

October 9, 2009



EEOC Issues Guidance for Employers Preparing for the H1N1 Flu Virus

CLIENT ADVISORY

The EEOC has issued a technical assistance document to help employers prepare for the upcoming flu season, and particularly the H1N1 flu virus. Specifically, certain provisions of the Americans with Disabilities Act (ADA) may impact how and when employers: 1) establish required infection control practices, and 2) request health information from applicants and employees, including H1N1 vaccination and exposure status.

A. Adoption of Infection Control Practices.

The EEOC guidance confirms that employers may require employees to adopt infection control practices, such as regular hand washing, coughing/sneezing etiquette, and tissue usage and disposal, without implicating the ADA. Employers also may require employees to wear personal protective equipment, such as face masks or gloves, designed to reduce the transmission of the H1N1 virus, so long as the employer provides reasonable accommodations to employees with a disability (for example, non-latex gloves to an employee with a latex allergy). If an outbreak of flu does occur, employers may encourage or require employees to telecommute and/or work from home as an infection-control strategy.

B. Obtaining Health Information (Including H1N1 Status) from Employees.

Employers must be mindful of the ADA's restrictions on how and when they may gather personal information needed for pandemic preparation

from employees. So long as employers make broad, non-disability-related inquiries, they may ask employees about factors that may cause them to miss work in the event of a pandemic. The EEOC has provided this Pre-Pandemic Employee Survey as a guide:

ADA-Compliant Pre-Pandemic Employee Survey

Directions: Answer "yes" to the whole question **without** specifying the reason or reasons that apply to you. Simply check "yes" or "no" at the bottom.

In the event of a pandemic, would you be unable to come to work because of any of the following reasons:

- If schools or day-care centers were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport were sporadic or unavailable, you would be unable to travel to work, and/or;
- If you or a member of your household fall into one of the categories identified by CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with



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underlying chronic conditions; or persons over 65).

Answer: YES _____ NO _____

If an employer wants to know the H1N1 status of all new hires, it also is permissible to require applicants to undergo a medical examination **after** making a conditional offer of employment but before the applicant starts work. Employers demonstrate ADA compliance by requiring all entering employees in the same job category to undergo the same type of examination.

If you have any questions about the ADA's impact on permissible employer responses to H1N1 or other employment law issues, please contact Kim Daniel at kdaniel@hdjn.com or Emily Scott at escott@hdjn.com. Additional information about Hancock, Daniel, Johnson, & Nagle, P.C. is available on the firm's website at www.hdjn.com.

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