



DON'T LET THE FLU GET YOU DOWN – BE PREPARED FOR H1N1 LEGAL AND OPERATIONAL ISSUES

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You've seen the latest headlines and news stories predicting a very rough flu season and warning of a possible swine flu pandemic. The latest report from the President's Council on Science and Technology released on August 24, 2009 describes a "plausible scenario" in which 30-50% of the U.S. population becomes infected with H1N1 this season, with 3 to 6 million Americans infected at the same time on the pandemic's peak day which is estimated to be sometime in mid-October. Up to 90,000 may die, with deaths concentrated among young people ages 0 to 24.

Healthcare providers will confront a myriad of legal and operational issues if the predictions regarding the flu's impact come true. We want to help our clients identify such issues so that appropriate proactive measures can be taken to minimize negative ramifications that may result in disruptions in operations. The purpose of this Client Advisory is to outline some of the key legal issues that healthcare providers should consider before the flu season hits and, where applicable, summarize any government guidance on the topic.

1. **EMTALA Issues.**

Many hospitals have disaster plans that require the establishment of additional sites to triage or treat patients as an alternative to their emergency departments or if they reach capacity and need to transfer or address overflow issues. The Centers for Medicare & Medicaid Services (CMS) issued a memorandum on August 14, 2009 clarifying permissible options under EMTALA for hospitals handling a surge in patients with H1N1 flu. For example, the memo indicates that hospitals may set up alternative screening sites on campus or at off-campus, hospital-controlled sites, and communities may set up screening clinics at sites not under the control of a hospital. The memo also describes the rules on EMTALA waivers. The memo is at: http://www.cms.hhs.gov/SurveyCertificationGenInfo/downloads/SCLetter09_52.pdf.

2. **HIPAA Issues.**

Healthcare providers may encounter HIPAA issues from a variety of sources. Questions may arise as to what medical information can be obtained and shared about employees as well as patients. From an employment standpoint, healthcare providers need to know whether it is a HIPAA violation to require employees to disclose whether they have swine flu, have symptoms of swine flu, or have been exposed to swine flu. The answer is no. HIPAA does not apply to questions that an employer asks employees about their health for employment purposes. In the workplace, HIPAA applies only to protected health information of employees created or received to administer a HIPAA-covered health plan. There are other employment laws which may impact what an employer can do with such information, but HIPAA does not prohibit an employer from asking about swine flu symptoms.

Of course, HIPAA issues also will arise in the treatment of patients. The Office of Civil Rights ("OCR") has stated that in the event of a national or public health emergency the HIPAA Privacy Rule is **not** suspended. However, the Secretary of the Department of Health and Human Services may waive certain provisions of the Rule if the President declares an emergency. In response to Hurricane Katrina, the OCR published a Web-based interactive decision tool designed to assist emergency preparedness and recovery planners in determining how to access and use health information consistent with HIPAA. The Decision Tool is accessible on the OCR Web site at <http://www.hhs.gov/ocr/hipaa/decisiontool/>.

3. Employment Law Issues.

Management of employee issues during a swine flu epidemic may be extremely difficult. Issues may arise under Occupational Safety and Health Act ("OSHA"), the Family Medical Leave Act ("FMLA") and the Americans with Disabilities Act ("ADA"), among others. OSHA's general duty clause requires employer to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. § 655(a)(1). This may impose a duty on an employer to take affirmative steps to protect employees from work-related exposure to H1N1 virus and may give employees a legal basis for refusing to work if they believe the risk of acquiring H1N1 is high.

The FMLA provides extended leave to an employee if he or she is unable to come to work because of either the employee's own serious medical condition or that of the employee's spouse, parent or child. Because of the broad definition of 'serious health condition', it is likely that swine flu will be a condition covered under the FMLA. Employers will need to be prepared to respond to a potentially high number of requests for leave under the FMLA and will need to consider how the FMLA may alter or impact at-will employees in termination situations. Legal counsel should be consulted prior to taking a negative employment action against an employee who asserts that the employee or a family member has had the swine flu which has prohibited the employee from working.

The ADA, which protects job applicants and employees from disability discrimination, places restrictions on an employer's ability to request health information from applicants and employees about the H1N1 virus. An employer's ability to ask about someone's disability or require a medical examination is governed by whether the employment process is in the pre-offer, post-offer or employment phase. In regard to current employees, a common question from employers is whether they can require employees with symptoms of the H1N1 virus to be tested. The answer is 'yes'. Under the ADA, an employer who reasonably believes, based on an individualized assessment, that an employee has symptoms of the H1N1 virus can require that the employee undergo medical testing to determine whether the employee, in fact, is infected. Before requiring testing, the employer should be familiar with the symptoms of the H1N1 virus and have sufficient information to confirm that the employee has those symptoms. Any required testing must be limited to a test for the H1N1 virus. In addition, the employer is required to pay any costs associated with the test. The employer must treat the test results as confidential.

The Equal Employment Opportunity Commission ("EEOC") has issued a technical assistance document as a guideline for employers to follow in formulating workplace preparation strategies for the 2009 H1N1 virus that comply with the ADA. For additional information on the ADA and the flu pandemic, including a sample ADA-compliant pre-pandemic employee survey and a fact sheet on telecommuting as a reasonable accommodation, visit http://www.eeoc.gov/facts/h1n1_flu.html.

This Advisory summarizes just a few of the important legal issues that healthcare providers may encounter in the event of an H1N1 epidemic. Other questions and issues may arise regarding volunteer immunity laws, consent for treatment requirements, and insurance issues if operations are negatively impacted.

Other resources are available to provide providers guidance on the myriad of treatment and operational issues that may arise, including, but not limited to: (a) the Oklahoma Pandemic Influenza Management Plan available on the Oklahoma State Department of Health website; (b) Joint Commission standards and guidance on the application of the standards in a crisis situation available at www.jointcommission.org; and (c) a plethora of information and preparedness checklists available on a website managed by the federal Department of Health and Human Services dedicated to the influenza pandemic, <http://pandemicflu.gov>.

If you want more information regarding legal issues that may arise or would like our assistance in providing employee training or reviewing any of your employment or other policies that may be relevant when addressing swine flu issues, we are ready to help. You may contact either Karen S. Rieger, at (405) 235-7788, karen.rieger@crowedunlevy.com, the Chair of the Firm's Healthcare Practice Group or Cori H. Loomis at (405) 234-3238, cori.loomis@crowedunlevy.com.