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## **Swine Flu: The Employer's Guide to the Legal and Workplace Implications of a Swine Flu Outbreak**

By Mark A. Lies II\*

### **I. Introduction**

By now, most people are familiar with the "Swine Influenza", or "Swine Flu" virus (the "virus" or "disease") that has been reported in Mexico and most recently in the United States and Europe. Given high density areas such as mass transportation systems, schools, hospitals and the workplace, the potential is great for this widely circulating virus to spread from human-to-human in a short period of time.

### **II. Background**

#### **A. What is Swine Influenza?**

The Swine Influenza (also identified as H1N1), is an infection that usually affects swine. Certain of these viruses that primarily affect swine are genetically indistinguishable from the influenza viruses that are contracted by humans. H1N1 has contributed to the largest number of detected cases and severe disease and death in humans.

#### **B. What are the Symptoms of Swine Influenza and Who are Most at Risk?**

Once a human contracts the virus, the symptoms have ranged from typical human-like influenza symptoms such as fever, extreme fatigue, coughing, sore throat, muscle and joint aches to eye infections, pneumonia, severe respiratory diseases and other potentially life-threatening complications. Symptoms usually begin within 2 to 3 days of exposure and depend upon the specific subtype and strain causing the infection. Only a laboratory test can confirm the virus in humans.

Those at risk of contracting the virus are mainly individuals who work with swine, health care professionals, frequent travelers, and airline/transportation industry personnel. It should be

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noted that the virus does not seem to discriminate in the sense that healthy, sick, young and old people all have a significant chance of infection.

### **C. How is Swine Influenza Transmitted?**

Direct contact with infected swine, or surfaces and objects contaminated by them is considered the main route of human infection. To date, many people that have contracted the virus live in rural/periurban areas where many households keep swine herds, which often roam freely around human habitations. It cannot be spread by contact with or consumption of properly handled and prepared pork food products.

Once a human contracts the virus, there is a potential for it to spread from person-to-person when a person talks, coughs or sneezes. It can also spread through hand or face contact or through coming in contact with something that an infected person has already touched.

### **III. What are the Legal Ramifications that Employers Should Consider?**

There are several employment and other laws which may be directly involved with this disease and must be considered by employers. These are as follows:

#### **A. Occupational Safety and Health Act**

Under the Occupational Safety and Health Act (“Act” or “OSHA”), the employer has a legal obligation to provide a safe and healthful workplace. One of the agency’s enforcement mechanisms is the ability to issue citations with monetary penalties to employers. According to Section 5 of OSHA, commonly referred to as the “General Duty Clause,” it requires that an employer protect its employees against “recognized hazards” to safety or health which may cause serious injury or death.

Given that OSHA does not have a specific regulation which deals with the Swine Flu, the Occupational Safety and Health Administration (the “Agency”) will utilize the General Duty Clause. In order to determine the scope of the employer’s obligation under the General Duty Clause, OSHA is empowered to utilize outside nationally recognized consensus standards or other authoritative sources. In this case, OSHA would rely upon recommendations issued by the Centers for Disease Control (“CDC”), the National Institute for Occupational Safety and Health (“NIOSH”) or other similar resources. If the Agency can establish that employees at a worksite are reasonably likely to be “exposed” to the Swine Flu (*e.g.*, through handling swine, working in the transportation industry requiring travel to affected countries, serving as healthcare providers, etc.), OSHA will likely require the employer to develop a plan with procedures to protect its employees.

Under the Act, the employer may also have additional legal obligations to the employees of another employer who may come to the workplace and may potentially be exposed to the hazard (in this case to Swine Flu carriers). OSHA may utilize its authority under the “multi-employer workplace doctrine” to issue citations to the host employer when personnel of another employer are exposed. In these instances, citations can be issued by the Agency to the host employer if another employer’s staff members are exposed or if the host employer created the

hazard or exposed the other employees to the hazard. The host employer or the controlling employer at the site will ultimately be held responsible to correct the hazard.

OSHA will expect the responsible employer to develop a program based upon a “hazard assessment” of potential exposure at the worksite (provided in more detail below), such as conduct employee awareness training regarding the hazard; develop procedures, including the use of personal protective equipment (*e.g.*, masks) if necessary to prevent infection and transmission; develop a means of reporting infection and providing medical surveillance for employees who contract the disease; maintain appropriate documentation of the foregoing; preserve of medical records; and maintain an OSHA 300 Log for illnesses which are occupationally related.

### **B. Worker’s Compensation – Disability Benefits**

In the event that an employee contracts Swine Flu as a result of occupational exposure, (in other words, the illness “arises out of and in the course of employment” which the employee must prove with competent medical evidence), the employee is entitled to receive temporary total disability benefits in lieu of wages, reasonable and necessary medical treatment and an award for any resulting permanent disability (*e.g.*, reduced respiratory capacity, etc.). An employer should evaluate whether it has adequate worker’s compensation insurance coverage and coverage limits that include occupational diseases.

If an employee contracts the disease and it is not occupationally related, the employee may be entitled to disability benefits if the employer provides such benefits. Again, the extent of such benefits and any exclusions should be carefully evaluated by the employer. The employer must consider that the Swine Flu is going to involve significant medical issues, such as determining (1) whether the employee is infectious, (2) what type of treatment is necessary, (3) whether the employee presents a health risk to others and, (4) when the employee can safely return to work. Therefore, it is essential that the employer identify a competent medical professional with expertise in infection control who can advise it on all medically-related issues, including worker’s compensation.

### **C. Family and Medical Leave Act**

Under the Family and Medical Leave Act (“FMLA”), employers who have more than 50 employees are required to provide up to twelve (12) weeks of unpaid leave to a qualified employee who has a “serious health condition.” An employee is also eligible under the FMLA in the event of a “serious health condition” affecting its spouse, child or parent(s).

If an employee contracts the Swine Flu, this disease will most likely be considered a “serious health condition” under the FMLA warranting the unpaid leave. Similarly, if an employee’s parent, spouse or a child contracts the disease, this will likely be a qualifying event entitling the employee, with physician’s documentation, to utilize leave time to care for such an immediate family member.

It is certain that issues may arise if the employee contracts the disease but is able to continue working while potentially exposing other employees to infection. Since the CDC appears to recommend removal of such individuals from the workplace to prevent transmission

of the disease, the employer may have to consider placing the employee on an FMLA leave or providing some other form of leave despite the employee's desire to continue working.

If the employee exhausts the entire twelve weeks of FMLA leave, and is unable to return to work at that time, the employer may wish to consider additional unpaid leave for the employee, although such leave would be outside of the FMLA required reinstatement rights.

#### **D. Americans with Disabilities Act**

The Americans with Disabilities Act ("ADA") provides certain protections to employees who may have physical, mental or emotional "disabilities" but who are otherwise qualified to perform the essential functions of their jobs. Typically, a disability is an impairment which substantially limits one or more of the major life activities of an individual (*e.g.*, breathing, working, speaking) which is chronic in nature. Thus, Swine Flu, which is expected to involve temporary infection, and hopefully recovery, would not appear to qualify as a "disability."

The ADA may become a factor, however, if an employee develops a disability as a result of the disease and cannot return to their former work duties because of such impairment. The employer must then be prepared to engage in an "interactive process" with the employee which involves a case-by-case dialogue regarding the employee's ability to return to work, any work restrictions, what accommodations may be available which do not cause undue hardship to the employer or whether the employee's disability presents a direct threat to the health or safety of the employee or other employees. Again, it is recommended that employers engage competent medical advice regarding any accommodations which may be warranted as a result of the long term effects of this disease.

#### **E. Premises Liability**

Under general common law principles in most jurisdictions, a landowner (sometimes the employer) who allows third parties to enter upon its premises for business or related purposes (such as clients, vendors, contract employees), owes these individuals a duty of "reasonable care" to protect them against hazards at the premises which are not "open and obvious." In the case of Swine Flu, if the landowner is (or should be) aware that there are infectious persons at the premises (whether its own employees or tenants) who may create a health hazard to these third party entrants, there may be a duty to warn such third parties, or to prevent access to certain facility areas. In the event that the building ventilation system or washroom facilities may become contaminated with Swine Flu, the landowner may have an obligation to prevent such contamination through enhanced measures.

In many cases, the legal duty of the landowner for site security and sanitation will be defined by contractual documents, such as leases. The landowner should make sure to review such documents to confirm its obligations regarding third parties who may have access to the property.

#### **IV. Where Can I Find Additional Information on the Swine Flu?**

##### **A. Informational Websites**

Center for Disease Control - [www.cdc.gov/swineflu/](http://www.cdc.gov/swineflu/)

OSHA – [www.osha.gov](http://www.osha.gov)

U.S. Department of Health and Human Services – [www.pandemicflu.gov](http://www.pandemicflu.gov)

The World Health Organization - [www.who.int](http://www.who.int)

CDC Emergency Response Hotline for health employers - (770) 488-7100

#### **V. Recommendations**

Unfortunately, it appears that this new health hazard has already and will continue to impact the workplace. It is recommended that the employer take the following steps to preplan for such a hazard.

- Obtain information on the disease from the local Department of Public Health, the Centers for Disease Control and Prevention (CDC), or the employer's local health provider so that the employer can determine whether there is a Swine Flu health risk in the community and/or within the particular groups which may be within the workplace.
- Institute a program to require employees to comply with recognized personal hygiene practices, including hand washing, cleaning of surfaces that may have been contaminated due to sneezing, coughing or other contact with disinfecting agents and avoid spreading of disease by coughing or sneezing without covering the mouth and nose.
- Inform its employees that the employer is committed to providing a safe and healthy workplace (required under the OSHA Act) and that it wants to protect its employees against potential exposure to any disease whether or not work-related, including Swine Flu, within the workplace. Provide information to employees, such as the CDC Key Prevention Messages discussed above.
- Advise employees that they are required to report immediately to the employer any communicable diseases (including Swine Flu) so that the employer can institute appropriate action with public health authorities to control the spread of the disease within the workplace and ensure that an adequate medical response is occurring.

- Inform employees that all such medical information will be maintained as confidentially as possible and that no employee will be subjected to retaliation for reporting such information.
- Ensure that the employer documents its actions to respond to any actual, reported infection or other information involving Swine Flu, including recommendations from the DPH, medical providers and to the affected employees as the situation is resolved.
- Follow the employer's policies relating to documenting any requests for FMLA or other leaves which may be required to treat Swine Flu and resulting chronic health conditions.
- Document any employee requests for an accommodation and the interactive process with the employee for any Swine Flu related "disability".

## **VI. Conclusion**

If the employer becomes informed of the facts relating to Swine Flu and responds in a reasonable manner as outlined above, the employer will be able to properly respond to this health hazard to protect the health of its employees, as well as to limit its potential legal liability.

\*\*The author acknowledges source material on the disease, including the Centers for Disease Control and Prevention (CDC); American Medical Association; Mayo Foundation for Medical Evaluation and Research.