

# Asking about H1N1 can expose risk to lawsuit

Lawyers say it could be illegal to ask employees to cough up personal information concerning Swine Flu

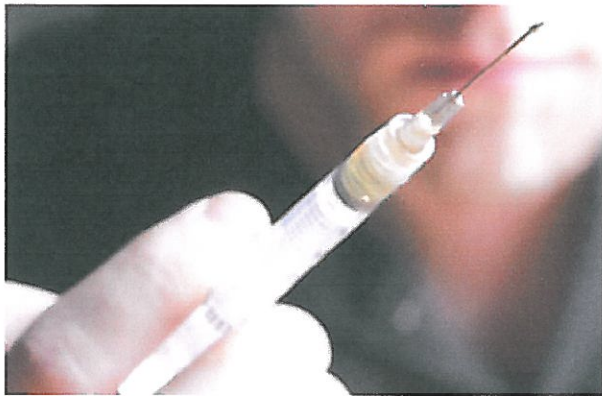
By LISA JENNINGS

**(Oct. 12, 2009)** Picture the following scenario: Sally the server has just arrived for her shift, but she doesn't look well. She is coughing, hoarse with a sore throat and just asked a coworker to feel her forehead for fever.

That scenario is likely to repeat itself throughout restaurants nationwide in coming months in what is anticipated to be a flu season made even more brutal by the appearance of H1N1, or swine flu. As restaurateurs heighten their hygiene practices to prevent outbreaks from what has already been declared a pandemic, they also need to know some of the legal aspects of dealing with H1N1.

For instance, when Sally walks in the door, it's not a good idea for her manager to ask if she has the dreaded swine flu, say attorneys around the country, who have been fielding many questions about H1N1. Asking whether an employee has swine flu could be considered a disability-related inquiry, which is prohibited under the Americans with Disabilities Act, they note.

The spread of H1N1—and the likelihood that it may soon appear in more workplaces—intensified this fall as kids returned to the collective germ pool of school campuses and then brought those germs home to working parents.



Experts at the Centers for Disease Control and Prevention advise employers to tell team members to stay home until flu symptoms are gone or are treated.

In late September, the Centers for Disease Control and Prevention reported an unusual level of widespread influenza activity in 26 states, particularly in the South, and employers were being urged to prepare for the possibility of an outbreak in their communities.

The Americans with Disabilities Act sets limits for when and how employers may inquire about medical conditions, and though the swine flu may not technically be considered a disability "it could be perceived as disabling because of myths about it," said attorney Jonathan Mook, an ADA specialist with DiMuroGinsberg in Alexandria, Va.

Mook said the legal issues are similar to those related to HIV infection.

If an employer asks specifically about swine flu, for example, and later is perceived as not wanting to work near the employee, even after the worker is no longer contagious, there may be grounds for a discrimination complaint, he said.

The ADA also requires that an employee's medical conditions be kept private, attorneys say.

That means managers should not announce that Sally the server is out with the swine flu, even if she has volunteered that information to co-workers, said Martin Ellis, an attorney with Butler, Vines & Babb in Knoxville, Tenn.

"You can tell workers that you are concerned that they may have been exposed" to swine flu without identifying the employee who may have exposed them, he said.

Instead, legal experts say employers should focus on symptoms.

In communities where an outbreak occurs, it is a good idea to include in every preshift meeting questions about specific symptoms related to the flu. It's also OK for employers to ask whether employees have fevers, sore throats, coughs or intestinal ills, so long as they don't ask for a diagnosis.



Asking employees directly if they have swine flu might open a business up to legal action, but employers are permitted send visibly sick workers home.



Swine flu inquiries may expose employers to discrimination lawsuits, according to legal experts.

In addition, attorneys say, employers are permitted to send employees home if they're showing symptoms of the flu and are allowed to ask them to stay home for three to seven days, as recommended by the CDC in Atlanta—or as long as necessary to complete treatment, such as antiviral medication.

As a result, eligible employees may be requesting leave under the federal Family and Medical Leave Act, or FMLA, which provides up to 12 weeks of job-protected, unpaid time off to care for their serious health condition or that of an immediate family member.

Unlike the more common version of influenza that occurs every year, many attorneys agree that H1N1 would be considered a "serious medical condition" for which eligible employees can take FMLA leave because the World Health Organization has declared the viral illness a pandemic.

Attorney Janet Grumer with Davis Wright Tremaine LLP in Los Angeles said some employees may only have a mild case of the flu, "but we have to treat it as though it could be a serious medical condition."

"We don't want to find out we've run afoul of the law by getting a lawsuit," she said.

That doesn't mean, however, that employees need a doctor's note to prove they have swine flu, said Jimmy Wright, an attorney with Butler, Vines & Babb.

In the case of swine flu, the CDC has discouraged employers to ask for such documentation because of concerns that medical clinics will be overwhelmed.

Failing to establish clear policies about illness and absenteeism during a pandemic could also be a risk to employers, Mook said.

Under the Occupational Safety and Health Act, or OSHA, employers are bound to furnish a safe workplace, and failing to take reasonable steps to prevent or abate a known hazard could put them in violation.

In the end, it doesn't matter if the employee is sick with the H1N1 virus or seasonal flu.

"A lot of employers are just saying they want their sick employees away from the facility," Wright said. "We don't care whether it's H1N1, they're saying, 'You're gone.'"

The CDC recommends that employers review sick-leave policies to encourage employees to stay home until they are fever-free for at least 24 hours.

For hourly employees that might not receive sick-leave pay that could be difficult, but employers can insist that workers stay home until they are symptom-free.

"They can always send them home if they show up for work with symptoms," Grumer said.

Employers should also be aware of state and local laws that may offer support to workers who are out sick or caring for a sick loved one for a period longer than they expected.

In California, for example, disability pay is available for those who miss two weeks or more, Grumer said.

“And these are employee-funded programs,” she said, “so it’s important to be aware of some of these state benefits that cost nothing for employers.”—[ljennings@nrn.com](mailto:ljennings@nrn.com)

