

Planning for Flu Season

**NHRMA's 71st Annual Conference & Tradeshow
Pre-Conference Workshop**

September 30, 2009
Oregon Convention Center



Paula A. Barran & Amy L. Angel

503-228-0500

www.barran.com

Barran Liebman LLP



H1N1 Pandemic Flu

Understanding What May Come

Pandemic Flu

PANDEMIC

- Main Entry: 1pan·dem·ic
Pronunciation: \pan-□ de-mik\
Function: *adjective*
Etymology: Late Latin *pandemus*, from Greek *pandēmos* of all the people, from *pan-* + *dēmos* people
Date: 1666
-Occurring over a wide geographic area and affecting an exceptionally high proportion of the population
- Main Entry: 2pandemic
Function: *noun*
Date: circa 1853
-A pandemic outbreak of a disease

Pandemic Flu

According to the World Health Organization (“WHO”), a pandemic can be declared when three conditions have been met:

1. Emergence of a disease new to a population;
2. Agents infect humans, causing serious illness; and
3. Agents spread easily and sustainably among humans.

Pandemic Flu

Seasonal (or common) flu

- Seasonal flu refers to the periodic outbreaks of respiratory illness in the fall and winter.
- More than 250,000 U.S. hospitalizations in an average flu season
- 30,000 – 40,000 U.S. deaths in an average flu season
- 90% of deaths in people 65 years +

Pandemic Flu

- An influenza pandemic occurs when a new subtype emerges that has not previously circulated in humans.
- Because there is **little natural immunity**, the disease spreads rapidly from person to person and can result in more serious illness than that caused by the common flu.

Pandemic Flu

- Historically, flu pandemics occur every 10 to 30 years.
- 3 pandemics occurred in the 20th century
 - The “Spanish Flu” in 1918-19.
 - The “Asian Flu” in 1957-58.
 - The “Hong Kong Flu” in 1968-69.
- These pandemics circled the globe in 6 to 9 months.
- Past pandemics have occurred in two and sometimes three waves.

Pandemic H1N1 Flu

A novel influenza A (H1N1) virus was first confirmed in Mexico in mid-April 2009.

Two months later, on June 11, 2009, the World Health Organization (“WHO”) declared an H1N1 global pandemic at level six (the highest level), a reflection of the far-reaching spread of the new virus as opposed to a reaction to the severity of the illness.

Commonly referred to as:

- Novel H1N1 Flu
- Swine Flu
- An H1N1 S-O.I.V.
- Pandemic (H1N1) 2009
- 2009-H1N1

Pandemic H1N1 Flu

The first wave:

- In March and April, Mexico experienced an outbreak of unexplained pneumonia, with hundreds of reported cases and 59 deaths in Mexico City alone.
- In the United States (April 15, 2009 – July 24, 2009):
 - 43,771 confirmed and probable cases
 - 5,011 hospitalizations
 - 302 deaths
 - Est. 1 million people became infected

Pandemic H1N1 Flu

Who was affected most?

- Rates of **illness**
 - 5-24 years old
 - Children 0-4
 - Lowest infection rates among those over 65 year old
- Rates of **hospitalization**
 - Children 0-4
 - 5-24 years old
 - Over 65 years old
 - Fewest hospitalizations among those 25-49 years old
- Rates of **death**
 - 25-49 years old
 - 50-64 years old
 - 5-24 years old

Planning Ahead

Second wave expected this Fall/Winter

- Anticipated to be “moderate,” i.e., most people will recover from infection without the need for hospitalization or medical care
- Concern about more severe cases in vulnerable populations: very young, very old, those with pre-existing medical conditions, including pregnancy.

Worst Case Scenario

- Half of all Americans will be inflicted with the virus
- As many as 1.8 million U.S. hospitalizations
- As many as 30,000 to 90,000 U.S. deaths
- Millions of deaths worldwide

Planning Ahead

High Risk Groups

- Individuals of any age with chronic medical conditions:
 - Asthma
 - Diabetes
 - Immune-suppression
 - Heart, lung, liver, or kidney disease
 - Severe obesity?
- Pregnant women
- Adults 65 years and older
- Children 0 – 4 years old
- Certain ethnic groups, including Native Americans?

Signs and Symptoms

Typical symptoms

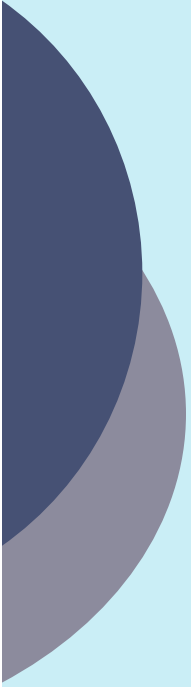
- Fever and cough
- Shortness of breath, fatigue/weakness, chills, muscle soreness
- Sore throat, headache
- Vomiting, diarrhea

Warning Signs

- Difficulty breathing or shortness of breath
- Pain or pressure in the chest or abdomen
- Sudden dizziness
- Confusion or change in level of consciousness
- Severe or persistent vomiting
- Severe sore throat, with swollen glands in the neck
- Symptoms improve then return with fever and worse cough
- Unidentified rash
- 101°F fever for over 3 days

How Influenza Spreads

1. The flu primarily spreads through large droplets that directly contact the nose, mouth, or eyes.
 - Infected people cough, sneeze, or talk.
 - Large droplets have a limited travel range, so limiting close contact (within 6 feet), limits transmission.
2. To a lesser degree, the flu is spread by touching objects contaminated with the virus and then transferring the virus from the hands to the nose, mouth, or eyes.
3. Flu may also spread through very small particles (aerosols).



The Alphabet Soup of Legal Obligations

- OSHA
- FLSA
- FMLA
- ADA
- HIPAA
- Title VII (okay—so those aren't letters)

Occupational Safety and Health Act

(Are we legally obligated to do anything?)

OSHA's "General Duty Clause"

- Protect workforce from a "recognized hazard."

Respiratory Protection Standard

- Dust mask respirators rated N95 or higher
- Confirmed cases and close contact cannot be avoided
- Healthcare workers



Occupational Safety and Health Act

(May an employee refuse to come to work?)

Under OSHA, an employee may refuse to work only in limited situations:

1. Reasonable belief of serious and immediate danger;
2. Employee has asked Employer to fix the hazard;
3. No time to call OSHA; and
4. No other way to do the job safely.



Occupational Safety and Health Act

(What if an employee makes a safety complaint?)

Why is the employee complaining?

- Actual illness in the workplace
- If at-risk for complications, consider reasonable accommodations

OSHA complaints

- Employees who file OSHA complaints are protected from discrimination and retaliation, even if no workplace hazard is found.



Fair Labor Standards Act

To Pay or Not to Pay

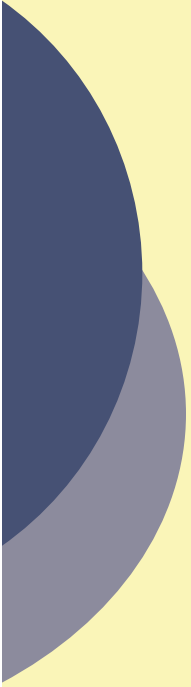


Remember the General Rules

- Employers may send sick employees home
 - Apply this rule uniformly to avoid ADA, Title VII and other problems
- Employers may require employees traveling home from affected areas to stay home until the incubation period has passed
- Employers may require employees who have the disease to stay home until they are no longer contagious others



Who Gets Paid?



First: Gather Information

Step 1: Is the employee exempt or non-exempt?

Step 2: How many days has the employee been off work?

Step 3: Who made the decision to stay home?

Step 4: What was the reason the employee stayed home?

Step 5: What PTO or sick leave does the employee have available?

Step 6: Is this a FMLA covered absence?

Step 7: How do you define the workweek?



Second: Review the Rules

- How are non-exempt employees paid?
- How are exempt employees paid?
- What are the exceptions to the salary test?
- Which law applies if state law is more beneficial to employee?



Non-Exempt Employees

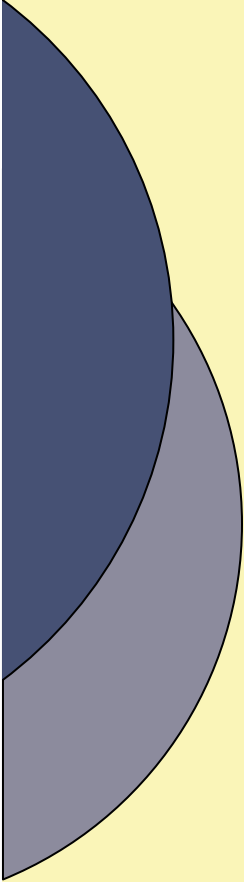
Non-exempt employees:

- Paid when they work
- Not paid when they don't work

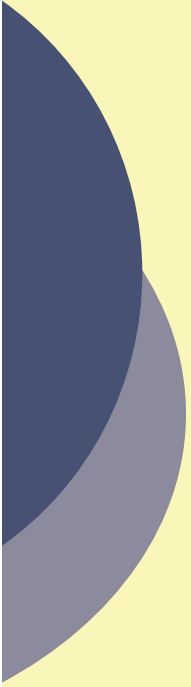


Exempt Employees

- “Salary basis”
 - Predetermined amount with no reduction in any week in which he/she performs any work
 - May not be reduced due to variations in the quality or quantity of the work performed
- Special rules apply for certain absences
- Do not make deductions not expressly permitted by law: 29 CFR § 541.118
- General rule: employee need not be paid for any workweek in which he/she performs NO work

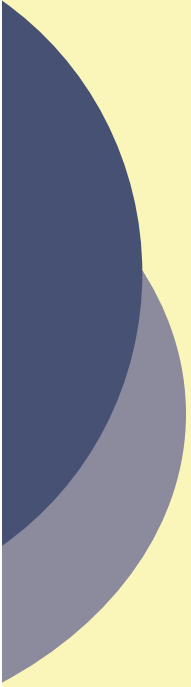


Absences of A Full Day or Longer



Permissible Deduction: For Personal Reasons (a Day or More)

- Employers are not required to pay exempt employees who absent themselves for a day or more for personal reasons.
- “Personal reasons” does NOT include sickness or accident.



Permissible Deduction: For Sickness or Disability (A Day or More)

Employers are not required to pay exempt employees for absences of a day or more due to sickness or disability IF

- Employer has a bona fide plan, policy or practice of providing compensation for sick leave; AND
- Employee has no compensable leave time available under the plan.
 - It's the plan that counts
 - Deductions can be made even if employee has no earned time under the plan

Not so fast ...

... does the employee agree he/she is sick?



Partial Day Absences



Partial Day Absences

General Rules

- Default rule: do not deduct for partial day absences
 - Unless express authorization by regulations
- Permissible deductions
 - Substitute accrued paid leave
- Washington
 - Employee must request
 - Deductions must not be for less than one hour
 - Benefit must be in written policy



Partial Day Absences

General Rules (cont.)

- Deductions may not be made for partial day absences
 - Employers can substitute paid leave IF THE EMPLOYEE HAS SOME
- Deductions may not be made when work is not available
 - Employer can substitute accrued paid leave
- Deductions may not be made for absences occasioned by the employer or the operating requirements of the business
 - Employer can substitute accrued paid leave



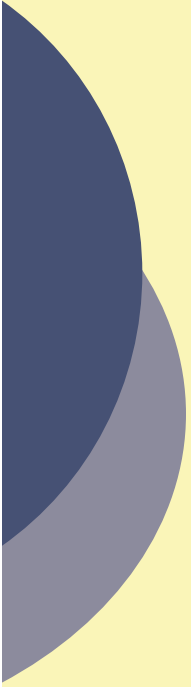
Special FMLA Rules

- Deductions are permissible for unpaid FMLA leave
 - Employers may not deduct after FMLA qualification has ended
- Oregon
 - Employers may not deduct for OFLA-only absences
- Washington
 - Employers may deduct for FMLA qualified partial day absences



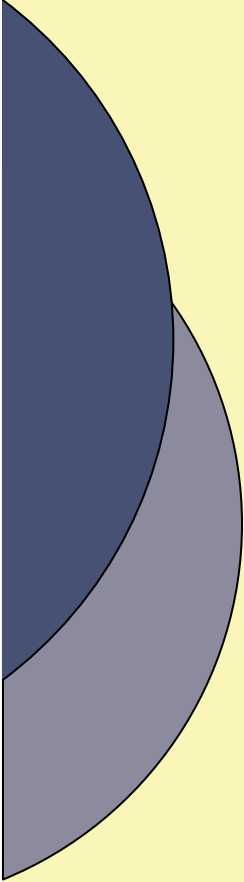
Third:

**Apply the rules to the
information you gathered**

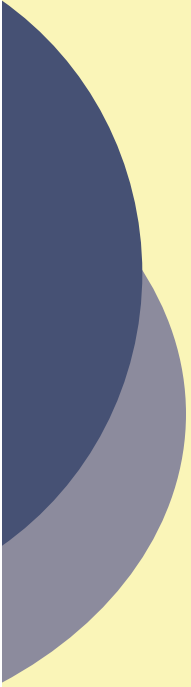


Non-Exempt (hourly) Workers: The Easy Answers

- Non-exempt employees get paid when they work and do not get paid when they don't work
- Caveat: Some jurisdictions have rules relating to minors— Oregon, for example, has OAR 839-021-0087(5) which requires “reasonable compensation” for minors required to report to work.
- In most cases you will not have to pay.
 - But double check PTO and other policies to see if there is a contract or policy right to be paid



**Exempt Employees:
Everything From this Point is
Really Complicated**



Exempt Employees Week-Long Absence

Salary must be paid if any work is done during the week

- Employers can forbid employees from working during the workweek
- Pay may depend on the day the employee gets sick
- Work M-T-W, sick Th-Fri + 3 days following week
- Apply your payroll week (this should be defined in your handbook)



Exempt Employees Absences of a Day or More

Q: For personal reasons?

A: Unpaid—employer can deduct

- “Personal reasons” is distinct from sickness or disability

Q: For sickness or disability?

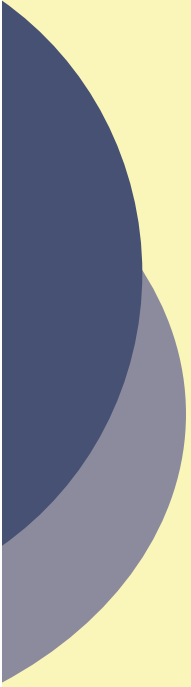
A: Unpaid—employer can deduct

Q: Because work not available?

A: Paid—employer cannot deduct

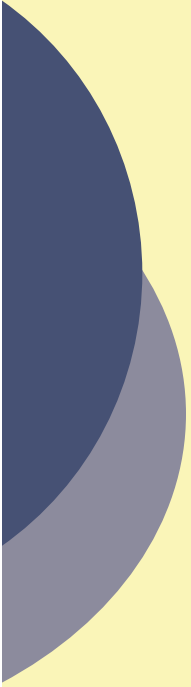
Q: At the employer’s insistence?

A: Paid—employer cannot deduct



Is the Employee Sick? or is the Employer Insisting on the Absence?

- Mandatory absence after travel but employee never develops symptoms?
- Employee “feels fine” but has a fever and is required to stay home?
- Employee is working sporadically from home...(checking email or voicemail is work!)?



Best Practices

When in doubt ... PAY.

To make sure sick employees stay home:

- PAY
- Create flexibility in attendance policy
- Back off from attendance-related discipline

Family Medical Leave

(When is the flu covered by FMLA?)

- In general, FMLA does not cover the flu.
- FMLA only applies if the employee or employee's spouse, child, or parent has a "serious health condition"
 1. **Inpatient care**
 2. **Continuing treatment**
- OFLA sick child leave

Family Medical Leave

(When is the flu NOT covered by FMLA?)

- Employee has the flu but does not visit a health care provider.
- Employee cares for a spouse, child, or parent who has the flu, but the family member does not visit a health care provider.
(* Child covered under OFLA)
- As a precautionary measure, employee stays home because of potential exposure to the flu.
- Employee does not report to work for fear of contracting the flu.
- Employee's child's school or daycare closes, there is no alternative child care, but the child is not actually sick.

Family Medical Leave

(May we require a doctor's note to return to work?)

“Fitness for Duty” Certifications under FMLA

- Permissible if included in FMLA policy
- Must be required of all similarly-situated employees
- Must notify employees at time leave begins that Return to Work certificate will be required

Practical considerations

- If healthcare providers are overburdened during a pandemic, requiring a Return to Work certificate may delay an employee's return.
- Government's policy is to require a Fitness for Duty certification if out over 7 days but may change to 14 days during a severe outbreak.



Americans with Disabilities Act

In general, the flu will not be a disability under the ADA.
However, several issues implicate the ADA:

1. Requiring medical tests for H1N1
2. Gathering personal information
3. Requiring infection control practices
4. Allowing reasonable accommodations

Americans with Disabilities Act

(May we test for H1N1?)

Stage	Permitted Inquiry
Pre-Offer	NO disability-related inquiry or medical exam permitted.
Post-Offer	Disability-related inquiries and medical exams permitted for all employees in same job category
Current Employee	Disability-related inquiries and medical exams permitted only if job-related and consistent with business necessity



Americans with Disabilities Act

(What can we ask employees?)

Under the “direct threat” exception...

Employers **MAY** ask:

- an employee calling in sick if they have flu-like symptoms
- an employee to notify the employer of a confirmed H1N1 diagnosis
- an employee to notify the employer if he/she has received the H1N1 vaccination
- all employees at the beginning of a shift if they are experiencing any flu-like symptoms.

HR, not supervisors, should be asking for this information.



Americans with Disabilities Act

(How do we plan for absenteeism?)

Directions: Answer “yes” to the whole question **without** specifying the reason or reasons that apply to you. Simply check “yes” or “no” **at the bottom.**

In the event of a pandemic, would you be unable to come to work because of any of the following reasons:

- If schools or daycare centers are closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transportation were sporadic or unavailable, you would be unable to travel to work; AND/OR
- If you (or a member of your household) fall into one of the categories identified by the CDC as being at high risk for serious complications, you would be advised by public health authorities to stay home.

Answer: YES _____ NO _____



Americans with Disabilities Act

(May we require infection control practices?)

To address infection control, employers may encourage or require:

- Employees to adopt infection control practices,
- Employees to wear personal protective equipment,
- Employees to telecommute,

without violating the ADA, so long as employees are not singled out.

www.eeoc.gov/facts/H1N1_flu.html



Americans with Disabilities Act

(Are employees entitled to accommodations?)

Qualified individuals with a disability may be entitled to a reasonable accommodation to reduce exposure to H1N1.

Reasonable Accommodations may include:

- Staying Home/Personal Leave
- Telecommuting/Working during non-peak hours
- Relocating workspaces
- Not wearing certain protective gear
- Providing vaccinations
- Cancelling face-to-face meetings, conferences or travel

Title VII

National Origin Discrimination

Not uncommon for groups to be blamed for pandemics.

- Black Death blamed on Jews
- Spanish flu so named because Spain reported on the outbreaks
- Hong Kong flu and Asian flu named based on area of origin

Under Title VII, an employer may be liable for discrimination if it takes an adverse action against an employee because of that employee's national origin.

Title VII

(May we exclude employees based on recent travel or other high-risk status?)

Examples:

- Employees returning from visiting family in Mexico?
- Employees returning from visiting family in other areas with recent outbreaks?
- Native American employees suspected to be at risk if exposed to H1N1?

Title VII

(What about sex discrimination?)

Sex Stereotyping and Disparate Impact

- Absenteeism Inquiries
- Excusing absences due to school or daycare closures or other caregiving responsibilities
- Cross training workers
- EEOC's recent "Best Practices for Workers with Caregiving Responsibilities"

Confidentiality

- HIPAA: protects an employee's confidential medical information
- FMLA/ADA: "Need to Know" provisions
 - Records and documents relating to certifications or medical histories must be maintained as confidential medical records in separate files from the usual personnel file
 - Supervisors and managers may be informed regarding necessary restrictions on work or duties and necessary accommodations
 - First aid and safety personnel may be informed if the employee's condition might require emergency treatment
 - Government officials shall be provided information upon request

Confidentiality

(Do we warn other employees?)

- Yes, but in general terms
- Protect privacy of sick employees
- No names or identifying date
- “Taking all precautions as if a case of H1N1 flu has been confirmed”

Employer Liability

Can an employer be liable for an employee who becomes ill due to exposure at work?

- Attendance bonus programs
- Mandatory attendance
 - Travel
 - Meetings
 - Work
- Vaccinations
- Workers' Compensation



Planning Ahead

“When did Noah build the ark? ...
Before the rain.”

-- Robert Redford, “Spy Game”



Creating a Business Pandemic Plan

Objectives for a workplace response plan:

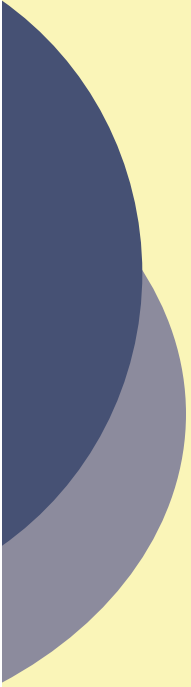
- Reducing transmission among employees
- Protecting those at increased risk
- Maintaining business operations
- Minimizing adverse effects on others



Creating a Business Pandemic Plan

Have a plan in place:

- Identify those responsible for making decisions in the event of an outbreak
- Identify essential employees and other critical inputs
- Cross-train employees
- Analyze impact of travel or transportation disruptions
- Establish an emergency communications plan
- Forecast for employee absences
- Establish changes to leave policies
- Stock up on infection control supplies
- Develop and disseminate information to employees



Creating a Business Pandemic Plan

Actual response should be based on local information including:

- Disease severity (how sick are people?)
- Extent of disease (numbers)
- Worker absenteeism rates
- Impact on at-risk individuals
- School and child care closures



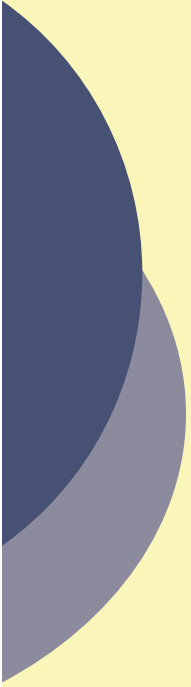
Review Safety and Health Policies

- Increase frequency of routine cleanings
- Provide supplies: soap, hand gel, disinfectant, face masks, gloves, etc.
- Create “social distancing”: rearrange workspaces, limit face-to-face meetings and travel, review telecommute policies
- Be alert for symptoms of the flu



Review Sick Leave Policies

- Sending workers home
 - CDC recommending individuals with flu-like illness remain at home until at least 24 hours after they are free of fever, even if taking anti-viral medications.
 - Paying employees during mandatory exclusion periods.
 - Exhausting sick leave.
- Covering school closures
 - If schools close, CDC recommends closing for five to seven days and then reevaluating.
 - If there is an ill family member, CDC recommends students stay home for five days from when first family member got sick.
- Check Collective Bargaining Agreements and other policies



Review Travel and Telecommuting Policies

- Travel
 - Cancel non-essential travel
 - Evaluate safety of travel locations
 - Excluding employees returning from a community with an outbreak
- Telecommuting
 - School closures
 - Caregivers
 - At-risk individuals



Additional Resources

- www.cdc.gov/h1n1flu
- www.pandemicflu.gov
- www.flu.gov
- www.osha.gov/Publications/influenza_pandemic.html
- www.ready.gov

BARRAN LIEBMAN^{LLP}SM
ATTORNEYS



Thank You