

At office, swine flu is nothing to sneeze at

But a legal checkup could forestall lawsuits, lawyers say

By Martin C. Daks

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Business owners who thought they had their hands full with a slow economy may soon have a lot more to worry about if **the swine flu, or H1N1, pandemic continues to spread**, some lawyers say.

Managing swine flu

TOP TIPS FOR concerned businesses:

- Keep up with Centers for Disease Control and Prevention and U.S. Equal Employment Opportunity Commission (www.eeoc.gov/facts/h1n1.html) recommendations.
- Carefully document any actions taken regarding swine flu-related issues.
- If someone does have to stay at home, try to keep paying their salary through telecommuting or paid-time-off arrangements.
- Be sure that any stay-at-home requirements do not disproportionately affect any racial, ethnic or other group.
- Be aware that an employee may qualify for leave under the federal Family and Medical Leave Act or the New Jersey Family Leave Act to care for a dependent or certain other people who come down with swine flu.
- Stay in touch with an attorney.

— Martin C. Daks

Besides wondering how they'll maintain productivity if masses of workers fall ill, entrepreneurs may have to do a balancing act: respecting privacy and other rights of workers who have the disease, while keeping healthy employees from being infected by their ill co-workers. New Jersey's sweeping labor laws could make it particularly tough on employers, attorneys said.

"If an employee was simply exposed to swine flu, or has some symptoms but hasn't been diagnosed yet, there's no easy answer about whether an employer should let him or her into the workplace," said **Rosemary Alito**, labor and employment partner with **K&L Gates**. "Part of the problem is that there's no case law on this so far."

That could be because up until now, the disease has been **somewhat contained in the United States**. But at the end of August, the federal Centers for Disease Control and Prevention announced that swine flu activity increased in 13 states, including New Jersey.

The closest case law Alito found, a 1988 ruling about a meat cutter who was fired because he was epileptic, may not bode well for business owners.

In *Jansen v. Food Circus Supermarkets Inc.*, a New Jersey court found a disabled worker who performed a job "at a level that met his employer's legitimate expectations" could not be fired simply because of an expectation that he presented a "materially enhanced risk" of harm in the workplace.

"Because the New Jersey Law Against Discrimination is considerably broader than the federal Americans with Disabilities Act, someone with H1N1 might be able to claim they're handicapped and therefore fall under the LAD's protection," she said. "On the other hand, sound advice from a knowledgeable medical professional may help as a defense in case of a lawsuit."

Employers may also take some comfort from the CDC's own guidelines, said **Gregory T. Alvarez**, an employment law partner at the Morristown office of **Jackson Lewis LLP**.

"The CDC says that workers with swine flu-like symptoms should be sent home and stay away from the workplace until at least 24 hours after their fever has subsided," he said.

"But it gets more challenging if an employee who cares for a child or other family member with swine flu comes to work. If the employee is not showing any symptoms, an employer who tells him or her to stay at home may have an increased level of legal exposure."

Every business needs a business continuity plan — and post-Sept. 11, many companies already have given key personnel remote access to their company's computer network so they can work at home in an emergency, said **Richard Popiel**, chief medical officer of **Horizon Blue Cross Blue Shield**, in Newark. "Employers should be thinking this through."

Don Mallo, vice president of human resources for **Extensis**, a professional employer organization in Woodbridge, said companies that haven't addressed this issue can purchase standard, off-the-shelf software to give employees password-protected, remote access to the company's computer system.

"My advice to employers: make sure you can continue to do business if key personnel are not in," Mallo said.

Having at-risk employees telecommute, or work from home, may help to reduce the risk of a lawsuit, Alvarez said.

"This way, at least the worker isn't burning through his paid time off," he said. "But you've got to be careful to apply this kind of a strategy in a consistent manner. If it turns out that most of the people you send home are from a particular racial, ethnic or other group, you could face a suit under the state's Law Against Discrimination."

Employers may also face legal heat if other employees find out a worker was sent home because of flu fears, said Patricia S. Robinson, who is of counsel at the Murray Hill law office of **Fisher & Phillips LLP**.

"An employee might bring a suit claiming defamation," she said. "On the other hand, if you follow the CDC guidelines and make an effort not to publicize the person's name, you may prevail. If it came down to a choice between keeping an employee who may have swine flu in the office or protecting, say a pregnant employee from exposure to such a person, I'd feel pretty comfortable arguing the case for the employer in front of a jury."

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Beth Fitzgerald contributed to this report