

## Environmental & Safety Report

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

The recent outbreak of Swine Influenza ("virus" or "disease") has health agencies around the world on alert, and, 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. Thus, it is important to understand the virus, and its potential impact on employers.

### What is Swine Influenza and how is it transmitted?

Swine Influenza is an infection that usually affects swine; however, certain strains are genetically indistinguishable from the influenza viruses that are contracted by humans. The initial route of transmission is believed to be by direct contact with infected swine, or surfaces and objects contaminated by them. (Note: it cannot be spread by contact with or consumption of properly handled and prepared pork food products.) Those at risk of contracting the virus are mainly individuals who work with swine or other individuals, such as health care professionals, frequent travelers, and airline/transportation industry personnel who are highly likely to be in contact with infected individuals.

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 into contact with something that an infected person has already touched. Once a human contracts the virus, the symptoms have ranged from typical influenza symptoms such as fever, extreme fatigue, coughing, sore throat, and muscle and joint aches to eye infections, pneumonia, severe respiratory diseases and other potentially life-threatening complications. Symptoms usually begin within two to three days of exposure and depend upon the specific subtype and strain causing the infection. Only a laboratory test can confirm the virus in humans.

### What are the legal ramifications that employers should consider?

There are several employment and other laws that may be directly invoked by Swine Influenza and must be considered by employers.

#### *Occupational Safety and Health Act*

Under the Occupational Safety and Health Act (OSHA), the employer has a legal obligation to provide a safe and healthful workplace. 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 Swine Influenza, 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 Swine Influenza (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, an employer may also have additional legal obligations to employees of another employer who may come to the employer’s workplace and may potentially be exposed to Swine Influenza carriers. OSHA may utilize its authority under the “multi-employer workplace doctrine” to issue citations to the host employer. In this case, the Agency will expect the host employer to develop a program based upon a “hazard assessment” of potential exposure at the worksite.

### *Workers’ Compensation: Disability Benefits*

In the event that an employee contracts Swine Influenza as a result of occupational exposure (e.g., the employee is a healthcare worker who is expected to be exposed to infected individuals in the performance of job duties), 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. An employer should evaluate whether it has adequate workers’ compensation insurance coverage and coverage limits that include occupational diseases. Additionally, employers should evaluate their disability benefits in the event that an employee contracts the virus in an unrelated manner.

### *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 weeks of unpaid leave to a qualified employee who has a “serious health condition,” or if the employee’s spouse, child, or parent has a “serious health condition.” Swine Influenza may be considered a “serious health condition” under the FMLA depending on the severity of the employee’s illness, thus warranting the unpaid leave. If the employee has contracted the virus but desires to continue working, employers should follow the advice of the CDC and remove such individuals from the workplace to prevent transmission. The employer may wish to consider placing the employee on a FMLA leave or providing some other form of leave until it is determined that the employee is no longer infectious.

### *Americans with Disabilities Act*

The Americans with Disabilities Act (ADA) provides certain protections to employees who may have physical, mental or emotional “disabilities” (a chronic impairment that substantially limits one or more major life activities), but who are otherwise qualified to perform the essential functions of their jobs. Swine Influenza is expected to involve temporary infection and would not appear to qualify as a “disability.” However, the ADA may become a factor if an employee develops a disability as a result of the virus and cannot return to former work duties and might be eligible for an accommodation.

### *Premises Liability*

Under general common law principles in most jurisdictions, a landowner (sometimes the employer) who allows third parties

to enter its premises for business or related purposes, owes these individuals a duty of “reasonable care” to protect them against hazards at the premises that are not “open and obvious.” In the case of Swine Influenza, 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 Influenza, the landowner may have an obligation to prevent such contamination through enhanced measures. The landowner should review any documents (such as a lease) to confirm its obligations regarding third parties who may have access to the property.

## **What actions can employers take to prevent the transmission and minimize the impact of Swine Influenza in the workplace?**

It is recommended that employers take the following steps to pre-plan for an outbreak of Swine Influenza in their workplace:

- Obtain information on Swine Influenza from the local Department of Public Health (DPH), the CDC, or the employer's local health provider to determine whether there is a Swine Influenza risk in the community and/or within the particular groups in 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, and avoiding spreading of disease by covering the mouth and nose when coughing or sneezing.
- Inform employees that the employer is committed to providing a safe and healthy workplace and that it wants to protect its employees against potential exposure to any disease whether or not work-related, including Swine Influenza, within the workplace.
- Advise employees that they are required to report immediately to the employer any communicable diseases (including Swine Influenza) 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.
- Properly document actions to respond to any actual, reported infection or other information involving Swine Influenza, including recommendations from the DPH or medical providers, and to the affected employees as the situation is resolved.
- Follow policies relating to documenting any requests for FMLA or other leaves that may be required to treat Swine Influenza and resulting chronic health conditions.
- Document any employee requests for an accommodation and the interactive process with the employee for any Swine Influenza related “disability.”

## Conclusion

Employers should become familiar with the facts relating to Swine Influenza and respond in a reasonable manner to help protect the health of employees and to minimize potential legal liability.

*For more information, please contact the Seyfarth attorney with whom you work, or any Environmental, Safety & Toxic Torts attorney on our website ([www.seyfarth.com/Environmental](http://www.seyfarth.com/Environmental)).*

*Seyfarth Shaw acknowledges source material on the disease, including the Centers for Disease Control and Prevention, American Medical Association, and Mayo Foundation for Medical Evaluation and Research.*



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