

Employment Alert

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House Lawmakers Propose Paid Sick Leave For Employees Sent Home Due To H1N1 Virus

Yesterday, House Democrats introduced a bill that would mandate employers to offer five days of **paid** sick leave if they send workers home or tell them not to come to work due to the H1N1 virus or other contagious "influenza-like illnesses." The Emergency Influenza Containment Act, as it is called, **does not** cover workers who voluntarily choose to call in sick, and employers who already provide at least five days paid sick leave or have fewer than 15 employees are exempt from its requirements. If the bill is enacted, employers may find themselves in the position of having to determine the difference between merely "encouraging" infected employees to stay home (which the U.S. Department of Health and Human Services Center for Disease Control and Prevention recommends and which presumably would not trigger the paid sick leave requirement) versus "directing" them to stay home (which presumably would trigger the requirement). A committee hearing on the bill will occur on November 16, 2009, and a floor vote will likely quickly follow. If passed, the bill would take effect as soon as 15 days after enactment.

Regardless of whether the bill becomes law, employers should be mindful of the impact of other leave provisions on what is certain to be a rise in absenteeism in the coming months due to seasonal flu and H1N1. Because of its temporary nature the H1N1 virus typically would not be covered by the Americans with Disabilities Act. However, the H1N1 virus most likely **will be** considered a "serious health condition" subject to the leave provisions of the Family and Medical Leave Act (FMLA) to the extent that it results in either (1) inpatient care or (2) more than three days of incapacity plus continuing treatment by a health care provider. On a case-by-case basis, employers should carefully examine whether each situation is covered by the FMLA and, if so, whether the employee in question is eligible for FMLA leave, keeping in mind that time off may be needed not only because of an employee's own illness, but also to care for a child, spouse or parent with H1N1. Additionally, employers should be mindful that individual state laws may provide more expansive leave than the FMLA.

We will continue to monitor the emergency paid sick leave bill. In the meantime, employers should review their leave policies to ensure they are prepared to address what is expected to be a higher than normal seasonal influenza and H1N1 flu outbreak. Materials addressing the 2009-10 flu season are available on the CDC's website at pandemicflu.gov/professional/business/guidance.html.

For more information, please contact Paul Garry, Erika Dillon or any other MBT labor and employment lawyer at (312) 474-7900.

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