

# The Metropolitan Corporate Counsel®

www.metrocorpcounsel.com

Volume 17, No. 12

© 2009 The Metropolitan Corporate Counsel, Inc.

December 2009

## Preparing For H1N1: What Your Business Needs To Know

**Sandy Girifalco**

**STRADLEY RONON STEVENS &  
YOUNG, LLP**

According to President Obama, it's a national emergency. According to the World Health Organization, it's a pandemic. States and cities have their own H1N1 czars. Legal departments are bombarded with advertisements for H1N1 seminars.

Is this a disaster waiting to happen or overreaction? H1N1 has infected six million Americans, and millions more are expected to get infected. This is in addition to the seasonal flu and a particularly virulent strain of rhinovirus making the rounds. While this flu season should not be 1918 revisited, employee absenteeism is likely to be a significant problem for employers.

### **H1N1 Planning**

While many employers are developing plans to decrease the spread of H1N1 in order to help maintain business continuity, others are taking a "wait and see" approach, as H1N1 has not yet significantly impacted their workplaces.

Regardless, employees are worried. The managing partner of a law firm was in the elevator recently with a staff member. He was asked if there were a lot of people out sick on his floor, because there were on hers. He innocently replied, "No, we seem to be fine, but I understand Joe

---

*Sandy Girifalco is a Partner in Stradley Ronon's Litigation, Employment & Labor, and Banking & Financial Services Practice Groups, representing clients in the areas of employment law and complex commercial litigation.*



**Sandy Girifalco**

and Mary [both attorneys on the staff member's floor] have the swine flu." The employee panicked. "Oh, no," she wailed, "I have a compromised immune system. Pray for me." The next thing the managing partner knew, e-mails were flying, human resource personnel were flanking his door and he was faced with the question of whether to force Joe and Mary to go home.

The workplace and schools – where people gather, interact and spread germs – serve as the epicenters of H1N1 issues. Businesses face many challenges as they try to address H1N1 concerns in the workplace. How can businesses minimize the risk of the virus spreading throughout the workplace? How should employers prepare for increased absenteeism? Do legal, medical and public health issues conflict? How can businesses successfully navigate through both state and federal laws, and sick time and absence policies?

### **Communicate And Adjust**

To protect employees, as well as to maintain business operations, employers may be well advised to do the following:

- Encourage employees to be vigilant about their own health and to be on the lookout for common symptoms associated with H1N1;
- Encourage employees to wash hands frequently and sneeze and cough into their sleeves;
- Provide hand sanitizers so employees are reminded to regularly disinfect their hands;
- Send sick employees home;
- Advise sick employees to stay home;
- Make adjustments to the normal sick time or paid time off (PTO) policy;
- Encourage employees to get vaccinated for H1N1 as the vaccine becomes available, as well as for seasonal flu;
- Implement flexible options to allow employees to work from home;
- Accommodate employees who have H1N1 or are caring for a spouse or child with H1N1;
- Identify the business's most important projects and needs, and develop contingency plans in case critical employees become sick.

Regardless of how vigilant employers are, there will be sick employees. The laws that will most commonly be implicated are the Family and Medical Leave Act (FMLA) and corresponding state leave and disability laws. Sick time and PTO policies will feel the strain as well.

### **Leave And Sick Time/PTO**

The FMLA provides for up to 12 weeks of unpaid leave, consecutively, intermittently or on a reduced schedule, because of an employee's serious health condition that makes him or her unable to

*Please email the author at [sgirifalco@stradley.com](mailto:sgirifalco@stradley.com) with questions about this article.*

do the job, or because of the employee's need to care for a parent, spouse or child with a serious health condition. Requests for time off will not be unusual due to the illness of both employees and the employees' family members. Even though the absence may last no more than seven days, employers should still keep track of the time off as FMLA time and comply with the notification requirements for each leave.

Most employers require employees to use FMLA time simultaneously with sick and/or vacation time, which allows employees to be paid for at least some portion of the leave. Obviously, employees should be given whatever sick time they have accumulated. The more difficult situation is the employee who has used up all of his or her PTO time. That is when the business is more likely to see employees coming to work when they should be home.

Public health officials are recommending that employers provide additional paid time off to employees who have H1N1. Other accommodations such as allowing the employee to use banked time, if any, or borrow time from next year may be more palatable.

### **Should Doctor's Certification Be Required?**

Under the FMLA, the employer is entitled to certification by a health care provider. Most employers have some requirement for a doctor's certification for other absences, such as those of three days or more, absences violating an excessive absenteeism policy and in order to return to work.

Public health officials are asking employers to forgo these requirements for employees with H1N1 since they anticipate primary care physicians will be overburdened with treating the sick. And in many cases, employees with H1N1 may not even need to see their physicians.

Businesses need to decide whether they are going to suspend the doctor's certification requirements of their policies and for FMLA leave. This is a particular challenge if the employer determines that it will allow exceptions to its sick/PTO policy for H1N1 but not other illnesses. It is a further challenge because many patients are not even tested for H1N1.

### **Teleworking**

Employees who are home to care for a sick child may wish to telework, or the

business may need them to telework. Companies that already have telecommuting policies and procedures in place will, of course, be better equipped to deal with such requests. Regardless, this is normally an individualized decision that depends on the particular circumstances. If the business allows teleworking, it is important to keep track of the hours worked by the individual so that they can be counted against FMLA and PTO time. Both the employer and the employee should agree on the number of hours worked in order to avoid disputes when the employee may need time off in the future.

### **Abuse Of Special H1N1 Accommodations**

As any human resource professional knows, no good deed goes unpunished. If the business decides to adjust its policies to allow more paid time off and relinquish its doctor's certification requirements for employees with H1N1, there will surely be the few who will take advantage. There will be those who have already used all their sick/PTO time and either need the time off for some other condition or simply want a few days off. This is the downside of adopting interim measures to deal with H1N1. The employer has little recourse unless it can show that the employee did not have H1N1. Catching the employee shopping at the mall or coming back to work with a tan might work, but those instances will be rare.

### **Cross-Training/Staffing**

Serious H1N1 planning requires employers to identify key functions that, if delayed, would significantly hurt the business, and then to examine staffing to determine whether employees should be cross-trained, whether additional staff will be needed or whether higher-level managers can step in if necessary.

### **Discrimination**

Pregnant employees and individuals with certain chronic underlying health conditions are among those at highest risk. Can or should special precautions be taken to protect those individuals? Public health officials might say yes, but their job is to protect the health of the public. They don't have to worry about violating the Pregnancy Discrimination Act or the Americans with Disabilities Act (ADA). It would not be wise to instruct a pregnant employee to stay home because other

employees have come down with H1N1, particularly if she were not being paid. On the other hand, do the reasonable accommodation requirements of the ADA apply for these high-risk individuals? Each case must be handled individually based on its particular circumstances. Knowledge and communication are key. The more both the employer and employee know, the easier it will be to address all concerns. As it turned out in the law firm example, Joe and Mary were at work because they had deadlines. Upon further inquiry, it was determined that they did not have H1N1. Once that was communicated to the staff member, she was relieved, even though what they did have was still contagious. It just goes to show the fear folks have about H1N1.

### **Summary**

H1N1 is a special challenge because it is so easily transmitted and highly feared. Our public health officials want businesses to encourage sick people to stay home and pay them so they do not come to work, and to suspend doctor's certification requirements to spare overburdened medical practices.

While every business needs to make its own decisions, education and communication are easy and can help. Letting employees know what H1N1 is, what its symptoms are, the course of the disease and how to decrease transmission should be the cornerstone of an H1N1 plan. Employees who come to work with fevers and coughs should be sent home regardless of whether they have paid time available or not. Employees who must come in because of a serious business need should be isolated from others as much as possible. Cleaning of common areas should be encouraged. Wipes and hand sanitizers should be available. Key functions, projects, presentations and the like should be examined to make sure an outbreak of H1N1 would not hurt the business or cause the loss of a significant opportunity.

The CDC and state and local health departments have up-to-date information available for employers and should be accessed as needed. The more difficult questions, particularly those involving high-risk individuals and demanding employees, may require consultation with counsel to make sure no decision is made that could give an employee the opportunity to make a claim.

Finally, let's hope that next year we're back to just the regular old seasonal flu.