

Swine Flu - advice for employers

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The swine flu pandemic has the potential to be highly disruptive to organisations in all sectors. Although numbers infected in England have risen in the last few months, the government expects a big surge of cases in the autumn and estimates that, at the pandemic's peak, 15 – 20% of the workforce could be absent from work.

There is now a large amount of information and advice available from health and governmental sources on how to prepare for and respond to the situation.

To help employers and HR professionals draw up their own list of priorities for addressing the pandemic, the Withers employment group has produced a brief summary of some of the legal challenges which pandemic swine flu may present for organisations, particularly in their capacity as employers. It also provides some brief guidance on how to address these issues and provides links to some of the most important sources of guidance that the government and NHS have produced.

Business continuity planning

The adverse effects on an organisation from a pandemic may come from a range of sources, particularly large numbers of simultaneous staff absences, absences amongst key personnel, reductions in customer demand and difficulties amongst suppliers in meeting normal service standards. Some of these will lie outside the control of the organisation but, in relation to those matters within their control, organisations need to make contingency plans, or tailor those already in place.

Practical steps might include:

- identifying a 'pandemic coordinator' and / or team responsible for response planning;
- identifying the critical activities undertaken by the business and those employees, suppliers etc who support them;
- considering how those activities might be maintained in the event of significant absences (e.g. recruiting an additional pool of workers, or training staff to perform different functions); and
- establishing an emergency communications plan.

The government has developed a [checklist](#) to assist organisations with their business continuity planning.

Communication

None of the steps an employer takes are likely to be effective if they are not adequately communicated. Once a contingency plan has been drawn up, an employer needs to communicate it clearly to the whole workforce, but in particular to the employees who are likely to be called upon to implement it.

Employers also need to communicate with staff about the health risks, summarising up-to-date government guidance (e.g. [Introductory Advice to Staff on Planning for Pandemic Influenza](#)) and providing the details of where to obtain further advice.

Employers should remind employees of the content of any internal policies that are likely to be relevant during a pandemic and in particular those on sickness absence, absences due to transport disruption and absences for the purpose of caring for dependents.

Whilst it is important not to cause alarm, employees are more likely to pay attention to information of this nature when they know something is a threat.

Employers should also consider who in the organisation should communicate this information, in order to ensure that it is listened to and treated with sufficient seriousness. Employees may be more likely to take seriously communications from senior managers or those regarded as spokespersons for the organisation. This will be particularly important if there is ordinarily a relatively relaxed attitude to health and safety in the workplace.

Health and safety

Employers need to take certain practical health and safety measures to try to minimise the level staff absences. These steps will also be needed to reduce the risk that employees try to bring claims for personal injury, on the basis that an illness was caused or exacerbated by the employer not meeting minimum standards for health and safety at work or by its breaching its duty of care towards its employees.

Hence employers should:

- ensure that workplace hygiene standards are as high as possible (e.g. encouraging staff to wash their hands regularly and to carry tissues; installing antiseptic hand-gel dispensers in bathrooms and kitchen areas; introducing more regular and thorough cleaning routines);
- carry out risk assessments to assess any factors that make the employer particularly vulnerable (e.g. high level of contact between people). A model for risk assessment can be found in the NHS 'Pandemic Flu: Guidance for Businesses' booklet. Employers may decide to introduce alternative ways of working (e.g. home working) to reduce the risk of cross-infection. Some larger organisations have purchased Tamiflu, face masks and gloves for this purpose;
- ask employees to stay at home if they have flu-like symptoms and make it clear that infected employees should not attend work until they are fully recovered. Employers with a culture of staff attending work when they are ill will need to encourage their workforce to change their approach. This approach may need to be specifically endorsed by senior management if it is to be effective, particularly if it is a departure from normal workplace culture;
- consider imposing quarantine periods during which employees who have had flu may not return, as well as imposing quarantine periods on those who have come into close contact with those who have been infected; and
- remind employees that everyone has a responsibility under the health and safety policy both to themselves and to their colleagues and that they are therefore expected to comply with the rules and guidelines issued by the employer. An employer will need to judge whether it needs to reinforce this message with the threat of disciplinary proceedings. This will be appropriate in some workplaces but in others may cause employees to "switch off" and hence undermine the importance of the message.

Pregnant and vulnerable employees

At the time of writing, the government has indicated that pregnant women should "carry on life as normal" but, if the level of cases rises significantly in the autumn, it may advise pregnant women and those with weakened immune systems to stay away from work for several weeks. Employers should give serious consideration to requests from such staff to work from home, or to commute outside rush hour to avoid crowds.

Employers have an ongoing obligation to carry out risk assessments for pregnant employees and should keep these under review. A sudden surge in the number of flu cases in the workplace would be an identifiable risk to which employer would be expected to respond, taking into account government and medical guidance available at the time.

Absenteeism and malingerers

It is likely that the pandemic will cause fear amongst workers and some people will choose to stay away from work, seeing this as the safest option. Whilst this will inevitably reduce productivity, employers may risk employees resigning (and potentially claiming constructive dismissal) if they are forced to attend work in these circumstances.

An employer would have various options in dealing with an employee who is genuinely afraid to attend work because of the risk of infection, but the precise approach the employer takes will be determined by the amount of flexibility towards employees that is compatible with keeping the organisation operational. Options include:

- enabling employees to work from home (e.g. providing laptops) although employers should not overlook the need to carry out risk assessments if an employee is home-based;
- showing flexibility about start and finishing times to enable employees to travel outside peak commuter periods;
- rearranging the working environment so that employees have less contact with each other;
- offering unpaid leave to those who are not sick but would prefer to remain at home. This is likely to be a better option than disciplinary action which may prove to be counter-productive and is likely to be very difficult to administer, particularly if there are a number of such cases.

Unfortunately, it is also likely that some employees will use swine flu as an opportunity to mangle and seek paid sick leave without proper cause. The government is currently discussing the option of a temporary extension to the period of self-certification from 7 to 14 days. If this happens it may well tempt some employees to take time off unnecessarily. Employers may have provisions in their contracts that enable them to send an employee for an independent medical assessment, which will be helpful in cases where there is doubt about an employee's true condition.

In the usual way, an employer with evidence that an absent employee is, in fact, perfectly healthy would have grounds to take disciplinary action – although such cases will be rare. Nevertheless, managers should ensure that employees understand that disciplinary action will be taken if they believe a member of staff is mangleing. In a genuine situation of pandemic employers may find that their normal processes for handling difficult situations come under strain, for example because of reduced resources at management level or in the HR department. Employers should think carefully before cutting corners on proper procedures nevertheless and should take external advice before taking any steps if it seems that a particular situation could become contentious.

Children and other dependants

In addition to their own illnesses, employees may be affected by the illness of children or other dependants, nursery or school closures and sickness absence of normal carers. All these eventualities may present employers with an additional pressure on staff attendance. Employers may need to be more generous about giving time off to employees caring for dependants than they otherwise would be. Statutory rights are limited and are likely to be insufficient in the context of a swine flu pandemic, since alternative carers may be difficult to find. Nevertheless employers will need to put some limits on what they consider to be acceptable periods of absence, bearing in mind health advice and the possibility that some employees may have to deal with unexpected complications or emergencies.

A balance will need to be struck between setting reasonable expectations and relaxing these in cases involving genuine emergency or difficulty.

Employers also need to try to be fair and consistent amongst employees to avoid grievances and allegations of breach of trust and confidence or discrimination.

Employers will also need to consider whether any extensions to permitted absence will be paid or unpaid.

If policies are to be temporarily relaxed or amended, employers need to communicate this fact clearly along with a statement that normal policies will be reinstated once the pandemic is over.

Changes to terms and conditions

In addition to entailing a need to review policies, the pandemic could mean employers need to impose changes to some contractual terms and conditions, at least on a temporary basis. This may be necessary where:

- employees who have not already done so might be asked to opt out of the Working Time Regulations to cover for sick colleagues;
- employees might be forced to stay away from work against their will (e.g. in quarantine);
- employees might be asked to take on duties outside their normal roles or to undertake training to enable them to perform new tasks;
- employees may have to work to new shift patterns or shortened rest breaks or may have to postpone holidays; or
- employers may take the view that their absence management procedures are not robust enough and need to be tightened.

These measures could lead to breach of contract claims if not handled appropriately, but are far less likely to do so if employers bear in mind the following points:

- good communication will be critical to obtaining agreement to a temporary change of terms and conditions;
- if there is an established employee consultation body in place such as a works council or a recognised trade union, their remit is likely to include discussion of matters such as contingency planning and emergency measures. Any proposals should be raised with them as early as possible as it may become impractical to consult with them basis during an actual crisis and their involvement is likely to lead to higher level of employee co-operation;
- employees should be told the reason for any proposed change and the likely duration at the earliest opportunity, to enable them to plan. If possible, employers should seek voluntary co-operation. If the issue is covering for colleagues, those with dependants or other responsibilities outside of work may have less flexibility to provide cover than those without. Employers may need to consider how to circumvent any feelings of resentment this may cause, perhaps by offering time off in lieu at a later stage once any crisis has passed or additional payment if that is financially feasible for the organisation;
- forcing people to accept changes, by threatening disciplinary measures or dismissing people and rehiring them on new terms, should be a very last resort, but may be needed if the organisation is in real difficulty.

Travel

Employees' normal travel arrangements may be disrupted during a pandemic if public transport is not running to normal full timetables. Employers will need to establish a policy for dealing with employees' difficulties and will need strike a balance between tolerating unavoidable disruption and stating clearly an expectation that employees will not take advantage of the situation. Again communication will be vital.

Businesses with international interests who regularly send their staff overseas should consider:

- whether on a temporary basis they should curtail or cease business travel to reduce risks (for example by using video conference technology as an alternative to business travel);
- whether there are particular countries or locations that employees should avoid for health reasons (taking into account current government advice); and
- whether any special measures are needed to protect those who continue to travel (e.g. ensuring suitable medical cover if local medical cover might be unavailable or difficult to obtain); and
- whether their travel insurance arrangements contain specific obligations such as a requirement to comply with current government guidance on overseas travel during a pandemic. Failure to comply with these stipulations would be likely to invalidate the cover under the policy.

Some employers have organised temporary accommodation for key workers near the workplace in anticipation of disruption to local travel to / from work.

FSA-regulated firms

Firms regulated by the FSA are required to take reasonable care to organise and control their affairs responsibly and effectively, with adequate risk management systems. The FSA published a statement on 1 May 2009 urging firms to assess their business continuity plans owing to swine flu, and to consider the steps they may need to take to address this. It is also contacting "high impact" firms (e.g. infrastructure providers) to establish whether swine flu is affecting any aspects of their business.

Regulated firms should be reviewing and testing the effectiveness of their business continuity plans, and keeping appropriate records so they are able to demonstrate this to the FSA. The FSA has directed such firms to a report on the lessons learned from a 2006 business continuity exercise it carried out, based on a pandemic scenario. Firms should also consider the additional information on the [UK Financial Sector Continuity website](#).

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