

Review

Employment



Swine flu – what should you be doing?

In recent weeks we have been contacted by an increasing number of clients with questions about the employment law implications of the current swine flu pandemic. In this note we outline your legal rights and responsibilities as employer by answering some of the most frequently asked questions.

A pregnant employee wants us to tell her if anyone in the office has been diagnosed with swine flu – do we have to do this? Do we have to inform employees generally?

There has been a great deal of media coverage about swine flu and it is therefore understandable that employees are concerned – especially those who are at greater risk if they become ill, such as pregnant women or those with certain pre-existing medical conditions.

As an employer you are under a general duty to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all your employees. This does not mean you are under a general obligation to inform employees about other members of staff anywhere in the business who have been diagnosed with swine flu. However, where an employee is pregnant or already has underlying health issues known to the employer - both groups are recognised as more than usually vulnerable either to catching swine flu and/or to serious illness (or the possible loss of the baby) if they do - the burden on the employer to avert that risk will be higher. In such circumstances it may be wise to take steps to separate them from swine flu sufferers if at all possible.

It is important to communicate with your employees about what precautions you are taking to deal with swine flu, what they should be doing to protect themselves and others from it and what would happen if there was an outbreak of swine flu in your organisation. This should avoid unnecessary gossip, fear and disruption to the workplace.

What can we do if employees refuse to come to work because they are scared about getting swine flu? Do we have to pay them?

The Government's current advice is that people should continue with their normal activities such as going to work or travelling on public transport. Healthy employees should therefore continue to attend work as normal. If an employee refuses to attend this is potentially a disciplinary matter on the grounds of unauthorised absence. In light of the Government's guidance, a refusal to travel is likely to be deemed unreasonable. Before going down this route employers may prefer to seek to raise awareness – there have been many alarmist articles in the media and it may simply be a case of making the employee aware of the Government's current advice and what the company is doing to deal with the threat of swine flu. A sympathetic approach is most likely to be effective. The more the employer does to recognise and educate about the risk the less reasonable such an absence would be.

Ultimately if an employee is absent from work without authorisation he is not entitled to be paid during his absence because he is failing to perform his contractual obligations. Employers need to be careful how they handle this to avoid claims of breach of contract or unlawful deduction from wages. A written statement that "precautionary" absences of this sort would be unpaid may be helpful.

It is important to communicate with your employees about what precautions you are taking.

Employers are likely to see higher than normal levels of absence.

One of our employees cannot come to work because her son's nursery has been closed due to a swine flu outbreak and she has to look after him. What can we do?

The swine flu pandemic means that employers are likely to see higher than normal levels of absence (as many as 1 in 3 people could be affected when the pandemic reaches its height in the Autumn), either because employees are ill or because they are looking after ill children or other dependants.

Your employee has a statutory right to take a reasonable amount of unpaid time off work to deal with an emergency involving a dependant such as a child, spouse or partner. The legislation does not state what a reasonable amount of time is but it would normally be one or two days as necessary to enable the employee to put other care arrangements in place.

In the current circumstances it may be more difficult for an employee to make alternative childcare arrangements and it may therefore be necessary to allow an employee to take more time off than would normally be needed to put alternative arrangements in place.

Consider whether it is possible to allow employees to work flexible hours or to work from home in such circumstances if they are having difficulties making such arrangements quickly.

You should not unreasonably refuse any requests to take time off and should not subject the employee to any detrimental treatment for taking or seeking to take time off, as this could result in a Tribunal claim.

One of our employees has told us that her boyfriend has got swine flu. Her colleagues think she should be sent home. Do we have to do this and, if so, do we have to pay her?

On the basis of the Government's current medical advice it would appear that employees are not contagious unless they actually have swine flu. There is no certainty that contact with an infected person would necessarily lead to catching it. In other words provided this employee is not displaying any symptoms there is no basis for sending her home. You do not have a general right to suspend employees in such circumstances and may face claims of breach of contract if you attempt to do so.

It is understandable that her colleagues may be concerned but the best approach in such circumstances is to reassure them about the Government's medical advice (i.e. that a person is not contagious until s/he shows symptoms) and what steps you are taking to deal with the threat of swine flu.

If some of our employees are off work due to swine flu can we require other employees to cover their work?

This will depend to a large extent on what their contracts of employment say. Many contracts contain flexibility clauses but whether an employer will be able to rely on such a clause will depend on whether it has been drafted in such a way as to cover the proposed change.

In the absence of an express contractual right to require employees to undertake other duties you could seek their agreement to do so. Many employees may be willing to carry out additional tasks on a short-term basis to cover for absent colleagues and probably already do so in the event of others' sickness or holidays from time to time. Most swine flu absences last no longer than the average holiday anyway. A failure to rally round at such times may well constitute refusal of a reasonable management request, and hence misconduct, but this is dependent on the volume, nature and duration of the additional duties in question.

In light of the risks posed by a swine flu outbreak in your organisation you may wish to consider varying your contracts of employment to give you greater flexibility – bear in mind this is not something you can do overnight and (given the points above) may not need to do at all. It may be worth revisiting if the complaint mutates such that more extended absences become likely.

Alternatively you may wish to seek employees' agreement to a change for a limited period of time to deal with the impact of swine flu, which may be easier to achieve. You will have to obtain the employees' consent to any changes or go down the route of terminating and re-engaging, which is unlikely to be desirable or practicable in the circumstances. It would be very much a measure of last resort.

Some of our employees have to go abroad on business to areas that have a high incidence of swine flu. Are there any risks for the business if we ask them to go and they then become ill?

In light of the current global outbreak of swine flu it would be advisable to curtail any unnecessary business travel to such areas, though the UK is obviously far from the least affected region itself. Consider whether meetings could be carried out by video or tele-conference instead. It would certainly be advisable for pregnant employees or those with certain pre-existing medical conditions to be allowed to avoid travelling to these areas if possible.

If business travel is unavoidable you should ensure you have put in place measures to minimise any risks to the employees, for example, ensuring they are aware of the importance of good hygiene, have medical cover in place, and have looked into the benefits of precautionary measures such as the wearing of masks (almost none, according to the NHS!)

Be aware that some countries have introduced medical screening for swine flu at airports and that quarantine measures may be introduced with no notice. It would be a good idea to check the Foreign Office's website before travelling (www.fco.gov.uk).

Also check your insurance to ensure there is cover for medical repatriation if local care is not available or is unsatisfactory.

You clearly have to ensure you have put in place procedures to ensure employees are not unnecessarily put at risk but it is however important to bear in mind that in the vast majority of cases an employee will only suffer minor symptoms – very few will become seriously ill and it is therefore appropriate to maintain a sense of proportion in terms of preventive steps give that you will after all take few steps to protect staff against any other non-work related risks to their health, such as drinking to excess, smoking or simply crossing the road.

Once a vaccine becomes available, are we obliged to provide it to our employees?

No, you are under no legal obligation to inoculate your staff, although you may wish to look into the costs of doing so to reduce the impact of absence caused by swine flu on your organisation.

No vaccine or other medicine should be made available, let alone administered, without the clearest of medical consents, as there could be side-effects.

We suspect that some of our employees who have called in sick are not genuinely ill. What can we do?

There is clearly always the risk that in such circumstances some employees will “take the Mickey” but unfortunately there is not much you can do about it unless you have clear evidence that somebody is not genuinely ill, in which case this would be a disciplinary matter. You should at least require them to complete a self-certification form, as they may be slightly more reluctant to commit a lie to paper!

In light of the highly infectious nature of swine flu any concerns you have about a few malingersers should be outweighed by the risks to the business if employees continued to come into work despite being ill. A balance must be struck.

As employer what steps should we be taking to deal with the swine flu outbreak?

It is essential that employers put appropriate business continuity plans in place to minimise the impact of the flu pandemic on their business. In the checklist below we set out the key issues for employers to consider.

It would be advisable to curtail any unnecessary business travel to such areas.

Checklist

As employer you should:

- Have up-to-date information on the current position on swine flu. Government departments are regularly updating their advice. Plans will need to be modified as the pandemic evolves. Access to information will be essential as will the communication of it to staff. Useful information can be accessed from the following websites: **Guide for businesses**; **NHS guidance for businesses**. You will be deemed to be aware of published Government guidance in your handling of your staff.
- Keep employees updated on the latest position and what you are doing to maintain the business and protect them to avoid unnecessary gossip, fear and disruption in the workplace - inform staff about known symptoms, what steps they can take to reduce the risk of infection, what the Government's guidance says on particular points, etc. Use your notice boards and intranet where you can.
- Put in place contingency plans to deal with the implications of swine flu – work out the real risks to the business so you can identify a response. Assume, for example, up to 30% absence levels in line with Government predictions and disruption to supply chains.
- Carry out a risk assessment to identify measures for reducing the spread of the flu virus at work. Put in place policies if necessary to reduce the risk of the flu spreading at work, for example prompt exclusion of employees with symptoms, increased cleaning of offices, etc.
- Identify key roles and transferable skills – consider which staff could be retrained or relocated if necessary.
- Consider modifying employment contracts to ensure you have the necessary flexibility to continue to run your business in the event of high levels of staff absence. For example, the power to require staff to work flexibly in other roles to ensure business continuity, to suspend or exclude staff if they are suspected of having swine flu or to cancel holiday if there are staff shortages.
- Review availability of alternative labour sources – high levels of staff absence may affect your ability to cope with your workload, so consider a draw-down arrangement with a relevant employment business, possibly on an exclusive or priority basis if the corporate coffers can take it.

FURTHER INFORMATION

For more information relating to this article, please contact:

Sue Nickson

Chief Operating Officer and International Head of Human Capital
E: sue.nickson@hammonds.com

Mark Shrives-Wright

Partner & Head of Leeds Human Capital
E: mark.shrives-wright@hammonds.com

Nick Jones

Partner & Head of Manchester Human Capital
E: nick.jones@hammonds.com

David Whincup

Partner & Head of London Human Capital
E: david.whincup@hammonds.com

Teresa Dolan

Partner & Head of Birmingham Human Capital (Employment)
E: teresa.dolan@hammonds.com

WWW.HAMMONDS.COM

If you do not wish to receive further legal updates or information about our products and services, please write to: Richard Green, Hammonds LLP, Freepost, 2 Park Lane, Leeds, LS3 2YY or email richard.green@hammonds.com.

These brief articles and summaries should not be applied to any particular set of facts without seeking legal advice. © Hammonds LLP 2009.

Hammonds LLP is a limited liability partnership registered in England and Wales with registered number OC 335584 and is regulated by the Solicitors Regulation Authority of England and Wales. A list of the members of Hammonds LLP and their professional qualifications is open to inspection at the registered office of Hammonds LLP, 7 Devonshire Square, London EC2M 4YH. Use of the word "Partner" by Hammonds LLP refers to a member of Hammonds LLP or an employee or consultant with equivalent standing and qualification.