

May 1, 2009

## Contacts

If you have questions or would like more information, please contact any of the attorneys listed at the end of this Alert. Hunton & Williams' [labor and employment law practice](#) covers the entire spectrum of labor and employment litigation, arbitration, administrative practice before the NLRB, EEOC, and the DOL, federal contract compliance, wage-hour standards, workplace safety and health standards, workers' compensation, contractual rights and remedies, Sarbanes-Oxley and whistleblower claims, workplace investigations and client counseling under federal and state labor and employment laws.

Hunton & Williams LLP provides legal services to corporations, financial institutions, governments and individuals, as well as to a broad array of other entities. Since our establishment more than a century ago, Hunton & Williams has grown to more than 1,000 attorneys serving clients in 100 countries from 19 offices around the world. While our practice has a strong industry focus on energy, financial services and life sciences, the depth and breadth of our experience extends to more than 100 separate practice areas, including bankruptcy and creditors' rights, commercial litigation, corporate transactions and securities law, intellectual property, international and government relations, regulatory law, products liability, and privacy and information management.

## H1N1 Flu Update

H1N1 has infected hundreds of people in 11 countries and continues to spread, although the mortality rate remains relatively low. The disease is spread by human-to-human contact in the same manner as with seasonal flu or the common cold. The media's label for this virus is a misnomer, as the virus contains a combination of mammal and avian viruses. It is not spread by eating pork or pork products.

The [April 27 client alert](#) outlined the broad areas of legal and planning issues. This alert will address several specific legal employment issues that have arisen during the first week of this health emergency.

### Travel and Leave

Employers should not require employees to travel to high-risk areas until the present risk has decreased. If such travel cannot be avoided, employees required to travel should be carefully trained regarding precautions to avoid infection.

Employers may be tempted to forbid employees who have traveled to infected areas from returning to work until it is clear that such employees are not infected. This risk is perhaps underscored by the news today that an aide to President Obama who traveled with him to Mexico is showing signs of infection. Public health officials state that the incubation period for H1N1 can be anywhere from one to seven days

and that infected individuals may be contagious a day before symptoms emerge. Thus, to be effective, such a policy would have to prevent travelers from returning to work for seven days. Employees are unlikely to protest if employers provide paid administrative leave for this period of time. However, if the employer requires employees to use sick or vacation leave or be deprived of pay, this approach could create legal risk. For example, a policy that prohibits symptom-free travelers returning from Mexico from working may have a disproportionate impact on workers of Mexican origin and create a risk of discrimination claims. Also, the salary basis test for exempt employees under the Fair Labor Standards Act restricts employers' ability to deprive exempt employees of pay in less than full-week increments. The employers' own policies may prevent them from mandating the use of paid leave. Finally, any requirement that symptom-free nonexempt employees stay home must be done in consideration of FLSA obligations and state wage and hour laws. The spread of this flu may understandably prompt consideration of delaying the return to work of traveling employees. If you choose to do so on an unpaid basis, you need to recognize the risks and you should probably consult with counsel.

The legal risk analysis changes for the employees who exhibit flu symptoms. The OSHA general duty clause requires

employers to maintain workplaces free from recognized hazards that are causing or likely to cause death or serious physical harm to employees. An employer may have a general duty clause obligation to prevent infected workers from coming to work. Typically, that risk is balanced against risks under the Americans with Disabilities Act not to discriminate against individuals with disabilities. However, employees with flu symptoms are unlikely to be considered disabled under the ADA and, in any event, such legal risk would be outweighed by the risk to the workforce if a symptomatic employee is present. Ultimately, this issue may be taken out of employers' hands. Public health authorities have the legal right to order quarantine and, if the disease progresses, may order travelers returning from high-impact areas to remain isolated until it is clear they are symptom free.

A related issue is how to manage employees who have not been exposed but are afraid to come to work. Employers should decide in advance how they will manage such issues so policies are consistently and legally applied. A flexible nonpunitive leave policy creates the least legal risk, but

could leave employers short-handed and unable to operate. Employers who take a more aggressive approach and require employees to come to work if they are symptom free should be certain that these policies are in compliance with OSHA and the National Labor Relations Act. OSHA provides very limited rights for employees to refuse to work. The National Labor Relations Act protects employees from retaliation for exercising Section 7 rights to engage in "protected concerted activity." In some circumstances, employees' refusal to come to work may constitute NLRA-protected concerted activity. The OSHA and NLRA issues are individualized and should be handled based on the specific circumstances in consultation with counsel.

#### **Health Precautions at Work**

Employers should provide information to employees regarding H1N1 to be certain that their workforce is getting accurate, nonsensational information. The CDC website has continually updated accurate information. Also, employers should provide posters and training regarding universal precautions. Universal precautions include cough/sneeze hygiene, social

distancing and proper hand-washing techniques. Common guidance is that hands should be washed for as long as "Happy Birthday" twice. The chorus of Queen's "Bohemian Rhapsody" also is the proper length.

Employers are wondering whether they should provide surgical masks to the workforce. Surgical masks provide some protection from breathing in infected respiratory droplets and retard dispersal of respiratory droplets from an infected person's sneeze or cough. In workplaces with potential exposure, surgical masks may be beneficial. Employers should purchase or allow only single-strap masks. Double-strap masks are covered by the Occupational Safety and Health Act respirator standard and require compliance with substantial regulatory requirements not required by single-strap masks.

Hunton & Williams has developed a training program on the employment issues associated with pandemic flu, which can be provided either over the phone or in person. Please contact one of the attorneys listed for further information.

# Hunton & Williams Labor and Employment Team Contacts

## Practice Leaders

**Laura M. Franze**  
lfranze@hunton.com  
(213) 532-2131

**Gregory B. Robertson**  
grobertson@hunton.com  
(804) 788-8526

### Atlanta

**W. Christopher Arbery**  
carbery@hunton.com

**Kenneth L. Dobkin**  
kdobkin@hunton.com

**L. Traywick Duffie**  
tduffie@hunton.com

**Kurt A. Powell**  
kpowell@hunton.com

**Robert T. Quackenboss**  
rquackenboss@hunton.com

**Emily Burkhardt Vicente**  
ebvicente@hunton.com

### Brussels

**Hervé Cogels**  
hcogels@hunton.com

### Charlotte

**A. Todd Brown**  
tbrown@hunton.com

**Wood W. Lay**  
wlay@hunton.com

### Dallas

**G. Allen Butler**  
abutler@hunton.com

**W. Stephen Cockerham**  
scockerham@hunton.com

**Laura M. Franze**  
lfranze@hunton.com

**William L. Keller**  
bkeller@hunton.com

**David C. Lonergan**  
dlonergan@hunton.com

**Alan J. Marcuis**  
amarcuis@hunton.com

**Julie I. Ungerman**  
jungerman@hunton.com

### Houston

**Fraser A. McAlpine**  
fmc Alpine@hunton.com

**Kevin J. White**  
kwhite@hunton.com

**Holly Williamson**  
hwilliamson@hunton.com

### London

**Ruth M. Harvey**  
rharvey@hunton.com

### Los Angeles

**Phillip J. Eskenazi**  
peskenazi@hunton.com

**Laura M. Franze**  
lfranze@hunton.com

**Roland M. Juarez**  
rjuarez@hunton.com

### McLean

**Jeffrey B. Hardie**  
jhardie@hunton.com

**Thomas P. Murphy**  
tpmurphy@hunton.com

### Miami

**Terence G. Connor**  
tconnor@hunton.com

**Juan C. Enjamio**  
jenjamio@hunton.com

### Norfolk

**Sharon S. Goodwyn**  
sgoodwyn@hunton.com

**James P. Naughton**  
jnaughton@hunton.com

### Richmond

**Patricia K. Epps**  
pepps@hunton.com

**Patricia S. Gill**  
pgill@hunton.com

**Gregory B. Robertson**  
grobertson@hunton.com

**Marguerite R. (Rita) Ruby**  
rruby@hunton.com

**C. Randolph Sullivan**  
rsullivan@hunton.com

**Hill B. Wellford, Jr.**  
hwellford@hunton.com

### San Francisco

**M. Brett Burns**  
mbrettburns@hunton.com

**Fraser A. McAlpine**  
fmc Alpine@hunton.com

### Washington, DC

**Ian P. Band**  
iband@hunton.com

**Frederic Freilicher**  
ffreilicher@hunton.com

**Michael J. Mueller**  
mmueller@hunton.com

**Susan F. Wiltsie**  
swiltsie@hunton.com

**Richard L. Wyatt Jr.**  
rwyatt@hunton.com

© 2009 Hunton & Williams LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This information is not intended to create an attorney-client or similar relationship. Please do not send us confidential information. Past successes cannot be an assurance of future success. Whether you need legal services and which lawyer you select are important decisions that should not be based solely upon these materials.