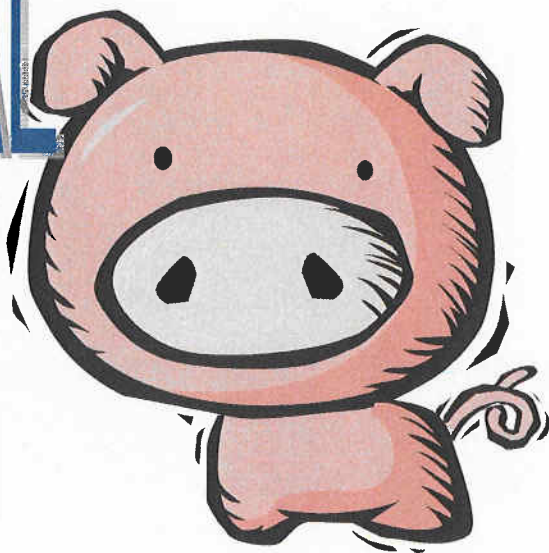


SWINE FLU SPECIAL

The H1N1 virus, more commonly known as swine flu, is spreading rapidly throughout the United Kingdom. Employers should therefore be prepared to deal with a flu outbreak to minimise any potential health risk to both their employees and the wider business community.

We have been inundated with enquiries from businesses and no doubt employers have plenty of questions about what safeguards can be implemented in order best to deal with an outbreak of swine flu in the work place. We have therefore put together some FAQ's that we hope you will find helpful.



Q How serious is swine flu?

A There have been 29 swine-flu related deaths in the UK at the time of writing this. In the majority of these there has been a pre-existing medical condition, and in the coming months the number of fatalities is expected to increase, though at present in the majority of cases the severity of the condition is mild. Health Secretary, Andy Burnham, has reported that the number of swine flu related cases are doubling every week. It is likely that by the end of August 2009 there will be over 100,000 people suffering with the condition. Should it escalate, the resulting impact on businesses and the wider economy could be considerable.

Q What can be done to minimise the impact of swine flu?

A As it stands, more than a third of Britain's businesses do not have a contingency plan in place to deal with an outbreak of swine flu in the workplace. It is this lack of planning that leaves employers vulnerable. By making a contingency plan in advance of an outbreak, an employer can minimise disruption to the business should swine flu hit. This should therefore be high on an employer's list of priorities.

When drawing up a contingency plan an employer should highlight the key business functions which allow the day-to-day running of the business to take place and calculate how many employees, in a worst case scenario, would be required to enable the business to continue unhindered. Employers should consider the following: -

- The possibility of employees working from home. This would minimise the chance of the virus spreading to more of the workforce.
- Putting in place an effective emergency communications plan to enable the employer to contact employees and other key individuals in an emergency.
- Prior consultation with suppliers, sub-contractors and distributors.

The contingency plan should be communicated to all employees and if need be, appropriate training should be given. If employees are kept well informed it is more likely that they will be amenable to any future changes that may need to be put into effect. Visit www.direct.gov.co.uk for further information on contingency plans.

Q What are the duties of an employer concerning the health & safety of staff?

A In employment law, an employer has a general duty to provide to the employee a safe place and system of work. Employers are thereby required to take precautionary steps to ensure that their employees are protected from reasonably foreseeable dangers. That said, only reasonably foreseeable dangers will give rise to a personal injury and/or employment claim, and therefore, employers will not be held responsible for an employee being injured by a truly unforeseen event. It may be however, that a Court may say that the risk of contracting swine flu is a reasonably foreseeable event and as such, an employer must take reasonable precautions to minimise any potential risk to the employee.

Employers also have a statutory duty to ensure the health, safety, and welfare of all employees at work under s.2 of the Health & Safety at Work Act 1974.

The important part of this act that needs to be taken into consideration in times such as this is s.2(2)(e) of the Act which states that this duty extends to the provision and maintenance of a working environment for employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

To meet the common law and statutory obligations during the pandemic, an employer may need to put into place specific health and safety policies aimed at preventing the spread of the illness amongst employees. The following are some of the measures that can be considered: -

- Making employees aware of the symptoms of the virus;
- More frequent cleaning to minimise germs in all common work places and providing anti-bacterial gel dispensers;
- Making temporary changes to working practises, such as avoiding face-to-face meetings;
- Identifying employees who are most at risk of contracting infection and giving consideration to how these risks can be minimised;
- Planning how to reintroduce those employees who have been off sick or caring for unwell dependants.



Q I am concerned that some people will use this outbreak as an excuse to take time off of work. Am I entitled to check on employees claiming to have been infected?

A When an employee claims to have been infected with swine flu the employer should treat the illness as they would with any other periods of absence due to sickness. An employee can self certificate for 7 days and after this they should provide a certificate from their GP. In some cases, when there is an issue over company sick pay, an employer can request that a certificate from the GP be provided before the seven day period, or if there is a reasonable belief that the employee is not actually ill. It has been widely reported that the Government are considering extending the self certification period from 7 days to 1, should the effects of the pandemic worsen.

Q Can employees be refused time off to care for dependants?

A Under s.57A Employment Rights Act 1996 employees have the right to take unpaid time off to care for a dependant in certain circumstances. In order for the right to apply, the amount of time taken off must be 'reasonable' and 'necessary' in order to carry out one of the tasks listed in s.57A(1), these tasks include:-

- providing assistance when a dependant falls ill;
- arranging for the provision of care for an ill dependant;
- taking action necessary in consequence of the death of a dependant;

A 'dependant' for the purposes of the Act includes a spouse, civil partner, child or parent of the employee, or a person who lives in the same household (who is not a tenant, employee, lodger or boarder). This right also applies where an employee needs to take time off due to the unexpected disruption or termination of arrangements for the care of a dependant. This would be relevant in situations where a nursery or school has to be closed.

If an employee has been unreasonably refused or denied this right then they may start Tribunal action. Furthermore, if the employee is dismissed the dismissal will be automatically unfair and can lead to compensation being awarded by the Tribunal.

Q Can you discipline or dismiss an employee who refuses to travel abroad?

A If an employee is dismissed for refusing to travel to another country they would have to prove to a Tribunal that they believe the request to be unreasonable and/or that their health and safety was at risk. For example, if you required an employee travel to Mexico without having first completed a risk assessment to assess the potential dangers, or you did not look into any available vaccinations, medical treatment or insurance cover, an employee may be justified in their refusal. It would be for a tribunal to assess whether the level of consideration of any potential risks were reasonable.

Q Are there special duties to protect vulnerable staff such as pregnant women or those with HIV or other existing medical conditions?

A The Management of Health & Safety at Work Regulations imposes a duty on employers to conduct a risk assessment if working arrangements could involve risk to an expectant mother or her unborn child. At present, there are no guidelines or directives for treating pregnant women or any other person differently to other members of staff, although this may change in the coming months if the pandemic worsens.

In the case of a disabled person, the Disability Discrimination Act 1995 provides that reasonable adjustments have to be made for those who fall within the definition of disabled within the Act. Someone contracting swine flu will not be included within the definition of 'disabled'. Employers must bear in mind that most of the swine flu related deaths have been those who have underlying medical problems.



Q What potential issues do we face if our staff have to work longer hours to cover for absent colleagues?

A Increased staff absenteeism owing to swine flu is likely to result in employees taking on extra work. It is important, therefore, that employers monitor this situation carefully so that they do not breach the Working Time Regulations 1999 SI 11998/1833. A worker is entitled to :-

- A daily rest of not less than 11 consecutive hours – Reg 10;
- An uninterrupted weekly rest period of not less than 24 hours – Reg 11;
- An uninterrupted rest break of not less than 20 minutes where the working day is more than 6 hours – Reg 12;
- Adequate rest breaks where the pattern of work is such as to put the worker's health and safety at risk;

Regulation 21 (e) provides that Regulations 10, 11 and 12 can be exempted where the worker's activities are affected by an occurrence due to unusual and unforeseeable circumstances beyond the control of the employer. Wherever possible employers should ensure that their employees get sufficient rest periods. Overburdened and exhausted employees are unlikely be able to maintain a high standard of work and are more likely to succumb to the virus if the are exhausted.



Q Can we discipline employees who refuse to come to work because they fear contracting the virus?

A There are likely to be a handful of employees who will not want to attend work for fear of contracting swine flu. S.100 (1)(D) Employment Rights Act 1996 states that an employee will be automatically unfairly dismissed if the reason for the dismissal was that the employee reasonably believes that he or she was in serious or imminent danger, and therefore left, proposed to leave or (while the danger persisted) refused to return to work. However, cases decided under this section have been in relation to dangers emanating from the work place itself, rather than threats associated with it.

If there is no basis for the employee to have a reasonable belief that there is serious or imminent danger, they are unlikely to be able to rely on this provision. An employer can therefore discipline and/or dismiss the employee so long as the ACAS guidelines are followed.

An employer may also face the situation where any employee suffering from flu like symptoms refuses to stay away from work. As the employee would be compromising the health and safety of other colleagues, disciplinary and/or dismissal action can be taken so long as action is reasonable and necessary.

If in doubt seek our advice. Please contact either Roger.cheves@sleebblackwell.co.uk or Krystyna.legge@sleebblackwell.co.uk