but not the outer limits of what may be covered. For instance, meningitis, herpes, HIV/AIDS, pink eye and chicken pox are all technically contagious diseases and it remains unclear whether they would be covered under the EICA. There is a very real possibility that this loose definition of "contagious disease" changes the EICA's original focus and creates an act that essentially grants additional paid leave for employees.

In light of this proposed legislation, employers should conduct a review of current employee leave policies in order to determine the impact EICA may have on your business. If your company provides any paid leave, the definition should mirror the legislation's definition. The key components under EICA require five-days of paid sick leave per twelve months which may be used at the employee's discretion. If your company requires a doctor's note or any pre-approval, your current policy may not exempt you from the provisions of the act. You

may want to consider a temporary modification of paid sick leave to remove your company from the guise of the Act, and ideally insulate you from any liability pursuant to the EICA.

If you employ less than fifteen people or already provide more than five days of paid leave to employees, then you would not be subject to the provisions of the EICA. If you are potentially subject to the provisions of the Act, you should keep a close watch on this legislation, and any subsequent changes that are made. You may also want to conduct an informal inventory of current employees who would qualify under the Act. You can use this information to make adjustments to annual budgets, and hopefully mitigate some of the financial impact of any new legislation.

### **Communicating with Employees Regarding Their Rights and Your Responsibilities**

Be open with your employees regarding their sick leave options. If the EICA is adopted, apprise your employees of the change in the law. A company meeting would be an easy informal forum for employees to ask questions regarding the EICA and its applicability. Inform employees that it is important, and permissible, to stay home from work if they exhibit flu-like symptoms or are exposed to the flu.

In light of the loose definition of “contagious disease,” and issues regarding employee privacy, you may consider instituting a “no questions asked” policy when it comes to employees who have been exposed to a “contagious disease.” It is unclear how the EICA will affect any privacy issues, so explain to your supervisors how to appropriately respond, with tact, to an employee who appears to be sick or confesses exposure to a “contagious disease.” Do not ask the employee embarrassing or probing questions. When implementing any leave policy, whether paid or unpaid, employers should avoid establishing any criteria which may improperly discriminates against an employee’s race, color, sex, national origin, age (over 40), disability, or veteran status.

### **Instituting your Company Action Plan**

Employers, employees, schools, and the general public are working together to prevent this pandemic flu from spiraling out of control. The only way we can all gain control of H1N1’s uncertain future is to develop and implement a contingency plan to ensure that afflicted employees provide the necessary care for themselves or their families while minimizing impact on your business.

Although an employee may not qualify for any specific policy allowing for leave, the U.S. Department of Labor, Wage and Hour Division recommends liberal application of an employer’s paid sick, paid vacation/personal leave or FMLA leave. In other words, make sure that your employees understand the benefit and necessity of a healthy workplace. This may mean, temporarily varying your company policies. Be creative when dealing with employees who are sick or have sick family members at home, offer temporary telecommuting, reduced hours, or staggered hours.

All your actions are still subject to the provisions of the Americans with Disabilities Act (ADA), Title VII, and the FLSA. This means, you can encourage employees to telecommute, but you cannot single out a specific employee on a basis prohibited by any Equal Employment Opportunity law. It is permissible to limit telecommuting to a specified group of employees; however, any restrictions must be based on legitimate business reasons. *Tarin v. County of Los Angeles*, 123 F.3d 1259, 2164-65 (9th Cir. 1997). Generally, short-term, non-chronic impairments, such as the flu, do not qualify as a “disability” and are not protected under the ADA. Issues would arise under the ADA if any implemented policy discriminated against an employee with an existing disability.

To implement a telecommuting schedule in your workforce, actively seek out employee volunteers. Clearly establish any technological requirements and work with your tech-department to determine whether supplying technology to employees is a viable option. Employees cannot be required to purchase their own technology required for work if it will reduce their total wage below the minimum wage. An employee will receive the same wage while telecommuting. Hourly employees are compensated only for actual hours worked.

### **Keeping Your Work Force Healthy: Preventative Steps to Reduce Employer Health Costs**

Not surprisingly, employer health costs are directly linked to the health of the workforce. The costs associated with an unhealthy work force include: actual time loss for employee sick leave, whether paid or unpaid, loss of productivity from unhealthy employees in the workforce, time loss to care for sick family members, and an increase in health care costs for the company.

The CDC offers a free online program for obesity prevention in the workplace at [www.cdc.gov/leanworks](http://www.cdc.gov/leanworks). The online program can help you to establish programs to increase the health of your workforce and reduce the likelihood of diseases, such as swine flu. The CDC has also developed a campaign entitled: "Take 3" Actions to fight the flu. Brochures are available in English and Spanish through the CDC's website for distribution to your employees.

Encouraging employees to exercise will help to generate a healthy workforce. Moderate exercise, defined as thirty minutes per day, is a natural boost to the immune system. Promoting exercise and other healthy habits within the workforce can be a touchy subject for some employees. It is important that all levels of management understand the sensitive nature of a company health program. The program should not be implemented in a manner which subjects certain individuals to criticism or disparaging remarks; this would be counter-productive. The system must also balance the needs of the members of your workforce who are already healthy. An employee who has exercised on their own dime and time may feel hurt if your program is only geared towards heavier individuals.

A lunch hour walking/running program is great way to get the entire office involved in an exercise program at no cost to you as the employer. Select individuals to organize group runs and walks to be conducted during employee lunch breaks. A group brown-bag luncheon paired with a brisk afternoon walk is the perfect way for employees to bond while engaging in healthy activities. You can also use this lunch time meeting to bring in speakers on various health-related topics.

You may also turn an old un-used office into a workout room for employees to use on their lunch break. Do you have an employee who participates in yoga? Perhaps they would like to lead a late afternoon class. Actively seek out information and ideas from your employees.

### **Conclusion**

The current state of the law does not require you to offer your employees paid sick leave. If you already offer paid leave, of any form, you may want to liberally apply those policies or modify those policies to mirror the provisions of the EICA. Be mindful of financial concerns the employee may have with taking or using any unpaid leave; you may consider alternatives to the traditional workforce, such as telecommuting or staggered shifts, as a means of reducing exposure to contagious diseases. It is important that both you and your employees understand the importance of staying home when infected with a contagious disease, such as H1N1. With proper planning and some modifications to employer policies you should be able to mitigate most financial impact arising out of this swine flu season.