

# Legislative Brief

## ADA-Compliant Employer Preparedness for the H1N1 Flu Virus



This Midlands Financial Benefits, Inc. Legislative Brief answers basic questions about workplace preparation strategies for the 2009 H1N1 flu virus (swine flu) that are compliant with the Americans with Disabilities Act (ADA). Because this situation is rapidly evolving, employers should consult their local public health authorities and the Centers for Disease Control and Prevention (CDC). For key facts on the H1N1 flu virus, see [www.cdc.gov](http://www.cdc.gov).

Accurate and timely public health information is critical to an effective and ADA-compliant pandemic plan. Employers should establish lines of communication with local public health authorities and community medical experts in advance of a pandemic. See [www.pandemicflu.gov](http://www.pandemicflu.gov).

### Disability-Related Inquiries and Medical Examinations

Title I of the ADA protects applicants and employees from disability discrimination. Among other things, the ADA regulates when and how employers may require a medical examination or request disability-related information from applicants and employees, regardless of whether the individual has a disability. This requirement affects when and how employers may request health information from applicants and employees regarding H1N1 flu virus.

Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations is analyzed in three stages: pre-offer, post-offer, and employment.

- At the first stage (prior to an offer of employment), the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to a job.
- At the second stage (after an applicant is given a conditional job offer, but before s/he starts work), an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.
- At the third stage (after employment begins), an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity.
- The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical examination (including medical information from voluntary health or wellness programs), as well as any medical information voluntarily disclosed by an employee, as a confidential medical record. Employers may share such information only in limited circumstances with supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.

See *Disability-Related Inquiries & Medical Examinations of Employees Under the ADA* (2000) at [www.eeoc.gov/policy/docs/guidance-inquiries.html](http://www.eeoc.gov/policy/docs/guidance-inquiries.html). See also *Enforcement Guidance: Preemployment Disability-Related Questions & Medical Examinations* (1995) at [www.eeoc.gov/policy/docs/preemp.html](http://www.eeoc.gov/policy/docs/preemp.html).

### Frequently Asked Questions

#### Planning for Absenteeism

**In light of the ADA's requirements, how may employers ask employees about factors, including chronic medical conditions, that may cause them to miss work in the event of a pandemic?**

An employer may survey its workforce to gather personal information needed for pandemic preparation *if the employer asks broad questions that are not limited to disability-related inquiries*. An inquiry would not be disability-

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related if it identified non-medical reasons for absence during a pandemic (e.g., mandatory school closures or curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that weaken immunity). Below is a sample ADA-compliant survey that could be given to all employees before a pandemic.

### ADA-Compliant Pre-Pandemic Employee Survey

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 were closed, you would need to care for a child;
- If other services were unavailable, you would need to care for other dependents;
- If public transport 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 high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over age 65).

Answer: YES \_\_\_\_\_ NO \_\_\_\_\_

### May an employer require entering employees to have a medical test post-offer to determine their exposure to the influenza virus?

Yes, in limited circumstances. The ADA permits an employer to require entering employees to undergo a medical examination **after** making a conditional offer of employment but before the individual starts to work, if all entering employees in the same job category must undergo such an examination.

*Example:* An employer in the international shipping industry implements its pandemic influenza preparedness plan when the WHO and the CDC confirm that a new influenza virus, to which people are not immune, is infecting large numbers of people in multiple countries. Because the employer gives these medical tests post-offer to all entering employees in the same job categories, the examinations are ADA-compliant.

### Infection Control in the Workplace

#### During a pandemic, may an employer require its employees to adopt infection control practices?

Yes. Requiring infection control practices, such as regular hand washing, coughing and sneezing etiquette, and tissue usage and disposal, does not implicate the ADA.

#### May an employer require its employees to wear personal protective equipment (e.g., face masks, gloves or gowns) designed to reduce transmission of a pandemic virus?

Yes. An employer may require employees to wear personal protective equipment. However, where an employee with a disability needs a related reasonable accommodation under the ADA (e.g., non-latex gloves, or gowns designed for individuals who use wheelchairs), the employer should provide these absent undue hardship.

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### **May an employer encourage or require employees to network (i.e., work from an alternative location such as home) as an infection control strategy?**

Yes. An employer may encourage or require employees to telework as an infection-control strategy, based on timely information from public health authorities about pandemic conditions. Telework may also be a reasonable accommodation. Of course, employers must not single out employees either to telework or to continue reporting to the workplace on a basis prohibited by any of the EEO laws. See the EEOC Fact Sheet *Work at Home/Telework as a Reasonable Accommodation* at [www.eeoc.gov/facts/telework.html](http://www.eeoc.gov/facts/telework.html).

### **Employment Discrimination and the 2009 H1N1 Flu Virus**

Title VII of the Civil Rights Act prohibits employment discrimination on the basis of national origin – for example, discrimination against Mexicans. Title VII prohibits national origin discrimination against employees who work in the United States for covered employers, regardless of citizenship or work authorization. While federal law prohibits employers from employing individuals lacking work authorization, employers who nonetheless employ undocumented workers are prohibited from discriminating against those workers.

Contact your MFB representative if you have questions about pandemic flu preparation, employment discrimination or any other ADA compliance issue.

*Source: EEOC*

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