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Swine flu and the legal issues for employers

Introduction

In the last week the World Health Organisation raised its pandemic alert a level to phase 5. This means that there has been human to human spread of the swine flu virus into at least two countries in one World Health Organisation region.

The Government's response to this news and media interest in the story has created a great deal of anxiety. Some of the headlines have been particularly alarmist, with one solicitor suggesting that an employer could be liable if an employee died having contracted swine flu from another member of staff due to the failure by the employer to adequately protect their employees. This type of story fans the flames of public panic and has a negative impact. Naturally there are legal issues arising out of the pandemic and indeed there are steps employers should be taking to protect their employees, and their business, from the risks posed by a large scale infection at work.

In this summary, we will deal with the key legal points and will advise how employers should be responding to the situation.

Health & safety at work act

The issues raised by the pandemic should be considered in the context of the employer's normal Health & Safety at Work Act policy statement. This policy will recognise that employers have a general duty to implement good working practices to protect staff from harm. Those given responsibility within the policy should consider what steps should be taken to respond to the situation. Further, the management of Health & Safety at Work Act Regulations 1999 (the Regulations) sets out additional statutory obligations which are particularly relevant to the risks of this flu outbreak. The Regulations require employers to consider the health and safety issues raised by the pandemic ie "to carry out an assessment of the risk to employee's health; have in place a clear emergency procedures policy should there be an event that results in serious and imminent danger to persons at work; communicate relevant information about emergency procedures to all employees; and provide appropriate training for employees to ensure that emergency procedures have been understood". These steps are of particular relevance to those employees who have a condition that places them in a high risk category, e.g. pregnant women or those with chronic lung disease.

There is a great deal of advice being given by the government about the steps that can be taken to help contain the spread of the virus. This advice can easily be found in a number of documents on the Internet, e.g. the Department of Health leaflet, entitled "Important information about swine Flu", the Health & Safety Executive has given guidance on hygiene and risk control for work based cleaning staff, and the Department of Health in conjunction with the Health Protection Agency, has produced guidance "Pandemic flu guidance for businesses, risk assessment of the

occupational setting: Department of Health – publication”. All of these documents give guidance that should be taken into account when framing an employer’s response to the pandemic.

It is also important to remind employees of their own obligations under the Health & Safety at Work Act. All employees have a duty to take reasonable care to ensure that they do not endanger themselves or anyone who may be affected by their actions at work. An employer should publish information that raises employees’ awareness of the dangers and encourage employees to comply with good health standards. But what if employees do not follow the guidance, can they be disciplined? It may be difficult to imagine taking action against any employee who flaunts the hygiene regulations published by the employer but disciplinary action could be taken as a last resort in the event of an employee failing to conduct themselves in an appropriate manner and as a result cause offence or concern to others.

Data protection

Employers can only react and protect employees within the business if they obtain information about who is vulnerable and who is infected. The collection of this information will be critical to enable the employer to respond appropriately to risks posed and is one of the first steps that should be taken when preparing a risk assessment. However, it is important to remember that any information collected in order to carry out an assessment is confidential and should be treated as such. Any information about an employee’s health is also sensitive personal data and therefore any attempt to process that information must be in accordance with the Data Protection Act. It may well be that an employer’s data protection policy makes provision for this but this point should be checked and the policy should be amended if you find that the policy does not allow the processing of basic information about employees. However, it is always possible to ask an employee to give their express consent to the disclosure of such information.

Policies and procedures

There will be a need to view some of the basic employment policies and procedures in the light of the Government’s statements about how it intends to control the pandemic. Employees are asked to self-certify sickness for a period of absence. Employees who have the symptoms are being told to stay away from work for at least 3 days after they recover from swine flu, so most employees who contract the virus will be off work for at least 5 days. Some absence policies will have a strict policy guideline that requires certification from a medical adviser for such a period. Clearly such a requirement is no longer appropriate where an employee has swine flu and is unable to go to his doctor. We advise employers to look at their absence policies to ensure that they can operate within the current Government guidance and, if not, make changes to the policies in cases of swine flu.

Given the nature of the pandemic it may be that employers will also wish to consider their attitude toward sick pay in the case of absence due to swine flu. If employees are concerned about losing pay then they will often come to work when they are ill. Poor performance from those at work who are sick is increasingly an issue for employers and is recognised as having a real impact on businesses but coming to work and infecting a wider group of employees is of much greater concern.

Another feature of the pandemic may be that many employees will have to stay at home to look after dependent relatives who are ill or to look after children who are either unwell or who may be well but excluded from school because of an outbreak of swine flu. Generally, dependent leave policies are limited in their scope and operation and are unlikely to be fit for this purpose. Accordingly it may be appropriate to review these policies in the light of current recommendations from the Government.

If employees are unable to get to work due to illness or transport problems that may arise due to the pandemic then more employees may be asked to work from home. If you have a flexible work policy that provides for home working this should be reviewed. Employers who do not have such a policy in place will need to give specific thought to the health and safety of their employees when working at home.

More flexibility will be expected of employees as employers seek to react to any problems. Most contracts of employment will be sufficiently flexible to allow employers to deal with any change in working practices that occur as a result of the outbreak of swine flu. However, it would be wise for the employer to review the policy to establish if there are any particular points that may be relevant to the current situation and, if necessary, changes can be made.

Of greater concern, is how the business responds if healthy employees decide not to travel or do not come to work because of fears of becoming infected on public transport or in the workplace. Given the nature of the risks that have been identified we do not believe that an employee, even one in a high risk category, would be justified in refusing to travel to work or attend work in the current circumstances. Clearly the situation needs to be kept under review.

An employee's reaction to their perceived or real fears will be affected in part by the employer's response to the pandemic. Employers that take no steps to monitor or control the situation may find it difficult to allay their employee's genuine fears. In some cases, employers and employees may find themselves in dispute and the employer may wish to take disciplinary action against an employee who refuses to attend work due to a fear of becoming infected that the employer views as an unreasonable fear. Employers will face a dilemma about whether to implement disciplinary action. However, it will be difficult to take disciplinary action in the absence of a positive response by the employer to the problems presented by the pandemic. We suggest that employers consider what if any action will be taken in the event that such events arise.

Employers may want to take action to exclude an employee from work if they are ill and insist on attending work. Generally, employers have a right to suspend employees on full pay but in certain cases such action can be challenged. If the action to suspend is taken in response to a real risk to the health of other employees an employee is unlikely to be able to challenge such a decision by claiming constructive dismissal.

Conclusion

The pandemic will give rise to challenges for HR but the key issue will be how to adapt working practices to ensure the underlying business is not unduly affected by staff absences. A positive communications policy will make a major contribution to employee engagement. Indeed, we would suggest that the key to the management of the process is good communication with

employees and also to ensure that any business continuity plans are reviewed in the light of the current situation.

Checklist

Action	Completed
<ul style="list-style-type: none"> • Form Action Committee within framework of H&S Policy / and/or continuity plan 	
<ul style="list-style-type: none"> • Delegate responsibility to named person who will lead the business response and will ensure you monitor and report on public information concerning the pandemic 	
<ul style="list-style-type: none"> • Contact your occupational health advisors to secure their advice and recommendations for action in response to the pandemic 	
<ul style="list-style-type: none"> • Consider whether the businesses wishes to secure vaccine for distribution to employees who become infected 	
<ul style="list-style-type: none"> • Prepare a risk assessment plan to respond to the particular health and safety concerns posed by the pandemic 	
<ul style="list-style-type: none"> • Consider what steps need to be taken to secure information needed to identify those employees who are at risk and how the business will deal with individuals who report that they are infected 	
<ul style="list-style-type: none"> • Review Data Protection rules and ensure adequate safeguards are in place to protect the confidentiality of information disclosed to the business 	
<ul style="list-style-type: none"> • Implement a regular communication plan to keep employees apprised of what steps you are taking to respond to the pandemic and, in particular, to protect them from infection in the workplace 	
<ul style="list-style-type: none"> • Consult with employees about steps being taken and what other issues or concerns they may have and make them aware of their own obligations to safeguard the health of other employees 	
<ul style="list-style-type: none"> • Review hygiene standards and publish guidance as to how best to limit the risk of infection in line with Government advice 	
<ul style="list-style-type: none"> • Review sickness and absence policy and where necessary amend to deal with issues such as: 	
<ul style="list-style-type: none"> <ul style="list-style-type: none"> ○ Certification 	
<ul style="list-style-type: none"> <ul style="list-style-type: none"> ○ Pay 	
<ul style="list-style-type: none"> <ul style="list-style-type: none"> ○ False certification 	
<ul style="list-style-type: none"> <ul style="list-style-type: none"> ○ Require employees to notify of swine flu symptoms 	

○ Adopt the right to exclude employees from work where their health gives rise to concern	
• Review flexible or home working arrangements and ensure adequate safeguards are in place to protect the safety of employees working at home	
• Consult with employees about any changes to be made to working conditions to secure their buy in or consent to the changes	
• Review dependent leave policies and ensure the business understands their scope and how the rules might be applied to deal with issues raised by pandemic	
• Review travel policies and raise awareness of the risks of travel overseas and in particular to high risk countries or areas	
• Ensure that all steps taken are considered in light of the business continuity plan	
• Where the business may be badly affected by absences, in particular work areas, review what steps need to be taken to find alternative staff and review terms of appointment	

Contact

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