

**Dewey & LeBoeuf London**

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Swine Flu

August 3, 2009

About Swine Flu

The World Health Organisation's current pandemic alert level has now been raised to Phase 6. This means that there is now a global swine flu pandemic.

In light of this, employers will benefit from forward planning to enable them to deal with the inevitable business contingency issues and higher than usual levels of employee absenteeism.

How Can Employers Respond to the Swine Flu Pandemic?**Employers should:**

- Advise sick employees to seek appropriate medical advice at the earliest opportunity and communicate the importance of employees staying at home if they feel unwell and suffer any symptoms of flu;
- Promote good hygiene practices at work, in particular: the importance of regular hand washing, the use of tissues when coughing and sneezing and the prompt disposal of tissues after use and the avoidance of touching the mouth, eyes and nose; and
- Develop a contingency plan, which would take into account the following:
 - Strategies to maximise the amount of home or flexible working by staff and increase the use of teleconferencing to limit face-to-face meetings;
 - Plans that would enable the organisation to operate on a skeleton staff and training for back-up staff to take over key positions if needed; and
 - The delivery of clear and consistent internal communications, such as an information bulletin, to ensure employees are kept informed of all relevant information.

Legal Issues for Employers

- Q. Is the fear of contracting an illness a sufficient reason for employees to refuse to attend work?

- A. No, unless the employee can show that it was reasonable for him or her to believe that, by attending work, he or she would be exposed to "serious and imminent danger." An employer facing this situation could consider taking disciplinary action against the employee in question, so long as the employer has taken reasonable steps to ensure the workplace is safe, including following government guidance.

Employers also need to be considerate of the fact that some categories of employees, such as pregnant women and employees with certain disabilities may be more susceptible to the virus. Employers should be prepared to listen to any concerns that employees in these categories have.

- Q. What can an employer do if an employee who has contracted swine flu wants to come into work?

- A. The employer should prevent the infected employee from coming into the workplace, or the employer risks failing to comply with health and safety obligations to other staff. The employer should ask the employee to stay at home and the employee has the right to be paid in accordance with any sick leave policy (including the right to Statutory Sick Pay) in place or as per the relevant provisions in his or her contract of employment.

- Q. Can an employer refuse to allow an employee time off to care for dependants?

- A. No. Employees have a statutory right to take reasonable time off if it is necessary for the employee to provide assistance to a dependant who has fallen ill.

- Q. Does the employer's duty of care extend to offering its employees antiviral drugs or face masks?

- A. The law imposes a duty of care on employers to protect their employees' health and safety. However, it is unlikely that this extends to offering employees anti-viral drugs or face masks. Frontline staff, could, perhaps justifiably, request additional protection such as the provision of face masks, in dealing with the public.

- Q. Are there restrictions on an employer discussing who has been affected by swine flu?

- A. Information on employees' health is sensitive personal data, for the purposes of the Data Protection Act. Usually, the

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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employer would not be able to disclose this information. However, where the health of another person may be affected, the employer can make such a disclosure in order to protect this person. If possible, the employer should obtain the consent of the affected person before releasing this information. The employer may release the information without consent in limited circumstances.

Finally, it is vital that employers stay up to date on the advice and guidance issued by the Department of Health and the Health and Safety Executive and travel advice issued by the Foreign and Commonwealth Office.

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