

**EXPERTS' FORUM** | Legal

## Reasons to Prepare Your Workplace for a Possible Flu Pandemic

The recent H1N1 flu outbreak should serve as a wake-up call for businesses to engage in pandemic planning. While concern about the severity of the virus has lessened, the virus demonstrates how quickly a pandemic could spread in our global society.

From April to May 2009, the H1N1 virus was confirmed in 30 countries, on five continents, and in 44 states within the United States. Employers are legally obligated to provide a safe workplace. In addition, a pandemic could create a human resources crisis, causing up to 40% worker absenteeism. Because it is difficult to respond thoughtfully to a crisis in its midst, employers should consider planning now.

• **Unique Plan.** A pandemic plan should be customized to each business, but general planning information is available online at: <http://cdc.gov/h1n1flu/>; <http://www.pandemicflu.gov/plan/checklists.html>; and <http://www.osha.gov/Publications/OSHA3327pandemic.pdf>.

• **Absenteeism.** Due to absenteeism, employers may need to cross-train and temporarily reassign workers during a pandemic. In changing job duties, employers should abide by any contractual obligations to particular workers and should not change the duties of exempt employees in a way that runs afoul of wage and hour laws. Absent workers may be legally entitled to leaves and reinstatement rights, and, in some circumstances, to workers' compensation or unemployment benefits, paid time off, and disability, health or other benefits.

• **Safety Measures.** An employer's planning efforts should consider a variety of workplace safety measures, such as a written pandemic prevention and response plan; educating employees on risks, good hygiene, and other prevention efforts; providing hygiene or other emergency supplies or equipment in the workplace; periodic

furniture or equipment cleaning; restricting or eliminating travel; and social distancing measures, including remote or other alternative work arrangements.

• **Keeping Sick Workers Home.** Employers should try to keep sick or contagious workers at home. Because such workers may continue to work even when they should not to earn income or for other reasons, an employer may need to consider voluntary time-off or pay policies designed to induce those workers to stay home. Employers might also consider requiring such workers to stay home or undergo a fitness for duty exam, but disability and privacy laws limit when and how an employer may make medical inquiries or seek a medical exam. Plant closing and lay-off laws could also apply. As such, employers should consult counsel to ensure compliance with applicable law.

• **Refusal to Perform Duties.** During a pandemic, some employees may refuse to work or perform their regular duties out of fear of possible exposure. If an employer has not officially changed job duties, it will need to decide whether it is legally obligated to or will otherwise accommodate the employee or if it will, instead, consider discipline or termination. Among other considerations, federal OSHA law protects an employee from retaliation for refusing to work based on a good faith concern about workplace safety.

• **Key Employees and Special Assistance.** Employers may want to identify key employees, with back-ups, to perform essential functions during a pandemic, perhaps in a sequestered location if needed. Special pay policies may be needed to induce key employees to work or to pay them for extra work hours. Employees may also need personal assistance to continue working, such as help caring for loved ones, food, water, cash, or transportation during a quarantine, or extra emotional support.



**MEGAN L. ANDERSON**  
Principal  
Gray Plant Mooty  
[megan.anderson@gpmlaw.com](mailto:megan.anderson@gpmlaw.com)  
<http://www.gpmlaw.com>