

Flu Season: Common Questions From Employers

Labor & Employment Law Update

on February 13, 2019

The flu virus circulates all year round, although according to the Centers for Disease Control and Prevention (CDC), flu activity historically peaks in February.

Here are a couple of flu-related questions frequently asked by employers:

Is an employee entitled to FMLA for absences due to the flu?

Maybe. The Family Medical Leave Act (FMLA) provides covered employees up to 12 weeks of unpaid leave during a 12-month period if the employee has a “serious health condition that makes the employee unable to perform” his or her job. A serious health condition is an illness that involves either *inpatient care* or *continuing treatment* by a health care provider. Inpatient care is typically an overnight stay in a health care facility.

Continuing treatment is more complex but is generally a period of incapacity of more than three consecutive full calendar days and any subsequent treatment or period of incapacity that also involves either (1) treatment or consultation with a health care provider two or more times within 30 days of the initial incapacitation or (2) treatment or consultation with a health care provider at least once and a regimen of continuing treatment under the supervision of the health care provider.

A “regimen of continuing treatment” includes prescription medication, even without a follow-up medical appointment. 29 C.F.R. § 825.115. Over the counter medications (aspirin, flu medicine), bed rest and fluids or other treatment that may be initiated without the direction of a health care provider, do not qualify as a “regimen of continuing treatment.”

So, while an employee with a typical case of the flu who recovers with only self-care generally does not qualify for FMLA leave, extenuating circumstances can trigger coverage. It is important to focus not on the name of the illness—flu—but rather on the facts of the particular situation to determine whether an illness is a “serious health condition” as defined by the FMLA.

When an employee calls in sick with the flu and is absent more than three consecutive days, the cautious approach is to send the employee an FMLA medical certification form. It is risky to deny FMLA leave without first taking steps to determine whether the absence qualifies for FMLA protection. If the employee

returns the completed medical certification, the employer can then assess whether the condition is a “serious health condition.” (Note: Even if FMLA does not apply, an employee may be entitled to leave under state or local sick leave laws, or the employer’s sick leave or paid time off policies. Depending on the circumstance, an employer may also need to examine whether the Americans with Disabilities Act, as amended (ADA), applies.)

Can an employee who is exhibiting flu symptoms at work be sent home?

Yes, an employee who is exhibiting flu-like symptoms at work (e.g., fever, excessive coughing, vomiting, chills, etc.) can be sent home (or instructed not to come to work).

Employers have the right to manage their workforce. This includes excluding potentially infectious employees, even if they want to work. Preventing the spread of contagious illness is a legitimate concern for employers. Employers can send sick employees home in an effort to maintain a safe and healthy workplace. (Note: OSHA requires all employers to maintain a safe and healthy workplace.)

Employers should, however, be consistent and fair in how they handle each situation. This is important for employee morale and to avoid legal claims (e.g., allegations of discrimination). Adopting an infectious disease policy will give employees and managers guidance on how to handle these situations.

Flu Season: Common Questions From Employers