



SWINE FLU PANDEMIC

A current hot topic is the Swine Flu Pandemic. It seems possible that we've not seen it at its worst yet so we decided to focus a large proportion on this subject. Rumour has it that this could affect as much as 35% of your workforce as we head into the winter months. We have put together some questions and answers, which should help you in these difficult times.

CAN AN EMPLOYER INSIST ON ITS EMPLOYEES HAVING A FLU VACCINATION?

An employer has no right to enforce a policy such as this without the signed consent of its employees. This applies even if it is a contractual term. If an employer forces an employee, they could find themselves with a charge of criminal assault. Equally, there is no obligation on an employer to offer a vaccination against Swine Flu at all.

SHOULD EMPLOYEES WHO ARE ABSENT DUE TO SWINE FLU BE REQUIRED TO GET CERTIFICATION FROM THEIR GP TO CONFIRM THAT THEY ARE ILL?

Employers should abide by their particular policy but in the absence of one, employees are able to self-certify during the first 7 days. After this, employees are required to provide a Doctors Certificate. If attendance at a GP surgery is restricted, employers may need to review their policy. This may include allowing a longer self-certification period. The Government is reviewing plans to allow self-certification for up to 2 weeks, for Statutory Sick Pay purposes, but this would be a temporary measure and has not yet been implemented.

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HUMAN RESOURCES - SUPPORTING YOUR BUSINESS

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SWINE FLU PANDEMIC ...cont

CAN AN EMPLOYER INSIST THAT SOMEONE WITH SWINE FLU SYMPTOMS COMES TO WORK?

Any employer insisting on this could be in breach of its common law and statutory duties to ensure the Health and Safety of its employees and to provide a safe place of work. This kind of action could also breach the implied term of trust and confidence between the parties, as the employer could jeopardize the health and safety of the employee in question, and of course of its entire workforce given that Swine Flu is highly contagious.

Advice from the Department of Health for employees feeling that they have Swine Flu symptoms is to stop work and report to their manager or occupational health department. If the symptoms are consistent with Swine Flu, the employee should be sent home straight away and told not to return until the symptoms have gone. If an employee develops symptoms whilst away from work, they should be informed not to return to work at all until they have recovered. Employees should also be advised to contact the National Pandemic Flu Service helpline for advice and an assessment of symptoms.

IF AN EMPLOYEE HAS EXHAUSTED HIS OR HER ENTITLEMENT TO CONTRACTUAL SICK PAY, IS THE EMPLOYEE ENTITLED TO BE PAID IF THE ABSENCE IS DUE TO AN INSTRUCTION BY THE EMPLOYER TO STAY OFF WORK TO PREVENT THE SPREAD OF SWINE FLU?

If an employer advises a perfectly fit employee to stay away from work, the employee will be entitled to full pay unless the contract states otherwise. Whether or not the employee has exhausted their entitlement to contractual sick pay is irrelevant as the employee is actually not sick but able to work. Fit employees could be requested to work from home but this will be on full pay. A sick employee should be paid in line with their sickness policy. If the employer then goes on to request the employee to stay at home once recovered, this will then revert to full pay again.



DO EMPLOYERS HAVE A DUTY TO TAKE SPECIAL MEASURES TO PROTECT THOSE EMPLOYEES WHO ARE MOST AT RISK DUE TO THE SWINE FLU PANDEMIC, SUCH AS PREGNANT EMPLOYEES OR THOSE WITH ASTHMA?

Guidance from the NHS has identified some medical conditions, which could lead to people becoming seriously ill with Swine Flu. Some of the illnesses include people with:

- Chronic lung disease,
- People who have had drug treatment for asthma over the past 3 years,
- Chronic heart, liver or kidney disease
- Pregnant women and People over 65.

Given the health and safety implication, employers should consider measures to protect these employees from the risk of contracting the infection.

Employers are under special duties under the Management of Health and Safety at Work Regulations 1999 to conduct risk assessments on pregnant employees and their working conditions. If the assessment reveals a specific risk to the expectant mother or her baby, the employer must follow steps so she is not exposed to the risk. If the risk cannot be avoided, the employees working condition or hours should be altered. If this is not possible, she should be removed to another role or as a last result, suspended on full pay.

In relation to employees who may be protected under the Disability Discrimination Act 1995, employers are under a duty to

make reasonable adjustments; these may entail taking special measures to protect disabled staff. Examples could include allowing the disabled person to work from another location or allowing home working.

IF AN EMPLOYEE HAS SWINE FLU SYMPTOMS, OR HAS BEEN IN CONTACT WITH SOMEONE WITH SWINE FLU, CAN HE OR SHE BE INSTRUCTED NOT TO COME IN TO WORK?

Employers are under a duty to ensure the Health and Safety of their employees; employees are equally responsible to ensure they do not endanger themselves or anyone who may be affected by their acts or omissions at work.

Due to this, an employer would be justified in instructing an employee to go home and not attend work if they have Swine Flu symptoms.

In relation to an employee who has been in contact with someone with Swine Flu but doesn't actually have symptoms themselves, the Cabinet Office advice is that it is not necessary on risk grounds to ask such people not to attend work. It is open to the employer to decide if the employee should go home during the incubation period. The incubation period (the time between contact with the virus and the onset of symptoms) is between one and four days. If the employee has no symptoms and the employer sends them home, this should be on full pay until such time as the employee develops symptoms.



SWINE FLU PANDEMIC...cont

IS THERE A DUTY ON EMPLOYERS TO CLOSE THEIR WORKPLACE TO PREVENT THE SPREAD OF SWINE FLU?

The answer to this one is currently no. The guidance from the Department of Health advises that infection control measures should be followed and the first focus should be on environmental, organizational and general hygiene measures to reduce the risk of transmission of the infection.

Employers should give consideration to putting a contingency plan in place that addresses business continuity if the threat escalates to a point where the workplace needs to close. BBi Alternative Solutions can help with business continuity plans.

IF AN EMPLOYEE HAS FLU LIKE SYMPTOMS, CAN THE EMPLOYER INSIST THAT HE OR SHE IS TESTED FOR SWINE FLU?

Employers are not able to insist on a Swine Flu test. In fact, testing an employee without their authorization would constitute a criminal assault and could result in a claim for constructive dismissal.

If the employer has a term in their contract to allow such testing, this still requires the employee's agreement although; failure to agree could be treated as a disciplinary matter.

CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE COMES TO COURT

The first ever prosecution is being brought by the Crown Prosecution Service (CPS) under the Corporate Manslaughter and Corporate Homicide Act 2007. Cotswold Geotechnical Holdings (CGH) will be prosecuted under the Act and under the Health and Safety at Work Act 1974; this comes after the death of a Junior Geologist.

Company Director Peter Eaton is also being prosecuted on an individual basis for gross negligence, manslaughter, and breaching section 37 of the Health and Safety at Work Act.

Corporate Manslaughter convictions carry an unlimited fine for Employers on conviction. The Court can also impose publicity and remedial orders. These mean that the court can order the company to publicise the full details of the conviction in whatever medium they feel appropriate. This could include, national press, the company's website and notices to clients.

A conviction for gross negligence manslaughter carries a maximum sentence of life imprisonment although the average sentence has been between 18 months and 2 years. The section 37 charge carries a

maximum 2 year sentence.

A company is guilty of corporate manslaughter if the way in which its activities are managed or organised causes death and amounts to a gross negligence of duty of care to the person who died. The following are factors which will be looked at by the court:

- How serious was the failure?
- How much of a risk of death was there?
- Was Health and Safety Executive guidance followed?
- What were the "attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure or to have produced tolerance of it"?

Companies can expect massive fines based on the percentage of their turnover and publicity orders, which are highly damaging to any company's reputation. The individual Directors, Officers and Managers position is also extremely precarious in prosecutions of this kind, particularly in smaller companies where it is easier for the prosecution to single out individuals. Any conviction of individuals is highly likely to lead to a prison sentence.

22% INCREASE ON UNFAIR DISMISSAL CASES

ACAS report for 2008/2009 has shown a 22% increase in the number of tribunal cases for unfair dismissal, and a 100% increase in the proportion of redundancy-related calls to its helpline.

STATUTORY MATERNITY PAY (SMP) EXTENDED

SMP will be increased from 39 weeks to 52 weeks. In order to benefit for this pay an employee must have been employed for at least 26 weeks running into the 15th week prior to the expected week of childbirth, and for the 8 weeks prior to the end of the qualifying week must have been earning on average not less than the lower earnings limit for national insurance.

The Government has confirmed that it is aiming to extend statutory maternity pay, maternity allowance and statutory adoption pay, alongside the introduction of additional paternity leave and pay. These changes are not due to come into affect before 2010 but there is speculation that the current economic climate may put a delay on things.





ADDITIONAL PATERNITY LEAVE AND PAY

If it is decided to go ahead, the Government will use its powers under the Work and Families Act 2006 to make regulations allowing fathers to benefit from additional paternity leave and pay where the Mother has decided to return to work early and doesn't take her full entitlement.

This new right will allow Fathers to take up to 26 weeks of additional paternity leave within the child's first year and in normal circumstances, during the 2nd 6 months of the child's life.



EMPLOYERS PREVENTED FROM INCLUDING TIPS IN MINIMUM WAGE

As of 1st October 2009, the National Minimum Wage legislation is amended to stop employers using tips to top up staff pay in order to meet the National Minimum Wage requirements. Currently employers are able to include service charges and gratuities processed through the payroll towards their obligation to pay the minimum wage.



NATIONAL MINIMUM WAGE REGULATIONS 1999 (AMENDMENT) REGULATIONS 2009 COME INTO FORCE

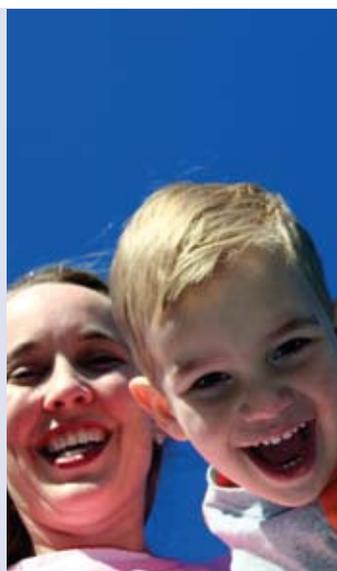
The Regulations increase the rate of the national minimum wage. The main rate rises from £5.73 per hour to £5.80 per hour and the development rate from £4.77 per hour to £4.83 per hour. The rate for workers aged 16 to 17 years increases from £3.53 to £3.57 per hour. The Regulations also specify new classes of persons who do not qualify for the national minimum wage and increase the day value of the accommodation amount that can be taken into account where an employer provides an employee with housing from £4.46 to £4.51.

WORK AND FAMILIES (INCREASE OF MAXIMUM AMOUNT) ORDER 2009 COMES INTO FORCE

On 1st October 2009, the Order increases the maximum weekly amount from £350 to £380 that can be used by employment tribunals to calculate awards such as unfair dismissal, redundancy payments and payments made by the Secretary of State out of the National Insurance Fund on an employer's insolvency.

CENTRALISED VETTING SYSTEM FOR PEOPLE WORKING WITH CHILDREN AND VULNERABLE ADULTS

The Safeguarding Vulnerable Groups Act will introduce a centralised vetting system for people banned from working with children and vulnerable adults. Employers will be able to make checks online, with information updated straight away when any individual is added to the list. Employers will be informed where possible if an individual becomes barred. There will be fines of up to £5,000 for employers that knowingly employ individuals on the list or fail to make the relevant checks.



WORKING TIME OPT OUT

Good news! It seems that EU Member States are unable to reach any decision with regard to the "Opt Out" arrangement contained within the Working Time Directive. After 5 years of negotiations an agreement wasn't reached so this means UK workers will be able to opt out of the 48 hour working week limit for the foreseeable future.



SINGLE EQUALITY ACT INTRODUCED

All existing discrimination legislation will be distilled into a single Equality Act. This comes in order to simplify and provide a more consistent legal framework for preventing discrimination.

It is expected to reach the House of Lords at the beginning of the new parliamentary session. The Government has confirmed that subject to the approval of Parliament, it is expecting the Equality Bill to receive Royal Assent in Spring 2010.

If it is enacted in its current form, it will:

- define discrimination as less favourable treatment because of a protected characteristic: age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation - this covers less favourable treatment because of an association with someone with a protected characteristic or an incorrect belief that someone has the protected characteristic;
- define pregnancy or maternity discrimination as unfavourable treatment because of pregnancy or maternity (Committee stage amendment);
- allow dual discrimination claims to be made in relation to direct discrimination only and combining no more than two of the following protected characteristics: age; disability; gender reassignment; race; religion or belief; sex; and sexual orientation (Committee stage amendment);
- standardise the definition of indirect discrimination adopting the test of particular disadvantage arising from the application of a "provision, criterion or practice" and extend the protection from indirect discrimination to disability discrimination;
- harmonise protection against harassment, so that it includes conduct related to a protected characteristic (so there is no need for the characteristic to be that of a particular person), and extend the protection against third-party harassment that currently applies only to sex-based harassment to include the other protected characteristics;
- remove the requirement for a comparator to establish victimisation;
- adopt a general exception to what would otherwise be unlawful direct discrimination where being of a particular sex, race, disability, religion or belief, sexual orientation or age - or not being a transsexual person, married or a civil partner - is a



- requirement for the work and the person to whom it is applied does not meet it;
- in addition to the protection against direct and indirect disability discrimination, introduce a clause providing that it will be discriminatory to treat a disabled person in a particular way, which, because of his or her disability, amounts to treating the individual badly, where the treatment cannot be justified (the Government's response to the House of Lords decision in London Borough of Lewisham v Malcolm [2008] IRLR 700 HL);
- establish the existence of a provision, criterion or practice that puts a disabled person at a substantial disadvantage as the single threshold for the trigger of the duty to make reasonable adjustments;
- repeal the list of capacities set out in the Disability Discrimination Act 1995, which currently forms part of the definition of disability;
- introduce a specific provision making it unlawful for a person to instruct, cause or induce someone to discriminate against, harass or victimise another person, or to attempt to do so - both the recipient of the instruction and the intended victim will be provided with a remedy, whether or not the instruction is carried out, as long as the recipient or intended victim suffers a detriment as a result; and
- allow positive action so that employers can take into account under-represented groups when selecting between two equally qualified candidates (an automatic policy of favouring individuals from under-represented groups will remain unlawful);
- extend positive action to permit measures, including training, to alleviate disadvantage experienced by employees who share a protected characteristic; reduce their under-representation in particular activities; and meet their particular needs - any such measures must be a proportionate way of achieving the relevant aim;

- render unenforceable any "secrecy clauses" preventing or restricting employees from discussing pay with a view to finding out differences connected to a protected characteristic, and designate any such discussion as a protected act for the purposes of victimisation; and
- strengthen enforcement by allowing employment tribunals to make recommendations in discrimination cases not only in relation to individual claimants but also in relation to the wider workforce in order to prevent similar types of discrimination from occurring - the recommendation must require the respondent to take specified steps to reduce the adverse effect of any matter dealt with in the proceedings in a stated period.

The Equality Bill will also:

- create a single equality duty requiring public authorities to have due regard to the need to eliminate discrimination, harassment and victimisation and other conduct prohibited by the Bill; advance equality of opportunity; and foster good relations - the duty will replace the existing race, disability and gender equality duties, and extend to age, gender reassignment, pregnancy and maternity, religion or belief and sexual orientation; and
- permit the introduction of regulations requiring private sector employers with at least 250 employees to publish information about the pay differentials between their male and female employees - the Government's aim is for employers to publish such information voluntarily, and in order to give voluntary arrangements time to work, it does not intend to make regulations before April 2013.

Over the last couple of years the number of cases reaching Tribunal has hugely increased, it is thought to be by more than 50%. Many of you may have experienced this for yourselves, the increases being driven by disputes about equal pay, unfair dismissal, age, sex, race and disability discrimination.

With this being high on the agenda, we are able to offer our clients with not only hands on consultancy but also, an insured/legal expenses cover of up to £75,000 per claim.

For further information please contact Michelle Brinklow at BBi Alternative Solutions:

Tel: 0208 506 0582
Email: info@alternative-solutions.org.uk



The Old Court House, 191 High Road, South Woodford, London E18 2QF

Telephone: 020 8506 0582
Facsimile: 020 8502 9900
Email: info@alternative-solutions.org.uk
www.alternative-solutions.org.uk