

# Questions—And Answers

## ***Dealing with Disease in the Workplace***

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Infectious disease is a problem for employers nationwide, especially as colder temperatures test our immunity and place employees in close proximity for much of the workday. In the past two years, outbreaks of no fewer than four major diseases have swept many parts of the country, resulting in everything from stomach bugs (enterovirus) to fears of an incurable epidemic (Ebola). These diseases in any form cause a good deal of workplace disruption, and handling them implicates a number of major employment laws. But don't panic—this column touches on relevant statutes and discusses how to structure and maintain effective company policies that can help to manage any challenges that might arise.

### **WHAT CAN AN EMPLOYER DO IF AN EMPLOYEE IS VISIBLY ILL AND THERE IS CONCERN FOR TRANSMISSION?**

Under the Occupational Safety and Health Act (OSH Act), employers can tell a visibly ill employee to return home, and compensation is not required absent applicable laws mandating paid sick leave.<sup>1</sup> You can also encourage the employee to work from home during any contagious period, which qualifies as a "reasonable accommodation" for a disability under the Americans with Disabilities Act (ADA).<sup>2</sup> Take care, though, to avoid running afoul of the ADA when taking any action beyond encouragement. The law prohibits employer discrimination and disability-related inquiries in the workplace, and most infectious diseases conceivably qualify as a "disability."<sup>3</sup> Before taking concrete action, you will want to determine that the person's illness presents what the ADA describes as a "significant risk of substantial harm" to other employees that a "reasonable accommodation" cannot address.<sup>4</sup>

The Equal Employment Opportunity Commission (EEOC) has identified four factors to use in determining whether a sick employee presents this kind of risk: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.<sup>5</sup> An employer is well advised to monitor and follow any recommendations made by the Centers for Disease Control and Prevention (CDC) when an outbreak looms.<sup>6</sup>

### **CAN EMPLOYEES CHOOSE TO STAY HOME BECAUSE THEY ARE WORRIED THEY MIGHT GET SICK?**

No. Where employees at a particular worksite are reasonably likely to be exposed to an illness, employers are required to establish procedures that will protect those employees. The OSH Act requires employers to protect their employees against recognized safety and health hazards that might cause death or serious physical harm.<sup>7</sup> Employees can only refuse to report to work when they suspect health hazards in the workplace and the employer has not or cannot objectively establish that it has developed a proper response plan.<sup>8</sup> That said, employees at a higher risk of infection—such as those with a preexisting disability—should be encouraged to work from home even when a low risk of contagion exists.

### **DO EMPLOYERS HAVE TO PROTECT THE HEALTH OF VENDORS AND CONTRACTORS, TOO?**

Maybe. Under the OSH Act's "multiemployer workplace doctrine," employers who manage a workplace that might host workers from another employer—for example, at hospitals, airports, or construction sites—are responsible for addressing workplace hazards that might place these other employees at risk.<sup>9</sup> Similarly, when considering notification of any potential third-party exposure to an illness, employers should consult the CDC or local health authorities, who will issue information classifying the level of severity of a particular outbreak. Taking this step will help employers to minimize panic and avoid unnecessary disruption of business operations.

### **CAN AN EMPLOYER SHARE INFORMATION WITH ITS WORKFORCE ABOUT A SICK EMPLOYEE?**

Yes, but keep it anonymous. Normally, disclosures about sick employees cannot be done without the employee's permission.<sup>10</sup> Disclosing the identity of a sick employee violates the Health Insurance Portability and Accountability Act (HIPAA); however, employers can disclose that an anonymous

employee is sick when such notification is necessary to protect potentially exposed coworkers from a true risk.<sup>11</sup>

### **ARE EMPLOYERS PERMITTED TO TAKE AN EMPLOYEE'S TEMPERATURE TO DETERMINE INFECTION OR ILLNESS?**

Taking an employee's temperature is considered a "medical exam" under the ADA. To avoid potential liability, employers should not subject employees to medical exams unless the CDC or local public health agencies have determined that the outbreak of a particular disease is severe enough to constitute a "direct threat" as defined under the ADA.<sup>12</sup> Monitoring news and releases from the CDC and local health authorities will help employers maintain the necessary perspective.

### **WHAT ABOUT FLU SHOTS? CAN AN EMPLOYER MAKE THE FLU SHOT MANDATORY?**

Probably not, but employees can be strongly encouraged to get one. Employers can generally require that at-will employees receive a flu shot as a condition of employment, but this rule does not apply to current employees. And not all employees can be compelled to get a flu shot. For example, where a particular employee has a religious objection or an ADA-covered disability that makes vaccination dangerous, these employees cannot be terminated for failing to get an otherwise-mandatory vaccine.<sup>13</sup> Employers are safest encouraging, but not requiring, that employees get a flu shot each year.

### **CAN AN EMPLOYER REQUIRE NEW HIRES TO UNDERGO MEDICAL EXAMS BEFORE BEGINNING WORK?**

Yes, but this is subject to a few conditions. Post-offer medical exams are generally permissible if this policy is applied to *all* employees entering the same job category and the results of the examination are kept confidential.<sup>14</sup> Employers may not rescind a job offer based on the results of a post-offer medical examination unless the applicant poses a direct threat to other employees (within the meaning of the ADA) and no reasonable accommodation could reduce the risk of exposure.<sup>15</sup>

### **WILL AN EMPLOYER NEED TO PAY AN EMPLOYEE WHO STAYS HOME SICK?**

Possibly. If an employer provides paid time off or paid sick time to its employees, the terms of those policies will apply. Under the Family and

Medical Leave Act (FMLA), covered employers must provide unpaid, job-protected leave to eligible employees who request such leave for specified family and medical reasons. Eligible employees may take up to 12 work-weeks of leave in a 12-month period for “a serious health condition that makes the employee unable to perform the essential functions of his or her job.”<sup>16</sup> The definition of a “serious health condition” includes a period of incapacity lasting for more than three calendar days that is accompanied by health-care provider treatment.<sup>17</sup> Because FMLA leave may run concurrently with paid sick and vacation leave, you can require employees to utilize that paid time (where available) for at least part of their FMLA leave.

### **WILL WORKERS’ COMPENSATION COVER EMPLOYEES WHO BECOME ILL AT WORK?**

Probably not. Each state controls its individual workers’ compensation system, and whether exposure to a contagious disease qualifies as a compensable injury depends on local law. In most states, however, simple exposure to a contagious illness will not be categorized as a compensable, work-related injury unless the peculiar nature of the work created a unique hazard of contracting the disease in question.<sup>18</sup>

### **IS IT OK TO REQUIRE A DOCTOR’S NOTE BEFORE AN EMPLOYEE CAN RETURN TO WORK?**

Just as an employer can request a doctor’s note from employees who are absent or plan to be absent from work for three or more consecutive days, under the ADA, a “return to work authorization” can be requested from employees who have been out sick from work under medical care, or who have requested medical leave to manage an illness. If this practice is part of an employer’s policy, it should be uniformly applied to all similarly situated employees. Because employees must have a “serious health condition” to qualify for FMLA leave, employers may require a certification from a health-care provider that the employee is fit to resume work after such leave, but the law *requires* consistent application of such a practice to employees where it is used.<sup>19</sup>

### **CAN AN EMPLOYER PREVENT AN EMPLOYEE FROM TRAVELING ABROAD—PARTICULARLY TO A COUNTRY EXPERIENCING AN OUTBREAK OF A CONTAGIOUS DISEASE?**

No. Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from discriminating against applicants and employees on the basis of race,

color, and national origin, among other characteristics. Restricting travel to a particular country can lead to a discrimination claim if the country at issue is, for example, an employee's country of origin. As a general rule, employees' *personal* travel cannot be restricted. Employers may, however, ask employees about any potential exposure to a virus during personal travel.<sup>20</sup> Business travel, on the other hand, may be freely limited. If travel-related exposure to a contagious disease is suspected, employers can permit an employee to work remotely or require the employee to seek medical approval before returning, but such restrictions can still raise the risk of discrimination claims.

## WHAT ARE BEST PRACTICES FOR WORKPLACE DISEASE PREPAREDNESS?

As the adage goes, "an ounce of prevention" can stave off much of the confusion and delay that can result from illness in the workplace. Employers can prepare for the worst by outlining business continuity plans, including emergency chain-of-command information in an employee handbook, or even separately crafting a full pandemic plan. A detailed pandemic plan is not necessary for all employers, but they can be particularly helpful for employers with large workforces, those that work internationally, and those that move a large volume of people in and out of their property on a daily basis. Employee handbooks can also outline all relevant policies, including travel or office attendance restrictions, nondiscrimination assurances, descriptions of when employees may be granted access to or barred from the workplace, and privacy-assurance statements. Of course, making sure managers properly—and consistently—enforce these policies will make it easier for an employer to implement them, and it will reduce the employer's exposure to potential liability.

Overall, employers will best be prepared to handle any future outbreaks of contagious disease by responding appropriately when employees are ill, creating plans to manage an illness-related crisis, protecting their employees from disease transmission, and minimizing the adverse effect illness can have on supply-chain partners and clients alike. By following these steps—even for seasonal or low-level illnesses—employers in all industries will be well positioned to manage confusion and make rational decisions during what can be a stressful and unpredictable time.

## NOTES

1. US Department of Labor. (December 10, 1999). OSHA directive no. CPL 2-0.124. Retrieved from [https://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=DIRECTIVES&p\\_id=2024](https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2024)

2. US Department of Labor (n.d.). The Americans with Disabilities Act, disability resources. Retrieved October 4, 2015, from <http://www.dol.gov/dol/topic/disability/ada.htm>
3. Jones, N. L. (2008, October 15). The Americans with Disabilities Act (ADA) coverage of contagious diseases. Retrieved from <http://congressionalresearch.com/RS22219/document.php>
4. US Department of Labor (n.d.). The Americans with Disabilities Act, disability resources. Retrieved October 4, 2015, from <http://www.dol.gov/dol/topic/disability/ada.htm>
5. EEOC, Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(r) (2011).
6. As an example, whether a particular influenza outbreak qualifies as a "direct threat" depends on whether health authorities classified it as a "seasonal" illness or "pandemic" flu, as they did with the 2009–2010 swine flu. See EEOC, Pandemic preparedness in the workplace and the Americans with Disabilities Act. Retrieved October 4, 2015, from [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html)
7. Occupational Safety and Health Act, 29 U.S.C. § 654 (2015).
8. US Department of Labor (n.d.). Refusing to work because conditions are dangerous. Retrieved October 5, 2015, from <https://www.osha.gov/as/opa/worker/refuse.html>
9. US Department of Labor. (1999, December 10). OSHA Directive No. CPL 2-0.124. Retrieved from [https://www.osha.gov/pls/oshaweb/owadispl.show\\_document?p\\_table=DIRECTIVES&p\\_id=2024](https://www.osha.gov/pls/oshaweb/owadispl.show_document?p_table=DIRECTIVES&p_id=2024)
10. US Department of Health and Human Services (n.d.). Summary of the HIPAA privacy rule: Permitted uses and disclosures. Retrieved October 5, 2015, from <http://www.hhs.gov/ocr/privacy/hipaa/understanding/summary/index.html>
11. Id.
12. EEOC (n.d.). Pandemic preparedness in the workplace and the Americans with Disabilities Act. Retrieved October 4, 2015, from [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html)
13. Id.
14. Id.
15. Id.
16. US Department of Labor, Wage and Hour Division. (n.d.). Family and Medical Leave Act. Retrieved October 4, 2015, from <http://www.dol.gov/whd/fmla/>. State laws may expand the leave available for similar serious health conditions or the care for a family member who is similarly ill. For example, under the Connecticut Family and Medical Leave Act, employees are entitled to up to 16 weeks of leave in a 24-month period. See Connecticut Department of Labor, Family and Medical Leave Act (FMLA). Retrieved October 9, 2015, from <https://www.ctdol.state.ct.us/wgwkstnd/fmla.htm>. See also State Regulations Update in this issue of *Employment Relations Today*.
17. Id.
18. Larson's Spotlight, Exposure to Contagious Disease. (2009, May 3). Retrieved from [http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/archive/2009/05/03/larson\\_2700\\_s-spotlight\\_3a00\\_-exposure-to-contagious-disease.aspx](http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/archive/2009/05/03/larson_2700_s-spotlight_3a00_-exposure-to-contagious-disease.aspx)
19. The Family and Medical Leave Act, 29 C.F.R. § 825.312 (2015).
20. EEOC. (n.d.). Pandemic preparedness in the workplace and the Americans with Disabilities Act. Retrieved October 4, 2015, from [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html)

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