

How to create a flu plan that covers every contingency

Flu season is here. Soon, employees will begin calling off, often requesting FMLA leave. For retailers and restaurants, influenza hits at the worst time – in the middle of the most profitable time of year. Also affected are schools, nursing homes, hospitals and other places sick people visit, stay or live.

It's impossible to predict if this year will see mild illness or escalate into a pandemic. This year's influenza season has the potential to be very dangerous. Researchers generally look to Australia's previous flu season as a predictor of severity in Northern hemisphere countries such as the U.S. For example, Australia's 2017 flu season set records for the number of cases. An estimated 79,000 Americans died of flu-related illnesses in the 2017-2018 season.

Employers need a flu plan that covers every contingency. It should include prevention such as immunization, plans for time off or telecommuting and encourage sick workers to stay home. The plan also needs to take into account religious objections to flu shots. Be sure to appoint an individual to manage your plan so efforts are coordinated across the company. Here's the plan you need that lets you provide time off for flu while keeping your business running.

Laws impacting influenza contingency planning

Three key laws affect how employers manage their workforce during a flu outbreak. These are the Family and Medical Leave Act (FMLA), Title VII of the Civil Rights Act's religious discrimination provision and the Americans with Disabilities Act (ADA). Consider each of these laws when formulating your flu season plan.

The FMLA

The FMLA provides leave when a serious health condition prevents a worker from performing essential job functions. The FMLA covers leave for a sick employee or family members an employee cares for. Serious health conditions include illnesses that incapacitate for three or more days and require continuous treatment by a health care provider.

Influenza almost always qualifies as a serious health condition. Flu generally lasts three or more days and often includes a doctor visit and prescription medication like Tamiflu or Relenza. Both are anti-viral medications that can shorten influenza by several days if administered within 48 hours of becoming ill. Employees should know to contact their doctor when they first experience flu symptoms to obtain one of the drugs.

Employees are supposed to provide their employer with notice that they need FMLA leave. For all practical purposes, a call-in reporting the flu in the household *is* that notice. Treat the report as an FMLA leave request and provide the worker with your FMLA eligibility notice. Tell them how much leave they have available and how to request it.

Title VII

Title VII requires employers to reasonably accommodate employees' religious beliefs, including freedom from vaccination. Some employers provide easy access to flu shots. They may do so for several reasons, including cutting down on time off for flu infections. Plus, the more employees that are immune, the less likely co-workers, customers or clients will get sick. This is so-called herd immunity. Employers that insist on their employees receiving an annual influenza vaccination should expect some employees may object.

Before insisting a worker receive the flu shot, listen to any religious objections. Remember that generally you must reasonably accommodate sincerely held religious beliefs that bar vaccinations. Relatively few religious organizations are anti-vaccines. Islam generally only opposes vaccines if they contain pork by-products. Christian Scientists, the Dutch Reformed Church are among the major Christian denominations to oppose vaccines on religious grounds.

The test is whether granting the request would create an undue hardship on your organization. If you run a nursing home, excusing some workers from the flu shot may create an undue hardship for patients. But you must consider each religious accommodation request individually. Be sure to document exactly why you rejected an accommodation request. That is, show why it would be unreasonable to allow the employee an exemption. Employers may make the case, depending on the public health conditions present, that accommodating the objection endangers co-workers and is, therefore, an undue hardship. Accommodations such as telecommuting or temporary reassignment may be a better alternative.

Still, understand that forcing a vaccination or firing the employee may mean she will sue. The employee may even enlist help from the U.S. Department of Justice's (DOJ) Office of Civil Rights. The DOJ has sued at least one health care facility for its strict requirements for refusing annual flu shots. Those requirements included a letter from the employee's pastor attesting to the religious objection.

The Trump Administration also enacted a 'conscience rule,' scheduled to go into effect in November 2019. It would have allowed health workers to refuse to perform duties that violated their conscience. Employers faced penalties for violating health care worker rights. A group of employers sued. While the rule's focus was abortions, government lawyers cited more complaints about vaccines than abortions in its brief. A federal district judge struck down the rules on November 6, 2019. The government has not said whether it will appeal the ruling.

For now, employees may not rely on the 'conscience rule' to refuse to get vaccinated. However, that's subject to change. If your flu contingency plan includes mandatory immunization against influenza, consult with counsel. He or she can tell you whether your state mandates immunization or protects workers who refuse.

The ADA

The ADA impacts your flu plan in three ways. First, the law prohibits discrimination based on disability. If you have a worker with an immune disorder, that condition may mean he can't receive immunizations. Employees who can show they are allergic to the flu vaccine (egg allergy, for example) should be excused. You would have to make reasonable accommodations for his inability to immunize. Use your interactive accommodations process to see if a reasonable accommodation is possible.

Second, the ADA protects personal health information and requires it to be kept confidential. Thus, make sure you keep immunization records separate from other employment files.

Finally, while preparing your flu plan, you can ask employees health questions that otherwise would not be allowed. ADA regulations allow an exception to the ban on health questions for emergency planning. For example, you could ask employees if they have heart or pulmonary conditions and offer telecommuting to avoid

illness. You could inquire about medications that make employees more likely to get infections, too. These drugs are becoming more commonly prescribed for conditions like eczema and forms of arthritis. Workers taking immune-suppressing prescription drugs may need to telecommute.

Any confidential information obtained for emergency planning may only be used for that purpose.

Telecommuting policies, the FMLA and flu

Now is the time to review the company FMLA and telecommuting policies. The policy should indicate which jobs are eligible for telecommuting and should be flexible enough to allow you to adjust to conditions as they change.

Employees who must be home to care for a family member with the flu may be capable of working. If so, allowing them to telecommute rather than take FMLA leave may be a welcome option. Offer it as a possibility. However, DO NOT require someone who is on FMLA leave to work. Doing so violates the law. Employees cannot simultaneously be on FMLA leave and telecommute.

If there is flu circulating at your workplace, you can cut the duration if you allow telecommuting. Telecommuting reduces the risk of contagion. It can be especially helpful when the influenza season takes a turn to extremes. The Centers for Disease Control (CDC) rank flu seasons by how widespread the infections are. The CDC says that a 'normal' flu season usually peaks between December and February.

During a normal season, there is plenty of flu vaccine and anti-viral medication available. But sometimes – rarely – a pandemic hits. This usually occurs when a new influenza virus evolves to which few are immune naturally. When a pandemic happens, there may not be enough vaccine or anti-viral medication and patients may overwhelm hospitals. The CDC maintains a pandemic flu plan on its website. It's worth a [visit](#) as you plan for a normal flu season to see what a worst-case scenario looks like.

Reporting illness

During the flu season, you may want to encourage employees who may have been exposed or feel ill to stay home. Employees who report flu symptoms should be encouraged to contact their doctor immediately. The best approach may be to offer paid leave even if workers are out of vacation and sick time. You could also exclude flu absences from any no-fault attendance program you have so there's no penalty for staying home. Otherwise, you risk the spread of influenza to other employees. And that, of course, may mean more people off work, cutting into productivity. It could also increase your health care costs, especially if some workers develop complications requiring hospital stays.

But what about forcing employees to stay home? Refusing to allow an employee to come to work on the suspicion they are infectious could violate the ADA. The law specifically bars employers from 'regarding' employees as disabled when they are not.

Likewise, forcing workers who may not have a serious health condition to take FMLA leave may be illegal. That's because forced leave may leave less or no leave for later needs, thus interfering with FMLA rights. As a practical matter, though, employers who pay employees for the time off and allow them to return to work with no penalty are less likely to find themselves in court.