

# What Employers CAN do about H1N1 flu

Scroll down the previous postings on this web site and you'll see CIS advice on what employer's *shouldn't* do in dealing with H1N1 flu, to avoid running afoul of federal privacy and discrimination laws. For advice on what members CAN do while complying with the law, read the following answers to CIS members' questions.

## **Can you ask questions of a sick employee?**

Yes. You CAN ask an employee who seems to have flu-like symptoms, "Are you feeling OK?". Managers CAN discuss health-related issues with an employee "out of business necessity." Asking the employee who appears to have the flu, which could infect other staff and possibly cause a significant disruption of your workplace, is clearly within the scope of "business necessity".

Avoid questions like "Do you think you could have swine flu or H1N1?" since the employee (or manager) is probably not qualified to make that judgment. In other words, treat the employee the same as anyone appearing to be sick from regular old flu or other illness. And treat all employees exhibiting the same flu-like symptoms, the same.

## **Can you send home an employee who appears to be sick?**

Yes. Managers CAN require an employee to go home if it is reasonably obvious that the employee has an illness that may affect the health or safety of others. If the employee doesn't want to leave voluntarily, you CAN tell them that they appear sick, that your organization cares about their health and the health of our other employees, and that they need to go home.

You CAN encourage the employee to take advantage of his or her medical benefits coverage to see their doctor for diagnosis and follow-up treatment including the identification of any quarantine period. Expect to be asked to cover any non-insured costs if you direct an employee to seek medical attention or clearance before returning to work.

You CAN require sick employees to use any accrued sick or vacation leave for time off from work. If you have employees who want to stay at work and not go home because they are out of sick time, you CAN consider some of the temporary policies discussed below.

## **Can other employees get information about a sick co-worker?**

Yes, IF and ONLY IF the sick individual chooses to share this information voluntarily with co-workers. Medical information is confidential under the law, and a key factor of medical confidentiality is protecting individual medical information. This means that if an employer is aware that an individual has H1N1, the employer CAN remind co-workers to follow good preventive measures, but may not specifically name the employee who has H1N1 as the reason for the reminder. Only the sick Individuals may choose to voluntarily share this information with co-workers.

Also, you MUST keep confidential *any* specific diagnosis you are told about by an employee or by an employee's doctor. This information is considered confidential under the ADA, the federal family leave act, and the Oregon Family Leave Act.

## **Can employers establish specific policies regarding H1N1 flu?**

Yes. Given the expectation of a highly-contagious flu season, employers CAN consider temporary or unusual measures for continuing services such as: allowing eligible

employees to work at home; allowing employees to take sick leave in advance; allowing the use of sick leave to care for family members; and allowing employees to donate sick leave to others. Such exceptions encourage sick employees or those with ill family members to stay home during a time when their illness may be contagious.

In creating a specific policy, those employers with collective bargaining agreements should be careful to take those agreements into account.

**Where can I get more information on what employers can and can't do?**

The federal Equal Employment Opportunity Commission (EEOC) issued ADA technical assistance specific to the H1N1 virus: [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html). The agency has also provided guidance on discussing any illness with an employee: <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>. And, CIS Pre-Loss Legal and Risk Management consultants are always available to assist members.