

Spots, Rashes, and Why Do You Think You Can Come in To Work?

Jo Ellen Whitney

Over the last several years periodic outbreaks of diseases we thought were relegated to novels and history books have resurfaced. We have seen issues with mumps, whooping cough, chicken pox and now the measles.

By the end of May 2019, the CDC reported measles outbreaks in 26 states. It is the largest number of cases reported since 1994. Measles is a highly contagious disease which presents with high fevers, rash and can have complications including permanent hearing loss, neurologic conditions, and pregnancy problems. It is particularly dangerous for young children, those who are immunocompromised, and pregnant women.

Can I ask if my employees have been vaccinated?

In healthcare and child care operations employees are asked if they have been vaccinated for specific diseases such as measles and hepatitis. They may, in some instances, also be titered (blood test) to see if they have current immunity.

Asking is potentially more difficult in an occupation that has no clear-cut reason to inquire. This inquiry could implicate issues under the ADA and be termed an inappropriate health assessment. However, if you are in the midst of a local outbreak and public health is concerned some limited discussion may be appropriate. This is a fact-based determination.

Can I require employees to tell me if they have been exposed?

Yes. An employee may show no symptoms but know he/she has been exposed. This could include having a family member who has been diagnosed or a notification from the Department of Public Health. You can have a reporting policy for various communicable exposures (mumps, measles, chicken pox, TB) in order to provide a safe work environment.

Measles exposures typically develop within 10-12 days, with the rash developing 2-3 days after fever begins. Typically, persons are contagious at least 4 days before developing any rash and for 4 days after the rash has resolved. You can't "see" when someone is contagious.

What happens if they show up to work and have been exposed?

Anyone who shows up to work sick (the general standards are fever of 101 or greater, active vomiting, or diarrhea) can be sent home. These are the basic standards used by the CDC and every child daycare. Many employers already have a policy that says if you show up with a fever we are sending you home. That counts for colds, flu and the measles. This time is sick leave or PTO and potentially FMLA if absences exceed three days. If an employee is not ill, but has been exposed, you may send him/her home.

What about wait and see time after someone has been exposed, is that FMLA?

Under the FMLA, you cannot require an employee to take more FMLA time than he/she needs for the illness or to provide care for another qualified individual. The time spent waiting to see if someone is ill is more of a business and public health issue. You can require that the employee take PTO or other forms of available leave. For exempt employees, if they have already exhausted all PTO available, you should not deduct the time from wages since this would be an absence not attributable to the employee. It is an absence based on employer discretion. PTO deduction - yes. Deduction from wages - No, for exempts.

Hourly employees do not have to be paid. Disability insurance is not likely to cover any waiting period. Once an exempt employee is on FMLA if there is paid leave available you may deduct from wages under the FMLA rules.

Once the employee has been diagnosed with the measles then FMLA coverage would be applicable.

Will an employee be able to pull from a PTO donation bank?

In any waiting period to see if someone is ill, it is unlikely that an employee would qualify under a PTO donation bank/plan due to IRS considerations

In general, in order to avoid adverse tax consequences, PTO donation should be part of a neutral plan which is equally available to all qualifying applicants. Qualifying applicants generally need to have an FMLA qualifying event. They do not have to be FMLA eligible (such as, they've worked for the company less than a year) but the event for which they need the PTO must otherwise qualify under the FMLA.

Some plans may also allow plan use when there is a presidentially declared emergency, locally declared emergencies are not sufficient. These restrictions are due to the IRS rules relating to PTO donation.

If the person is ill, or when in the waiting period otherwise qualifies for FMLA, since he/she is providing care for a child or spouse, then he/she could receive PTO donations.

Can I require my employees to be vaccinated?

Employers usually face this issue during flu season. Of paramount concern are the safety of the employee and those they come into contact with as a failure to vaccinate can create significant issues. In December 2018, the 8th Circuit which includes Iowa, decided in *Janice Hustvet vs. Allina Health System*, that the employer legitimately terminated Ms. Hustvet.

After a facility merger, Ms. Hustvet became an employee of Allina. As part of that process, she was required to show she was immune to or vaccinated for certain diseases. She was tested and had no immunity for Rubella (German Measles). She refused vaccination. Her role required her to work with persons who had compromised immune systems. Ms. Hustvet was eventually terminated from her job due to these issues.

She alleged the health evaluation regarding measles violated the ADA/ADAAA. The Court disagreed and indicated in the healthcare setting this was “job related and consistent with business necessity” relating directly to “essential” job functions. This was further supported by the CDC and Joint Commission (hospital accreditation agency) standards regarding vaccination of healthcare workers.

Hustvet also alleged failure to accommodate. During flu season you may have noticed certain healthcare workers continually “masked.” This is the standard accommodation for someone who has not had a flu vaccine. In this instance, the Court held that it was not clear that her “chemical sensitivities” were in fact a disability or even covered by the ADA/ADAAA and that she had not requested specific accommodation. Therefore, this claim also failed.

Note that the ADA/ADAAA claim was front and center in this case. Because this was a direct healthcare job the exam was “no broader or more intrusive than necessary.” What is and is not “too intrusive” is a case-by-case analysis and would not necessarily apply to other industries.

Vaccination depends on your industry and your specific risk factors. You will always need to assess religious exemptions and any documented need for medical accommodations. You need to show a clear business necessity for any adverse determination you may make.

What if there is a travel ban and my employee travels for the job?

There have been reports that state and local governments have considered imposing travel bans. *USA Today* reported on May 28, 2019, that eight people from five states were told that the federal government could put them on the CDC’s DO NOT BOARD list for flying.

Travel bans for passengers exhibiting certain symptoms, such as fever, have been implemented by various countries in the past, such as China, during the Bird Flu outbreaks and other countries where SARS was present. The basic rule: don’t send a sick employee to travel, whether it’s the stomach flu or measles.

Bottom Line:

- ❖ Know your industry - Do you have an industry where testing should be done, or vaccination mandated? What is your safety risk?
- ❖ Monitor local public health guidelines - Your local or state public health may provide guidelines or notices on local issues, including travel bans.
- ❖ Have a policy about communicable disease - If you are sick or have certain exposures, stay home. Also, model compliance in your management team. The rules apply to everyone.
- ❖ Know how payroll will work - Have your PTO, Sick leave, FMLA and other policies in place. Train on when they will apply and how to discuss this with employees.

- ❖ Use common sense - When you're contagious stay home. If you're the employer and want them to stay home, don't fire them for doing so.
- ❖ Assess accommodation and modification - During a waiting period to see if someone is ill this could, depending on the job, mean work from home. It could also mean modification of attendance points systems as you want to incentivize good behavior which includes staying home when you could infect others. It may also mean limiting certain job functions.

HR Laws

February 3, 2020

Coronavirus fears at work: What employers need to know

by Tammy Binford

News reports of deaths and illnesses from the rapidly spreading coronavirus get scarier every day. Millions of people are being quarantined. Foreign companies and governments are evacuating their people from hard-hit areas of China where the virus got its start. And even employees who don't travel for work are getting anxious about traveling coworkers who may have been exposed.

With the virus continuing to spread, employers need to plan how to respond and comply with the law's worker safety requirements. The U.S. Department of Labor (DOL) has posted [information](#) on the 2019 Novel Coronavirus (2019-nCoV), giving background and reminding employers of worker protection standards from the Occupational Safety and Health Administration (OSHA) and the need to consult [guidance](#) from the Centers for Disease Control and Prevention (CDC).

What employers can do

One way you can protect employees is to send sick or exposed workers home, [Jo Ellen Whitney](#), an attorney with the [Davis Brown Law Firm](#) in Des Moines, Iowa, says. If an employer knows an employee may have been exposed, the employer is within its rights to send the employee home even if she doesn't feel ill.

"We do that for the flu and other types of exposures as well," Whitney says. "Common indicators are fevers or vomiting, as to when someone should be sent home."

[Jodi R. Bohr](#), an attorney with [Tiffany & Bosco, P.A.](#), in Phoenix, Arizona, also says sending employees home can be advisable, but laws such as the Americans with Disabilities Act (ADA) must be kept in mind.

"Employers must balance their obligations to provide a safe workplace as required by the Occupational Safety and Health Act with their obligation to avoid violating privacy and discrimination laws," Bohr says. "Some situations, such as the H1N1 pandemic of 2009, permit a higher level of inquiry into an employee's illness without running afoul of the ADA, but there is no indication that the coronavirus has reached that level."

What if someone does contract the illness from a coworker? Can you be held liable? Whitney says that's an open question. "I think it is unlikely, but pandemic issues have not been well-litigated."

Regardless of the potential for legal liability, sending sick employees home is a good idea. "I think not sending them home is a huge internal PR risk—especially if someone gets sick," Whitney says. "It can also be difficult to address issues of workers who might be immunocompromised and therefore more likely to fall ill from exposures if you don't send potential disease victims home."

You also need to pay close attention to warnings from government health officials, Whitney says. Having knowledge of the danger puts greater responsibility on the employer, and that's why many are pulling their people out of China.

You also can require employees to report when they have been exposed to a significant viral illness. "This is much more common in healthcare or childcare settings, where it may be mandated by state law," Whitney says. "It is less common in other settings but has happened for issues such as measles and mumps."

[Amelia J. Holstrom](#), an attorney with [Skoler, Abbott & Presser, P.C.](#), in Springfield, Massachusetts, says employers should strongly consider having an employee who has recently returned from China stay home for a period of time after returning since experts think someone can spread the virus before showing symptoms and the incubation period for the virus is two weeks or more.

“Employers who are concerned that doing so may violate an employee’s rights can pay the employee during the time out of the office,” Holstrom says. At this point, she doesn’t recommend having employees stay home if they have been to places other than China since “doing so for employees who return from travel anywhere might create legal risk.” She also says employees should not be sent home for simply having cold-like symptoms.

Bohr also says an employer may want to encourage an employee who has just returned from Chi-na to take time off or work from home for a certain period of time. “It’s better to encourage, not require, an individual to take time off,” she says. “Employers should avoid singling out an individual; rather, encourage a consistent application across the board.”

FMLA, workers’ comp implications

How the federal Family and Medical Leave Act (FMLA) may be implicated is an “interesting question,” Whitney says. “In general, the FMLA applies only if you, your spouse, your parent, or your child is ill and needs care,” she says. “So, if you had been exposed and had no symptoms and felt fine and you were not treating with a doctor, the FMLA does not apply.”

Holstrom reminds employers that FMLA regulations “make it clear that generally, viruses like the flu don’t rise to the level of a serious health condition unless there is a complication.” Whether the FMLA applies depends on each specific situation.

Workers’ compensation is another area to consider, Whitney says. In general, getting sick with something like the flu while on business travel isn’t covered by workers’ comp since that could happen anywhere, not just on business travel. “That is true even in health care if you work as a floor nurse and get sick, but I have not seen any cases on how this same issue would be addressed in the event of an employee being sent into a target zone when caring for the ill is not his or her job,” she says. “Most people try to stay ahead of that issue by pulling their people out.”

Tammy Binford writes and edits news alerts and newsletter articles on labor and employment law topics for BLR web and print publications.

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