

# H1N1 in the Workplace

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Last year it was TB (tuberculosis). This year it's the flu. Communicable diseases in the workplace are a concern and employers are feeling the impact. Employees are out of the office and employment laws must be navigated. See H1N1 Labor & Employment Q & A's, <http://www.ogletreedeakins.com/uploads/publications/H1N1%20brochure%2010-09-09.pdf>. The CDC recommends that persons with flu-like symptoms should be out of the office for at least seven days. See <http://www.cdc.gov/H1N1FLU/>. Employers, in order to prevent the spread of flu, have begun adopting mandatory leave policies, requiring employees to be out at least seven days from the onset of the symptoms. See Workplaces: Influenza-Like Illness, <http://www.health.state.mn.us/divs/idepc/diseases/flu/workplace/index.html>; CDC: Guidance for Businesses and Employers To Plan and Respond to the 2009 – 2010 Influenza Season, <http://www.flu.gov/professional/business/guidance.pdf>.

Now the question is who is going to pay for the mandatory seven days out. The United States Senate Committee on Health, Education, Labor & Pensions held a hearing November 10, 2009 to determine whether emergency legislation should be enacted requiring employers to give employees paid sick time off in order to prevent the spread of H1N1 in the workplace. See The Cost of Being Sick: H1N1 and Paid Sick Days, Subcommittee on Children and Families, [http://help.senate.gov/Hearings/2009\\_11\\_10/2009\\_11\\_10.html](http://help.senate.gov/Hearings/2009_11_10/2009_11_10.html); SD-430/. The bill is still under consideration. We will follow the legislation and keep you posted.

In the meantime, the following is a summary of present Federal and Minnesota law addressing who pays for mandatory absences:

- Q. May an employer require an employee with Flu-like symptoms (fever over 100 degrees, cough, sore throat, and/or stuffy nose) to be absent from the workplace for a period of seven days?
- A. Yes.
- Q. May an employer require an employee to exhaust accrued sick, vacation, and/or PTO time for the mandatory absence?
- A. Yes.
- Q. Are employers required to pay an employee who has no accrued sick, vacation, and/or PTO time for the mandatory absence?
- A. No, not at this time. Legislation is under consideration that would require employers to offer paid sick time for the mandatory time out period. In the meantime, employers are urged to advance sick, vacation, and/or PTO time to cover the mandatory absence.

- Q. If an employee is required to be out seven days and does not have accrued sick, vacation, and/or PTO time available for the mandatory absence, may that employee qualify for unemployment.
- A. Maybe. Full-time employees whose hours fall below 32 hours per week and whose earnings with respect to that week are less than the employee's weekly unemployment benefit amount are eligible to apply for unemployment benefits. *See* Minn. Stat. §§ 268.03, subd. 26, 268.069, 268.085. The absences due to the illness are not disqualifying misconduct unless the employee failed to give proper notice. *See* Minn. Stat. § 268.095, subd. 6(a).

However, it appears that a reasonable defense to an unemployment claim in this context consists of an argument that the employee was not suitable for work during the mandatory seven days out because, under the CDC recommendations, the employee should not be in the workplace. *See* Minn. Stat. § 268.085, subd. 16. Please bear in mind, however, that there is no case law establishing the viability of this defense.

- Q. If an employee contracts H1N1, has the employee suffered a compensable workers' compensation injury?
- A. Maybe. Ordinary diseases to life such as the flu are typically not compensable injuries. *See* Minn. Stat. § 176.011 subd. 15. However, this is not the case where the disease follows as an incident of an occupational disease or where the exposure peculiar to the occupation makes the disease an occupational disease hazard. *Id.* An occupational disease is a disease that arises out of and in the course of employment peculiar to the occupation in which the employee is engaged, and due to causes in excess of the hazards ordinary of employment. *Id.*

In some cases, the very nature of a position requires individuals to be in close contact with those who are infected with the H1N1 influenza, for example nurses and doctors. In those cases, it is likely that the contraction of the communicable disease is a covered workers' compensation injury. *See Gray v. City of St. Paul*, 84 N.W.2d 606 (Minn. 1957); and *Olson v. Executive Travel MSP, Inc.*, 437 N.W.2d 645 (Minn. 1989). On the other hand, where an employee's work place is spacious, well-ventilated, and requires minimal contact with others such that the individual's exposure is no different then it would be outside of the workplace, then contracting H1N1 should not be a compensable workers compensation injury. *See Parle v. Henry Boos Dental Laboratories*, 153 N.W.2d 344 (Minn. 1967).