

Insight

IN-DEPTH DISCUSSION

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Zika Virus – Concerns for U.S. Employers and Protections for Employees

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Although the Zika Virus has been in the news since early January, the active transmission of the virus by mosquitos in Miami, Florida, along with the Zika-related challenges faced by individuals travelling to Rio de Janeiro for the Olympics, have raised new concerns over the virus for employers.

Summary of the Zika Virus Crisis

The Zika virus is primarily spread through the bites of infected mosquitoes. Because of the ease of transmission and the widespread prevalence of the *Aedes* and *Culex* mosquitos capable of spreading the virus, the Zika virus has the potential to spread quickly and across the globe. Further, the virus is not confined to places with infected mosquitos, as the Zika virus can also be transmitted through sex, and has been detected in semen, blood, urine, amniotic fluids, saliva as well as body fluids found in the brain and spinal cord.

The Zika virus is not the only mosquito-borne illness that can have serious and debilitating consequences. Many serious mosquito-borne illnesses, such as Dengue Fever and the widely-publicized West Nile Virus, are well-known and already present in the United States.

What are the Symptoms of the Zika Virus?

The Zika virus usually causes only mild illness that can last 2-7 days. Current science-based evidence suggests that approximately one out of five infected people develops symptoms of the Zika virus, usually beginning 2-7 days after the bite of an infected mosquito. Although many will not develop any symptoms at all, the most common symptoms include a slight fever or rash, and others may also suffer from conjunctivitis, muscle and joint pain, and fatigue.

There is no known difference in the symptoms of infected pregnant and non-pregnant women.

Possible Implications of the Zika Virus for Pregnant Women

While the symptoms of the Zika Virus for the host are often mild, the possible repercussions of infection for pregnant women have garnered widespread concern and have sparked intense efforts to combat the virus and protect women of childbearing age from infection. The spread of the Zika virus in Brazil resulted in an unprecedented rise in the number of children born with microcephaly (unusually small heads). In addition, several countries, including Brazil, reported a steep increase for all infected individuals in Guillain-Barré syndrome — a neurological disorder that can lead to paralysis and death. There is scientific consensus that the Zika virus is a cause of microcephaly and Guillain-Barré syndrome.

The Centers for Disease Control (“CDC”), the World Health Organization (“WHO”), the Occupational Safety and Health Administration (“OSHA”), and National Institutes for Occupational Safety and Health (“NIOSH”), have all advised that pregnant women should not travel to areas with ongoing Zika virus transmission because of these concerns. This includes both Miami’s Wynwood District and Rio de Janeiro. They have also recommended that pregnant women’s sex partners returning from areas with circulating Zika virus should practice safe sex or abstain from sex throughout the pregnancy.

How Can the Zika Virus Be Controlled and/or Prevented?

As there is not yet a preventative vaccine for the Zika virus, the best prevention is taking steps to avoid mosquito bites. OSHA and NIOSH have recommended that employers take the following actions to help their employees who work in Zika-infested areas reduce the risk of infection through mosquito-bites:

- Inform workers about their risks of exposure to the Zika virus through mosquito bites and provide them with literature and/or training about how to protect themselves.
- Provide insect repellents containing an EPA-registered active ingredient that is effective against mosquitoes and encourage use of the repellents according to the products’ instructions.
- Eliminate sources of standing water (e.g., tires, buckets, cans, bottles, barrels) at the worksite whenever possible to reduce or eliminate mosquito breeding areas. Train workers about the importance of eliminating areas where mosquitos can breed at the worksite.
- Eliminate unnecessary outdoor work in areas where Zika virus is being actively transmitted.
- Consider employee concerns relating to the Zika virus.
- Be aware of Zika’s symptoms and encourage employees to seek medical care if they are displaying symptoms.

Employees and individuals should take the following steps:

- Educate themselves on the risk of exposure and the symptoms.
- Seek prompt medical care if they are displaying symptoms.
- Use insect repellent that is effective against mosquitos in accordance with the products’ instructions.
- Wear clothing that minimizes exposed skin.
- Notify appropriate persons of standing water in or near buildings or structures that could potentially be a breeding ground for mosquitos.
- Continue to take precautions to prevent mosquito bites even after a diagnosis to avoid further transmission.

Mosquito Protection

The best protection from the Zika virus is preventing mosquito bites. This can be done by:

- Wearing clothing (preferably light-colored to reduce the chance of heat illness) that covers as much of the body as possible.
- Using insect repellent. Repellents may be applied to exposed skin or to clothing, and should contain DEET (diethyltoluamide) or IR 3535 or Icaridin, which are the most common biologically active ingredients in insect repellents. Repellents must be used in strict accordance with the label instructions. They are reportedly safe for use by pregnant women.
- Using physical barriers such mesh screens on doors and windows.
- Identifying and eliminating potential mosquito breeding sites by emptying, cleaning or covering containers that can hold even small amounts of water, such as buckets, flower pots and tires.

Is it Safe to Come to Work in an Area Where Zika is Transmitted?

Yes, but precautions should be used to avoid mosquito bites. As a practical matter, for most employees, going to work presents the same exposure as leaving the house for any other reason. This is what distinguishes going to work in an area where the Zika virus is spreading from avoiding travel to such an area. Further, this disease will likely continue to spread and there is no known cure. Thus, avoiding the workplace — especially an indoor work environment where mosquitos are not likely to breed—is not an effective solution. Rather, preventing mosquito bites, recognizing the symptoms, and minimizing the risk of further transmission is the best plan of action.

Is it Safe to Work Outside in Florida (or Anywhere Mosquitos are Present)?

Yes, but again precautions should be used to avoid mosquito bites. Employer should consider providing workers with hats with mosquito netting to protect the face and neck. In addition, diligent efforts to eliminate even very small areas of standing water (e.g., tires, buckets, cans, bottles, barrels) should be made to avoid having mosquito breeding sites. Placing mosquito dunks (insecticides that kill mosquito larvae) in water that cannot be eliminated should be considered.

Should Employees in Medical Laboratories and Healthcare Take Extra Precautions?

Yes. Zika may be transmitted through blood and some other bodily fluids, so employees occupationally exposed to these fluids should follow a comprehensive Bloodborne Pathogens (“BBP”) program as required by OSHA. Good infection control and biosafety practices (including universal precautions), as appropriate, to prevent or minimize the risk of transmission of infectious agents should protect against transmission of the Zika virus through bodily fluids.

What Should We Say to Employees Who are Concerned About the Zika Virus?

Educate employees on Zika’s methods of transmission, explain that transmission risk is very low, assure them that the situation is being monitored by public health agencies that are responsible for these issues, and emphasize good mosquito prevention practices.

Should Employers Immediately Send Home Its Pregnant Employees?

No. The Supreme Court has held that employers cannot treat pregnant employees differently than any other employees. Employers should refrain from asking any employee whether she is pregnant or plans to become pregnant, or any man if his significant other is pregnant or if he plans to become a father. If employees volunteer such information, it should be treated as confidential. Pregnant employees or female employees of childbearing age should not be involuntarily sent home. Instead, it is incumbent on employers to make sure that all employees are educated on the Zika virus's symptoms and modes of transmission in the workplace, as well as on the precautions they should take to avoid mosquitoes and the risk of infection. If employees ask about a leave of absence or the ability to work from home due to the risk to an unborn child, employers should consider the individual request, the available scientific information on the risk based on the workplace, and whether a consistent accommodation can or needs to be made.

May an Employee Refuse to Perform his or her Job Based on Concerns about Zika?

Under the Occupational Health and Safety Act, employees may refuse to work only where there is an objectively "reasonable belief that there is imminent death or serious injury." Refusing to work without such an objective belief may result in disciplinary action by the employer. Given that Zika is spread by mosquito bites, which can be prevented with appropriate precautions, this standard is unlikely to be satisfied, though each request should be considered and evaluated based on the employee's particular circumstances. However, given the level of public interest and concern, employers should exercise caution before taking adverse employment actions due to a refusal to work. Use of counseling, education and other available managerial skills before imposing discipline may be useful tools to avoid confrontations and possible legal challenges.

Can We Require Employees to Get Tested for Zika?

Generally, no. Under the Americans with Disabilities Act ("ADA"), employers can require a medical evaluation only if it is justified by business necessity. The ADA permits an employer to request medical information or order a medical examination when the employer has a reasonable belief, based on objective evidence, that an employee will pose a "direct threat" because of a medical condition. The Equal Employment Opportunity Commission's Pandemic Guidance states that an employer must take direction from the CDC or state/local public health authorities in determining whether an illness is a direct threat, and cannot make that assessment "on subjective perceptions...[or] irrational fears." Because Zika is not transmitted from person to person in causal contact, these standards are probably not met in most workplaces at this time.

Can We Quarantine Employees Who Have Recently Traveled to Areas Where the Zika Virus is Being Transmitted?

No. Because Zika is not known to be transmitted from person to person through casual contact, public health agencies have not quarantined persons returning from areas where the Zika virus has been detected. Employers who isolate or quarantine their employees absent further guidance or direction from public health agencies risk liability under medical privacy laws, disability discrimination laws, and state wage and hour laws, as well as potential race and national origin discrimination claims.

What if Someone at Work Gets the Zika Virus?

Again, Zika is not known to be transmitted from person-to-person casual contact. Employees who disclose a Zika diagnosis should be encouraged to use good hygiene practices to prevent transfer of any bodily fluids for up to three weeks after their diagnosis.

Employees should not be harassed, discriminated against, retaliated against, bullied, ostracized, or treated differently because of the Zika virus or fear that an individual may have the Zika virus. This type of conduct is likely a violation of a company's workplace conduct policy and may also implicate state and federal laws providing protections for certain protected classifications.

What Should People Travelling to Zika-Affected Areas Do?

Travelers should inform themselves about the Zika virus and other mosquito-borne diseases, such as chikungunya, dengue and yellow fever, and consult their local health or travel authorities if they are concerned.

Employers must decide whether they will continue to send employees to Zika-affected areas. In considering whether such business travel will be authorized, employers need to consider the importance and nature of the work and its direct potential for mosquito exposure and weigh that against potential reluctance to travel by employees. Employers need to decide whether they will require the travel even if an employee objects. And finally, employers need to decide whether they will accept the CDC recommendations against travel for pregnant employees.

While employers cannot prohibit its employees from travelling based on concerns related to the Zika virus, pregnant women should be advised of the CDC recommendation not to travel to areas of ongoing Zika virus transmission. Pregnant women whose sexual partners live in or travel to areas with Zika virus transmission should ensure safe sexual practices or abstain from sex for the duration of their pregnancy.