

In This Issue:

October 2009

This season's H1N1 influenza outbreak has prompted the EEOC to publish guidance for employers on ways to manage their workforces during a pandemic in accordance with the Americans with Disabilities Act (ADA). Employers must recognize the legal constraints of the ADA and other employment laws when implementing workplace policies and procedures, such as mandatory vaccination requirements.

Planning for a Pandemic: The EEOC Issues Guidance

By Terri M. Solomon and Ronit M. Gurtman

Each year an average of 36,000 people die and over 200,000 people are hospitalized in the United States due to flu-related complications.¹ In addition to seasonal flu, an outbreak of H1N1 influenza (often referred to as "Swine Flu") has greatly increased the number of people at risk this flu season.

The outbreak of the H1N1 virus has reached pandemic levels, prompting government and private action. On October 23, President Obama declared a National Emergency in response to the H1N1 influenza pandemic.² Federal, state, and local governments have created comprehensive plans setting forth public health strategies and guidance for communities, businesses, and individuals to plan for, and respond to, influenza outbreaks.³ Many employers are devising individualized plans to help prevent the spread of the virus in their workplace and to ensure continued operations in the event of an outbreak affecting their employees.

Employers must pay careful attention to the legal implications of their actions in implementing flu prevention and containment measures. Recently, the United States Equal Employment Opportunity Commission (EEOC) published guidance for employers on how to handle pandemic influenza without implicating the Americans with Disabilities Act (ADA), which prohibits disability-based discrimination ("EEOC Guidance").⁴ The EEOC also issued a notice reminding employers to avoid national origin discrimination in dealing with H1N1.⁵ In addition to the discrimination laws, employers' actions, or inactions, may implicate other laws such as the Occupational Safety and Health Act (OSHA); the Family and Medical Leave Act (FMLA); privacy laws; workers' compensation, and disability benefits laws.

EEOC Guidance

The EEOC Guidance sets forth the relevant ADA principles and explains, in a question and answer format, how these principles will be applied during various stages of a pandemic. The EEOC Guidance is not legally binding on employers, but it sheds light

on how the EEOC will interpret the provisions of the ADA when conducting its investigations into claims of discrimination. Relying on the agency's own prior analyses of the ADA, the EEOC Guidance elaborates on how these same principles will apply to employers dealing with a pandemic. The EEOC Guidance explains how the EEOC will interpret a "direct threat," a "reasonable accommodation," an "undue hardship," a "disability-related inquiry" and a "medical exam" when evaluating employer practices and whether those practices are discriminatory or justifiable under the circumstances of a pandemic outbreak.

Most importantly, the EEOC Guidance recognizes that such analyses and determinations may be modified depending on the severity and pervasiveness of the pandemic. The EEOC Guidance acknowledges that the pandemic may become so severe that employers' interests in protecting themselves and their businesses from the spread of disease may outweigh employees' rights under the ADA and other antidiscrimination laws. The EEOC Guidance states that should the World Health Organization (WHO), the Centers for Disease Control and Prevention (CDC), or other objective health organizations determine that certain precautionary measures are warranted due to the escalation of the severity or pervasiveness of the pandemic, their determinations would be controlling, and the EEOC Guidance will be modified accordingly.

The EEOC Guidance enumerates certain employer practices that are permissible during the various stages of a pandemic. For example, before a pandemic, employers may make inquiries that are not disability-related, such as whether an employee will not be available, for any reason, to work during a pandemic outbreak, without requiring the employee to specify his or her reason for not being available. Because an employee may be unavailable for any number of reasons, including childcare or transportation issues, the question is not likely to elicit information about a disability, but it will enable the employer to gauge the availability of its workforce if there is an outbreak and plan accordingly. Employers may also require post-offer medical examinations to determine the general health status of prospective employees, so long as these exams are given across the board to all entering employees in the same job categories. However, job offers generally may not be rescinded because of the results of these exams, unless the applicant would pose a "direct threat."

During a pandemic, employers may send home employees who are exhibiting flu-like symptoms and question employees who report illness regarding the nature of their symptoms. If the pandemic influenza is mild, the inquiries and actions would not be considered disability-related. If the pandemic is severe, even if disability-related, the inquiries and actions would be justified by a reasonable belief based on objective evidence that the influenza poses a direct threat.

Despite the interests of employers in ensuring business continuity and protecting their employees, there are certain things that employers are prohibited from doing. For example, before an actual pandemic, employers may not question employees specifically about any medical conditions predisposing them to complications from influenza, as this would be a "disability-related inquiry." Even during a pandemic, employers may not question employees who do not exhibit flu-like symptoms about any such medical conditions. Employers are also prohibited from taking employees' temperatures to determine whether they have a fever, as this would qualify as a "medical examination" under the ADA. However, the EEOC Guidance acknowledges that the aforementioned actions may become permissible if the severity and pervasiveness of a pandemic, as determined by a local, state, or federal health authority, poses a direct threat and therefore warrants such action.

Mandatory Vaccinations

One effective means of preventing and containing the spread of influenza is vaccination against the virus. There has been a wave of controversy, however, surrounding the swine flu vaccine. In fact, a group of health care professionals have filed suit in Washington, D.C., asking courts to stop the distribution of the swine flu vaccine, which they allege was approved too quickly by the Food and Drug Administration (FDA), without adequate testing for safety and effectiveness. Because of this public uproar, and general fears about getting painful injections, employees may be resistant to getting vaccinated.

The EEOC Guidance warns employers that they may not compel all employees to get vaccinated. While an employer may generally be able to impose mandatory vaccination requirements, it must provide exemptions for certain employees. For example, under the ADA,

an employee who has a disability preventing him or her from getting a flu vaccine, such as a severe allergy to eggs or an underlying medical condition that might be compromised by the flu vaccine, may be entitled to an exemption from a vaccination requirement, which would be considered a reasonable accommodation, barring any undue hardship to the employer. Under the ADA, an “undue hardship” would be a “significant difficulty or expense.”

Similarly, under Title VII of the Civil Rights Act (Title VII), an employee may be entitled to an exemption from vaccination because of a sincerely held religious belief, practice, or observance that prevents the employee from getting the influenza vaccine. This also would be considered a reasonable accommodation under Title VII, barring an undue hardship to the employer. Under Title VII there is a lower standard than under the ADA for establishing an “undue hardship,” which, under Title VII is “more than de minimis cost” to the operation of the employer’s business.

In August 2009, New York became the only state in the United States to adopt an emergency regulation requiring most health care workers who come into contact with patients to get annual vaccinations for both seasonal and swine flu by no later than November 30, 2009.⁶ The goal of the regulation, issued by the New York State Commissioner of Health, is to protect patients, who are particularly vulnerable to the influenza virus and its effects, from exposure to the virus. The regulation provides a limited exemption for workers with “medical contraindications,” but not for those with a religious or ideological opposition to the vaccination. The Department of Health’s rationale is that religious and ideological opposition does not sufficiently outweigh the damage that would be caused to patients by exposure to the virus, and therefore an accommodation to exempt such employees would cause an undue hardship for the employer under Title VII.

In response to the emergency regulation, several unions and other groups filed suit in New York, challenging the mandatory vaccinations and the authority of the New York State Health Commissioner to adopt such a regulation. On October 16, 2009, New York State Supreme Court Justice Thomas J. McNamara issued a temporary restraining order in one of the lawsuits filed in Albany, proscribing the mandatory vaccination. The New York State Commissioner of Health and the New York State Hospital Review and Planning Council plan to vigorously defend the suit and the Commissioner’s authority to mandate vaccinations, relying on an earlier court ruling that rejected employees’ challenges to regulations requiring mandatory rubella vaccinations and annual tuberculosis testing for healthcare workers.⁷ The court scheduled an October 30 hearing regarding whether the restraining order should be lifted. Additional suits, including one brought by a nurse in Manhattan, are pending in other New York state courts. While some opponents to the regulation oppose the vaccine itself, others merely oppose the mandatory nature of the requirement, arguing that it impinges on the rights of individuals to choose and, in adopting such regulations, the Commissioner exceeded his authority.

In a surprising development that could make the New York litigation moot, the New York State Health Department announced on October 22, 2009 that the mandatory vaccination requirement for healthcare workers is suspended.⁸ According to the Health Department, the policy change is due to a shortage of flu vaccine, and was not influenced by the pending litigation. It is unclear whether the New York State Health Department will reinstate the mandatory vaccine requirement once the flu vaccine becomes more widely available.

Similarly, a lawsuit was filed by the Washington State Nurses Association against a private health care provider that has voluntarily implemented a mandatory vaccination requirement for nurses at its multiple locations throughout the state. Interestingly, the nurses’ union said in a statement that it supports a voluntary vaccination program, but that any mandatory policy should be overseen by the state or federal government.⁹

In addition to exposure to discrimination and failure to accommodate claims, employers that adopt vaccination programs, whether mandatory or voluntary, face the risk of workers’ compensation claims for injuries resulting from vaccinations. On the other hand, an employer that does not adopt measures to prevent the spread of the influenza virus at work adequately may face liability for failure to comply with its duty to provide a safe workplace under OSHA.

Other Legal Risks for Employers

Employers will face many challenging issues in preparing for and dealing with an influenza pandemic. As discussed above in connection with the EEOC Guidance, employers may be restricted in screening employees so as not to violate the ADA, which prohibits employers from making inquiries that will elicit information about a disability and from conducting medical examinations, except under limited circumstances. Employers may also risk discrimination claims under Title VII if employees of certain national origins are singled out because of an irrational fear that they have been exposed to the virus or if employees argue that mandatory vaccines violate their religious beliefs.

In addition to liability issues, employers will face many challenging HR issues, such as implementing telecommuting policies and dealing with absenteeism, both voluntary and involuntary. In employing such practices, employers must consider both the practical challenges of choosing effective means to ensure business continuity, as well as the obstacles involved in ensuring that all adopted policies and procedures are enforced in a nondiscriminatory manner. Employers will have to deal with disability benefits rights, FMLA leave rights, OSHA laws, workers' compensation and other common law legal restrictions and entitlements. Accordingly, employers should carefully review all policies before they implement them.

.....
 Terri M. Solomon is a Shareholder and Ronit M. Gurtman is an Associate in Littler Mendelson's New York office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Ms. Solomon at tsolomon@littler.com, or Ms. Gurtman at rgurtman@littler.com.

Littler has created a special H1N1 task force that is available to assist employers in creating and implementing pandemic planning, and to advise employers how to proceed in light of the many applicable federal, state, and local laws. For more information about the H1N1/Swine Flu Task Force, please contact the authors above.

¹ See Centers for Disease Control & Prevention, 2009 H1N1 Flu ("Swine Flu") and You, Questions and Answers (Sept. 24, 2009), <http://www.cdc.gov/h1n1flu/qa.htm>.

² See <http://www.whitehouse.gov/the-press-office/declaration-a-national-emergency-with-respect-2009-h1n1-influenza-pandemic-0>.

³ See generally <http://www.flu.gov>; see also Centers for Disease Control & Prevention, Guidance for Businesses and Employers to Plan and Respond to the 2009-2010 Influenza Season (2009), <http://www.pandemicflu.gov/professional/business/guidance.pdf>.

⁴ EEOC, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (Oct. 2009), http://www.eeoc.gov/facts/pandemic_flu.html.

⁵ See EEOC, Employment Discrimination and the 2009 H1N1 Flu Virus (Swine Flu) (2009), <http://www.eeoc.gov/facts/h1n1.html>. The notice reminds employers that Title VII of the Civil Rights Act prohibits employment discrimination on the basis of national origin against both legal and undocumented workers, identifying Mexicans as a protected class of workers. This reminder is particularly relevant for employers who may discriminate against employees due to a baseless fear that the employee has been exposed to the H1N1 virus because of his or her national origin.

⁶ New York State Department of Health, Mandatory Flu Vaccine for Health Care Workers (Sept. 24, 2009), http://www.health.state.ny.us/press/releases/2009/2009-09-24_health_care_worker_vaccine_daines_oped.htm.

⁷ See *Ritterband v. Axelrod*, 562 N.Y.S.2d 605 (N.Y. Sup. Ct. 1990).

⁸ New York State Department of Health, "Governor David A. Paterson Announces Suspension Of Flu Shot Mandate For Health Care Employees Due To Shortage Of Vaccine." (Oct. 22, 2009), http://www.ny.gov/governor/press/press_1022094.html.

⁹ Puget Sound Business Journal, "Mandatory flu shots? Washington nurses say no." (Oct. 1, 2009), <http://seattle.bizjournals.com/seattle/stories/2009/09/28/daily52.html#>.