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NEWSLETTER

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MANAGING RISK AROUND SWINE FLU- WHAT EMPLOYERS SHOULD KNOW

Jesstina McFadden

Toronto

416.595.2990

jmcfadden@millerthomson.com

Human cases of swine influenza A (H1N1) ("swine flu") are continuing to appear around the globe and have received considerable attention from governments; global, national and local public health organizations; and the media. As this newsletter is being written, the World Health Organization (WHO) is closely monitoring the situation, and has assigned current designation of "Phase 5" pandemic alert, meaning that human-to-human spread of the virus into at least two countries in one WHO region has been identified which the WHO identifies as a strong signal that a pandemic is imminent. However, the situation continues to evolve and could change rapidly for the better or worse.

When faced with a disease with outbreak, epidemic or pandemic potential, employers may play an important role in protecting employee's health and safety as well as limiting the negative impact for the economy and society. This newsletter will provide basic information about the rights and obligations of employers and employees with respect to swine flu.

We also provide suggestions for employers on how to manage potential risks in relation to swine flu. We encourage clients to monitor this situation as it evolves and have provided some useful links to government information sources.

Statutory Rights and Obligations for Employers

Employers should be aware of their statutory rights and obligations in the event of a potential exposure, an outbreak of swine flu, or a pandemic, including those related to:

- Employees who have been exposed to swine flu or have been advised to take a self-imposed quarantine.
- Employees who are absent from work to care for dependents who are ill or quarantined.
- Payment of employees should the employment premises be quarantined, or where the employer is unable to provide work for employees due to an outbreak of swine flu.
- Ensuring that the workplace is safe pursuant to common law and occupational health and safety legislation, including obligations and employee rights with respect to refusal to work where the workplace may be unsafe.

Rights and obligations may vary among the provinces, and can also vary for different employers. We encourage employers to ensure they are familiar with those applicable to their specific circumstances.

Human Rights

Federal and provincial human rights legislation prohibits discrimination on the basis of disability or handicap, which can include diseases and medical conditions. For example, during the 2003 SARS outbreak in Ontario, the Ontario Human Rights Commission expressed concern about possible discrimination or harassment against Ontario's Asian-Canadian community since the SARS outbreak was believed to have originated in China. Similarly, human rights protections would extend to persons who have or are perceived to have swine flu.

Employers will consequently have a duty to accommodate employees with swine flu or who have been exposed to swine flu. Suitable accommodation will vary depending on the circumstances but could include allowing the employee to take time off work or allowing the employee to work from home, if possible.

Other Considerations

Employers should encourage employees to voluntarily quarantine themselves where there is a valid reason to do so. In order to encourage compliance, employers may also consider the following options where an employee is quarantined due to Swine Flu related symptoms or exposure: allowing the employee to use available sick days; short term disability benefits where available; use of vacation time; days off in lieu of overtime or a leave of absence without pay. It may also be possible to provide employees with the technology to work from home during the quarantine.

Risk Management Strategies

In our view, all employers should take proactive steps to ensure the protection of their workplace. The following actions may be subject to a policy or directive from the employer and should be clearly communicated throughout the workplace:

- The employer should provide information about swine flu to employees and outline the symptoms and criteria to watch for, and the actions that the employee and employer are required to take.
- Employees should be encouraged to wash their hands frequently. Signs should be posted in appropriate areas in this regard.
- Employers can consider use of hand sanitation supplies and other precautionary measures as applicable.
- The employer should designate an individual or create a team to monitor swine flu in the workplace and to coordinate efforts.
- Employees should be encouraged to voluntarily quarantine themselves if they are exhibiting symptoms or have been in direct contact with someone who is symptomatic. The employee will be asked to notify the contact person or team.

- Employers should consider advising employees that employees who break quarantine or attend work when they know that they have been exposed to swine flu may be subject to discipline, up to and including termination. Further, breaking quarantine may be a violation of provincial health and safety legislation and could result in criminal proceedings.
- Employers can initiate employer travel policies with respect to travel to high risk areas.
- Employers can initiate directives limiting non-essential internal and external contact. Use of technology in place of person to person contact may be encouraged.
- Contingency plans should be developed to limit possible work interruptions for those who perform essential duties in the workplace.
- Proactively, employers should have appropriate plans in place for addressing issues related to pandemic and other emergencies that may affect workers or the workplace environment.

The above information may be subject to terms contained in collective agreements or employment contracts.

At this time, we recommend that employers monitor regular updates from Ministry and government sites, as well ensure they are aware of local circumstances. This newsletter is a synthesis of information currently available. For more detailed information, please refer to the following web sites:

Public Health Agency of Canada
http://www.phac-aspc.gc.ca/alert-alerte/swine_200904-eng.php

Health Canada
<http://www.hc-sc.gc.ca/index-eng.php>

The World Health Organization
<http://www.who.int/csr/disease/swineflu/en/index.html>

For further information or assistance regarding managing risks related to swine flu, please contact us, or get in touch with your Miller Thomson lawyer who will be able to direct your inquiry to the appropriate person.

About the Author:

Jesstina McFadden is a lawyer practising in the Toronto office of our Health Industry Group, and is dedicated counsel for the Legal Retainer Program in Ontario.

This article has been adapted from a 2003 communiqué on SARS prepared by Kathryn Frellick out of Miller Thomson's Toronto Office.

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REGIONAL CONTACTS

National Chair

Joshua Liswood
416.595.8525
jliswood@millerthomson.com

Edmonton

Brian Curial
780.429.9788
bcurial@millerthomson.com

Vancouver

David Martin
604.643.1229
dmartin@millerthomson.com

Toronto/Markham

Kathryn Frelick
416.595.2979
kfrelick@millerthomson.com

Calgary

Ivan Bernardo
403.298.2425
ibernardo@millerthomson.com

Montréal

André Dugas
514.871.5410
adugas@millerthomson.com

Southwestern Ontario

Glenn F. Jones
519.931.3508
gjones@millerthomson.com

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