

## **BOLI ANSWERS COMMON QUESTIONS ABOUT EMPLOYMENT ISSUES AND SWINE FLU**

**Q: If an employee is returning from a swine flu affected area, may an employer prohibit the employee from returning to work until after the swine flu incubation period has passed?**

A: Yes, but employers need to treat all employees in the same circumstances equally and apply a consistent policy for all employees in regard to employees returning to work from an affected area as identified by the U.S. Centers for Disease Control (“CDC”). Title VII of the Civil Rights Act of 1964 and Oregon law prohibit employment discrimination on the basis of national origin; for example, discrimination against Mexicans or those associating with them.

Employers should access information provided by the CDC to identify geographic areas of concern, incubation periods and other recommended health precautions for determining an appropriate policy for their workplace. Information may also be found at <http://www.pandemicflu.gov/>

**Q: If an employee is told not to report to work until after the incubation period passes, is the employer required to compensate the employee for any of the time they were scheduled to work?**

A: If the employee is an hourly employee, and 18 years of age or older, the employer is not required to compensate for time the employee was scheduled but did not perform any work. Employers are, however, required to treat all hourly employees alike in regard to payment for hours scheduled but not worked. For minors under 18 years of age, there is an "adequate work" rule (OAR 839-021-0087(5)) that requires employers to pay a minor “reasonable compensation” who was required to report to work under certain circumstances if adequate work is not provided. (Contact BOLI for more information.)

Salaried employees, exempt from minimum wage and overtime, must be paid for an entire work week, if they work any portion of their regular workweek (even if they do not work for some portion of the week). In general, an employee paid on a salary basis receives a predetermined amount (salary) for the pay period, and that amount is not subject to reduction in any week in which he/she performs any work, regardless of the number of days or hours worked. Unless no work is performed in an entire week, a salaried employee must be paid their entire salary. An employer may, however, require a salaried employee to use any accrued sick or vacation leave for time off in the week. Again, an employer is required to treat all salaried employees equally.

**Q: May an employer send an employee who appears to exhibit flu-like symptoms home?**

A: Generally yes, but state and federal disability law both address health-related inquiries an employer may and may not ask of an employee. Under state disability law and the ADA, an employer may only make health-related inquiries and require medical examinations of current employees when such inquiries are “job related and consistent with a business necessity.”

If an employer determines there is a business necessity and that potentially ill employees in the same job class must be sent home, all employees with flu-like symptoms must be treated accordingly. Employers must ensure that all employees are treated equally.

Additional information regarding health-related inquiries and medical certification can be found on the EEOC’s website (see [Disability Related Inquiries and Medical Certification](#)).

**Q: If an employee has exhibited or experienced flu-type symptoms and goes home sick (either voluntarily or not), may an employer require the employee to obtain a release from a medical provider before allowing the employee back in the workplace?**

A: Yes, but the law provides that the employer is responsible for all uninsured expenses related to required medical certifications.

**Q: Is swine flu considered a “serious health condition” under OFLA/FMLA? May employees use OFLA/FMLA leave for swine flu illness?**

A: Flu should be treated as any other illness. Swine flu can be a qualifying event if it meets the serious health condition criteria (for example, an absence due to illness for more than three days, illness that involves two or more treatments by a medical provider, or in-patient hospitalization).

**Q: Several K-12 schools have been closed due to health concerns. Is an employee entitled to take OFLA leave in the event a school is closed for health concerns?**

A: Unless the employee’s child suffers from an illness, injury or condition that requires home care, no protected leave is provided under OFLA. OFLA provides protected leave for parents of sick children, but no protected leave is provided if the child is not ill or does not have a condition that requires home care, yet the school has been closed for a health risk.

For information on this and other employment related topics, contact the Technical Assistance for Employers assistance line at 971-673-0824 or visit our website at [www.oregon.gov/BOLI/TA](http://www.oregon.gov/BOLI/TA)