

Swine Flu – Health and Safety Obligations

On 11 June 2009, the World Health Organisation (WHO) raised the level of influenza pandemic alert for Influenza A (H1N1) (“Swine Flu”) from Phase 5 to Phase 6. Phase 6 is a pandemic, according to the WHO definition.

In New Zealand, several new cases of Swine Flu (not being travel related) have been identified in the last week and the first quarantining of employees by an employer has been witnessed. In addition, Medical Officers of Health have been provided with extra powers allowing them to order people to isolate themselves at home. If the situation worsens, these powers may be increased so that Health Officers could close businesses. What actions then, should employers take and what risks and obligations should they be aware of?

Health and Safety Obligations

Employers have a duty to take “all practicable steps” to provide and maintain a safe working environment. Employers should now be carrying out a workplace risk assessment to identify the level of risk in their workplace. This includes drawing up a protocol for avoiding, eliminating and, if necessary, managing the potential hazard of Swine Flu. Practical steps may include deeming the workplace a hazard and requiring employees to work from home or closing the workplace. In addition, under the Health and Safety in Employment Act 1992, employees have the right to refuse to perform work likely to give rise to serious harm. It is conceivable that employers may face a situation where employees refuse to attend work because they fear they will contract Swine Flu.

Who Foots the Bill?

The New Zealand Qualifications Authority (NZQA) was the first employer in New Zealand to quarantine employees because of Swine Flu concerns. The NZQA employee who had the virus was quarantined on sick leave. However, the other 28 employees were quarantined on special paid leave as they were not sick.

Employers can require employees who are sick (or who care for someone who is sick) to take sick leave. However, if an employer has to close the workplace to prevent further infection, is it obliged to pay employees who are not otherwise sick, as the NZQA did? Generally, the answer is yes. In the absence of any specific provision in employee’s employment agreements, there is no legislative provision that allows an employer to avoid paying employees in these circumstances. But, an employer may provide 14 days notice of the closedown of the workplace (or parts of it) and require employees to take their annual leave entitlements during this time under the Holidays Act 2003.

There is a possibility that the Government will take action under the Epidemic Preparedness Act 2006 to relieve employers of some of their obligations (ie amend the Holidays Act to allow an employer to require an employee to take annual leave without having to give the usual 14 days notice), but no such action has been advised so far.

What To Do?

Employers should:

- Review, update or implement a continuity plan. Include what happens before and after.
- Identify the essential or core work that has to be maintained.
- Review leave entitlements and policies.
- Consider the possibility of staff working from home and what that would involve. Do employees' employment agreements provide for them to work at a different site?
- Discuss with staff, relevant unions and even clients to decide on plans to deal with such a situation.

For more information, please contact Erin Davis.

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