

Swine Flu - A Guidance Note For Employers

Employers across the country are becoming increasingly concerned about how they should deal with swine flu as a pandemic takes hold. This is no surprise given all the media hype and the Government statistics suggesting there could be up to 100,000 new cases of the flu per day by August 2009.

The employment law implications can be equally daunting. We consider below some of the common employment issues employers may face and the relevant law surrounding the issues. We also consider some of the practical issues employers should be addressing now:

1. Contingency Planning

Draw up contingency plans and a swine flu policy that can be distributed amongst your workforce. The policy should deal with how the business intends to minimise the spread of the virus within the workplace (see special measures and hygiene below).

Disseminate information about the virus to employees. The NHS, Health and Safety Executive and the Department of Health have all issued guidance, you should follow this guidance so far as is reasonable.

Talk to employee groups (or direct to employees if appropriate) about the arrangements they feel are appropriate. Early consultation with employee groups and their approval of abnormal working arrangements (for instance enforced home working) will be important in defending potential employee claims that there has been a unilateral variation to their terms and conditions of employment.

2. Special Measures

Tell employees about any special arrangements the business will be taking. Consideration will need to be given to what is appropriate within your business. Areas for consideration include implementing travel restrictions, requiring employees to stay away from the office if they have been in contact with someone who has become infected with the virus, or sending 'core' employees to work from home to protect their health. See "Common Employment Issues" below for more details.

Some organisations are considering banning annual leave in an attempt to ensure sufficient business cover. Remember that under the Working Time Regulations you can compel employees to take holiday at times convenient to the business. However, if you

have not relied on this measure before, it may meet with employee resistance where employees have pre-booked holidays.

3. Hygiene

Implement enhanced cleaning processes around the business premises by having door handles, phones, computer keyboards cleaned more regularly. Provide employees with wipes and products to allow them to clean such items themselves. Consider placing alcohol-based gels at the entrances to workstations.

4. Sickness Absence Policy

Review your sickness absence policy. Is it appropriate for the present situation? The Government has recently announced that it is considering increasing the period of self-certification from 7 to 14 days to reduce the burden on GPs. Your policy may need to be temporarily changed to accommodate this and other swine flu-related measures such as asking employees to remain at home if they have flu-like symptoms or ensuring they do not return to work until fully fit. Employees should be made aware that any abuse of the sickness absence procedure is a disciplinary matter and may result in summary dismissal.

5. Emergency Time Off For Dependants

Some people may have to stay away from work to care for sick family members or children whose schools/nurseries have been closed. Review your 'time off for dependants' policy. Employees are not legally entitled to be paid for such an absence. If you have a policy of paying employees for such time off, consider if it is sensible to temporarily suspend or limit paid leave (bearing in mind any contractual right to pay in these circumstances).

Leave should only be for such period as is necessary to make longer term arrangements. In the case of a sick relative, the right is not to enable the individual time off to care for the relative themselves, although the circumstances may be such that securing alternative care arrangements is not possible for many. You may need to allow more time off, for longer periods, than usual.

6. Suppliers

Think about business continuity. What are your business suppliers doing to plan for a pandemic? Are you able to secure alternatives if one of your suppliers is badly affected by the pandemic? What knock on effects will there be if they are severely affected? Is there a force majeure clause within your supplier contracts that covers pandemic situations?

The Relevant Law

1. The Employment Rights Act provides that employees have the right to take "reasonable time" off in order to take necessary action to deal with particular situations affecting their dependants (see above).
2. All employers have a duty to look after the health & safety of their employees when

they are at work. This means you should follow sensible precautions to prevent the spread of the virus. It is advisable to undertake a risk assessment. Consider whether any factors make employees particularly vulnerable to infection (e.g. high levels of contact or a high incidence of public travel). Compliance with government guidance will most likely satisfy your health and safety duty and prevent claims of negligence being brought. Extra care should be taken with employees who have underlying health issues and hence are more at risk. Forcing such people to work where there is a significant risk to their health could be considered a breach of mutual trust and confidence and lead to constructive dismissal claims.

3. Help to minimise your potential liability by reminding employees to maintain good personal hygiene and by encouraging them to wash their hands regularly and cover their mouth and nose with a tissue when coughing and sneezing. Posters promoting good hygiene are available for printing from www.dh.gov.uk/en/Publichealth/Flu/Swineflu/DH_098802, these could be placed around the business premises.

4. Employers should be aware that The Public Health (Control of Disease) Act 1984 as amended by the Health and Social Care Act 2008 gives local authorities various powers including the power to order that a person does not attend work.

5. All firms regulated by the FSA are required to take reasonable care to organise and control their affairs responsibly and effectively. This includes adequate risk management systems. In particular, such firms are required to have appropriate arrangements in place to ensure they are able to continue to function and meet their regulatory obligations in the event of "an unforeseen interruption". Firms are expected to ensure the effectiveness of their business continuity plans by regularly updating and testing them. Regulated firms should be reviewing and testing the effectiveness of their business continuity plans, keeping appropriate records so they are able to show the FSA that this work has been carried out, if this is required. To help firms with their reviews, the FSA has directed them to a report on the lessons learned from a 2006 business continuity exercise it carried out, that was based on a pandemic scenario.

Common Employment Questions

Our employees are refusing to come into work because they are worried that this will increase their risk of catching swine flu. Can they do this?

As an employer, you are required by the Health and Safety at Work etc. Act 1974 to take reasonably practicable measures to ensure the health, safety and welfare of employees (and others).

Employers should keep abreast of Government advice and follow that advice. Whilst concerns raised by the majority of employees may be considered unnecessary, employers should ensure that employee concerns regarding health and safety risks are considered and responded to and that any legitimate concerns are dealt with appropriately. This could include allowing working from home or temporary flexible working arrangements. This is particularly the case for the more vulnerable groups that have been identified such as pregnant women and those with certain underlying medical conditions.

Remember that any unreasonable refusal to work and/or obey reasonable management

instructions by employees is a disciplinary issue and should be dealt with in accordance with your organisation's disciplinary process. It is very important however to deal with this as a last resort and to ensure that you attempt to address concerns. It is also important to ensure consistency in approach to minimise the risk of discrimination claims.

Can we compel employees to work from home or to undertake work they wouldn't normally do to cover absences?

The first port of call is to check employee contracts. There may be provisions that permit you to keep employees away from the work place, although most contracts only allow for this during a notice period (garden leave). Alternatively, the clause may be wide enough to allow you to direct employees to work at a place of the employer's choice, providing scope for you to direct employees to work from home for a period. You should also check whether there is scope in the contract to vary an employee's duties.

If there isn't flexibility to do either of these, consent will normally be required to avoid potential claims for breach of contract or constructive dismissal, particularly if you are requiring a well employee to remain at home because they have been exposed to someone with swine flu. Employees (and union or employee representatives) should be made aware of your health and safety obligations and consent sought now. Employees and representatives should also be aware of the fact that, given the nature of the pandemic, changes may have to be imposed at short notice. This reduces the scope for conflict at the time.

Some employees will not be able to undertake their duties from home but you may still consider it desirable to ask employees to stay at home if they become ill or are exposed to others with the virus. Employees should be made aware that any abuse of this may result in disciplinary action.

Make sure that you deal with employees consistently so there can be no allegations of discrimination.

I have my concerns that employees will abuse the system, especially if they can self-certify for up to 14 days. Is there anything I can do to prevent this?

Employers will always face a conflict between the need to keep genuinely sick employees away from work and the need to prevent malingering. Check the terms of your sickness policy carefully and make sure that employees are aware of their obligations. If you provide company sick pay in excess of the statutory entitlement, it is acceptable to require employees to continue to provide a GP's certificate after 7 days in order to receive this pay. If your policy does not specify it, you should decide and communicate now whether the business will meet this cost or whether employees will be required to meet it directly.

Employees should be made aware of the fact that abuse of the sickness policy will be dealt with as a disciplinary issue which, in some circumstances, could result in their summary dismissal. Highlight this point to employees now so that they cannot later claim ignorance.

Can I require my employees to provide a note confirming they are fit to return to work or submit to a medical examination to confirm they are well?

Allowing sick employees to return to work too soon may jeopardize the health and safety of the wider workforce. It is therefore prudent to put in place procedures for employees' return to work, although any new or key requirements should be highlighted to employees as soon as possible.

You should be mindful of the fact that healthcare resources may be overwhelmed and it may be difficult for employees to get the required confirmation of health from their doctor. You will need the express contractual right to require employees to undergo a medical examination to certify fitness, and for many employers, this will not be a cost effective measure. In these circumstances, it may be sufficient to provide that employees can return to work providing they remain symptom free for a specified amount of time.

Some Useful Links:

- [Pandemic flu guidance for businesses](#) - Department of Health - Publications
- [Swine influenza frequently asked questions](#) - World Health Organization
- [Pandemic influenza checklist for businesses](#) - Civil Contingencies Secretariat, Cabinet Office
- [Pandemic Influenza](#) - Health and Safety Executive

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