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“Flu Law”:

**What Employers Need
to Know About H1N1**

Holme Roberts & Owen Roundtable
October 1, 2009

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ARE YOU PREPARED FOR H1N1?





What is H1N1?

- New influenza A virus; first caused illness in Mexico and U.S. in March and April, 2009.
- It is pandemic flu – global spread among diverse human communities.
- Predicted deaths:
 - White House: 90,000
 - Center for Disease Control: Much lower

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H1N1 Incidence

- H1N1 flu is in every U.S. state.



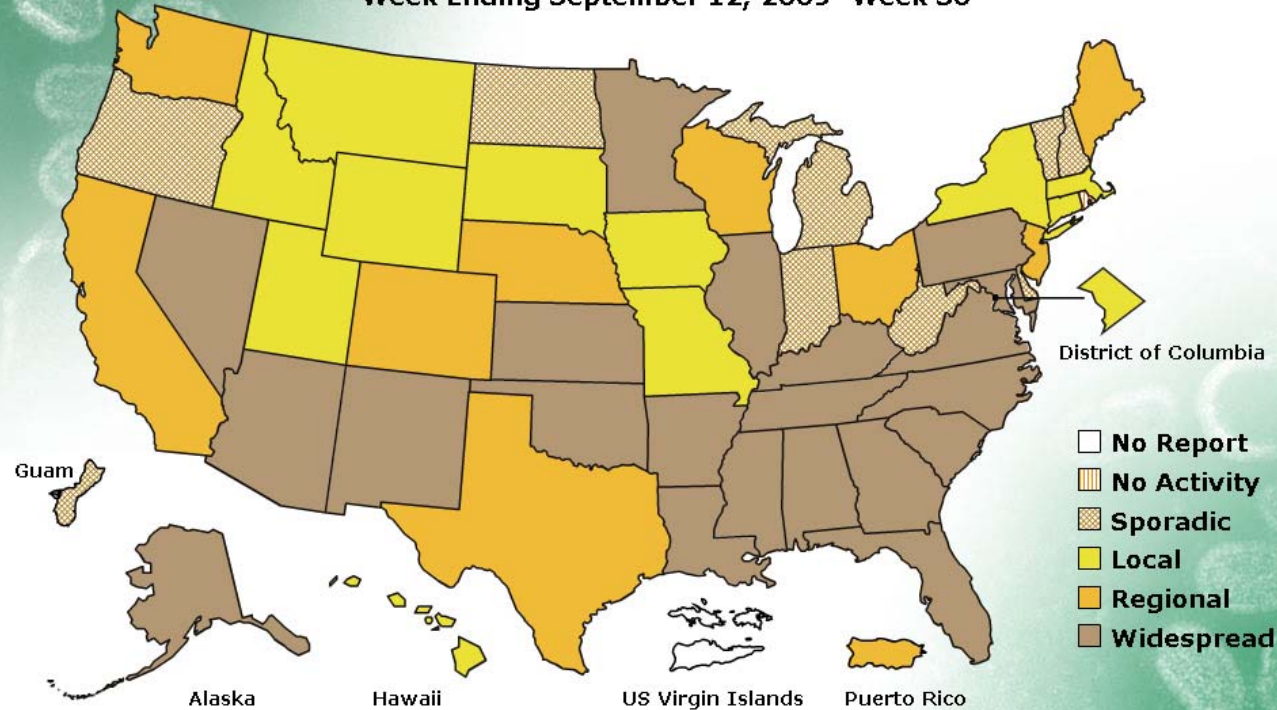
Week 36

FLUVIEW



A Weekly Influenza Surveillance Report Prepared by the Influenza Division
Weekly Influenza Activity Estimates Reported by State and Territorial Epidemiologists*

Week Ending September 12, 2009- Week 36



*This map indicates geographic spread and does not measure the severity of influenza activity.

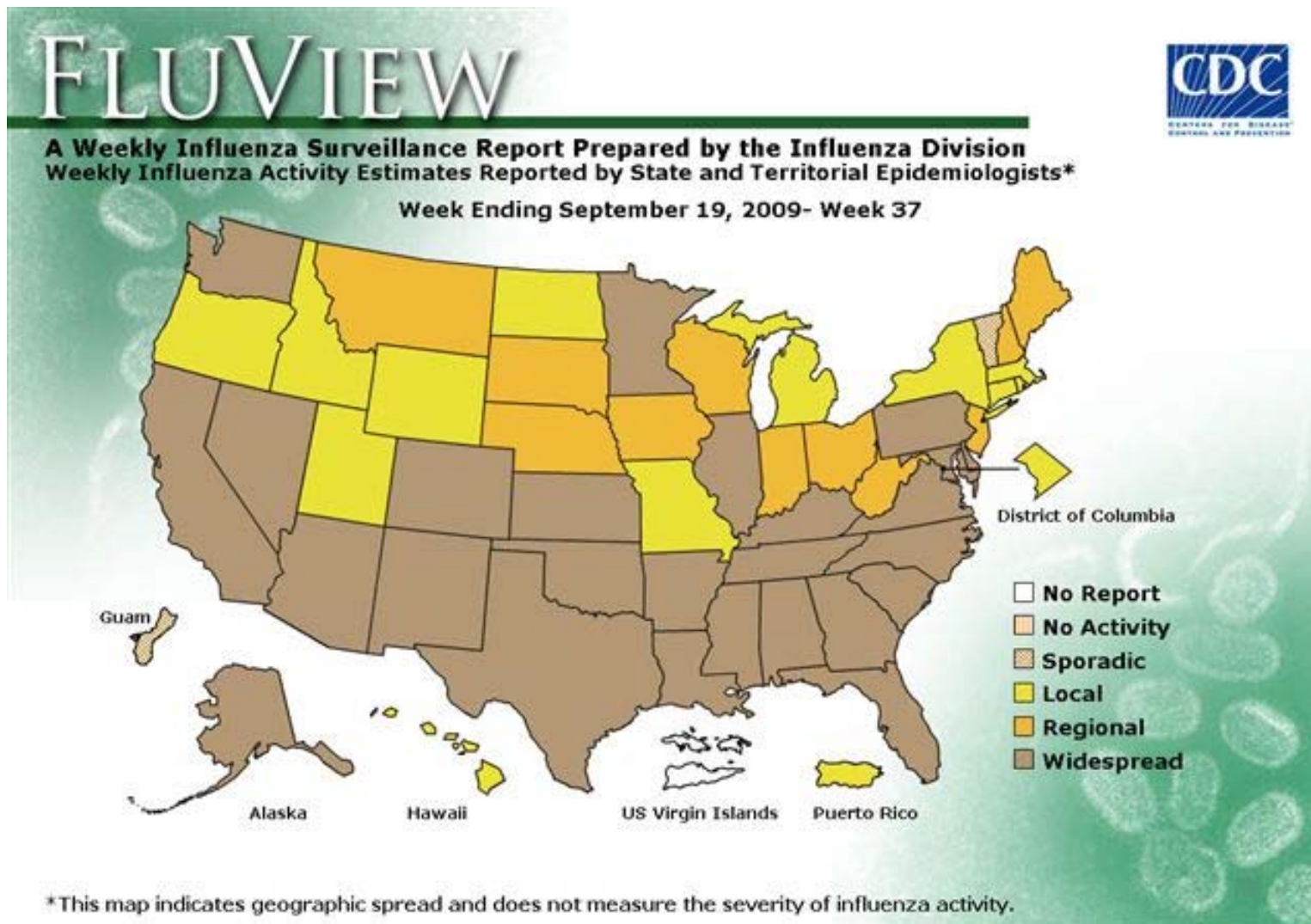
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Week 37





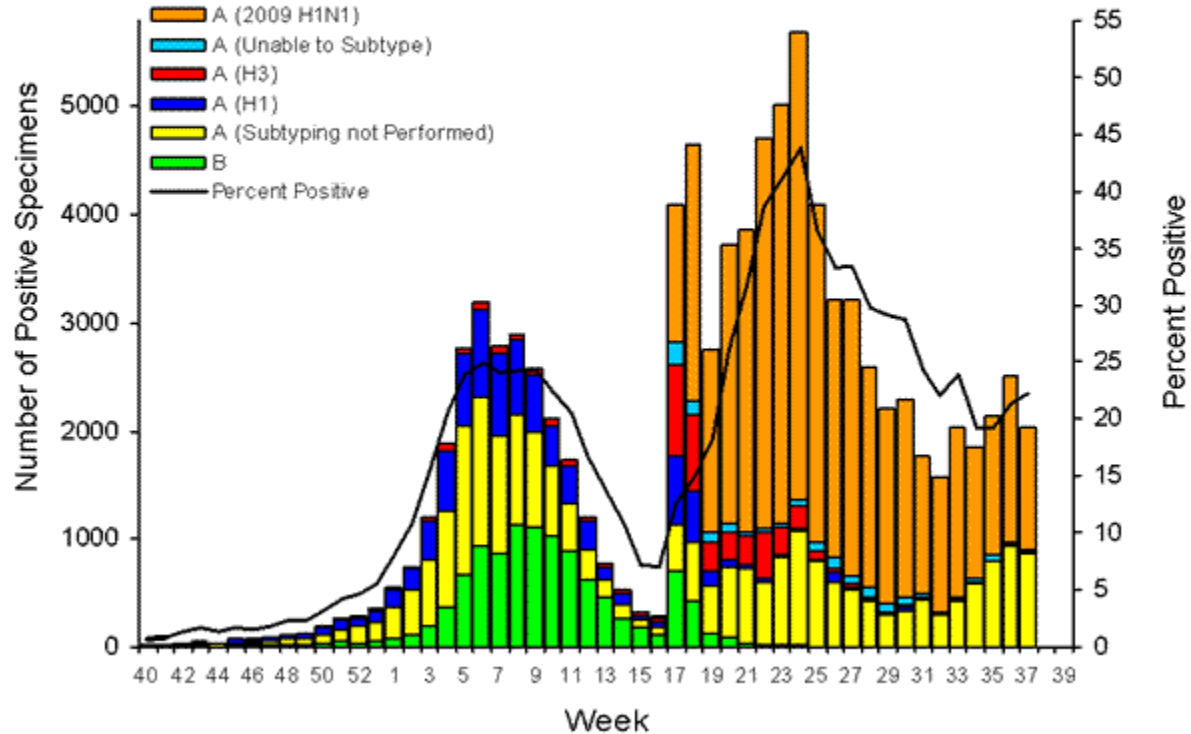
Different than seasonal flu

- Incidence increased in summer months of 2009, with a peak in September (start of school).
- Very different from seasonal flu, which usually increases in November with a peak in January.



Incidence in Summer Months

Influenza Positive Tests Reported to CDC by U.S. WHO/NREVSS Collaborating Laboratories, National Summary, 2008-09





In the workplace, who is most likely at higher risk from H1N1?

- Pregnant women;
- Individuals with chronic lung disease (like asthma), heart disease, kidney/renal disease, diabetes and other chronic conditions;
- Individuals with compromised immune systems (HIV, or from medications);
- Adults under the age of 25;
- Possibly adults age 65 and older?



When is an infected individual no longer contagious?

- Not entirely clear, and appears to vary by individual.
- Doctors say that that sick individuals are contagious from the day before getting sick to 4-7 days afterwards.
 - In some children, up to 10 days after onset of symptoms.
- CDC says that infected persons should stay home until 24 hours after last fever of 100°F or more, but some uncertainty about this.
- Infected persons should stay away from high risk individuals for 7 days after onset of symptoms, or until resolution of symptoms.



Is there a vaccine?

- Yes.
- First batches of new H1N1 vaccine should be distributed in first week of October.
- The H1N1 vaccine is separate from the seasonal flu vaccine.
- U.S. has ordered 195 million doses of H1N1 vaccine.



H1N1 Vaccine: Good News

- Vaccinated individuals slow spread of disease.
- U.S. ordered H1N1 doses on assumption that everyone treated would need 2 doses.
- CDC indicates that in most adults, 1 dose will do. So more people can be vaccinated than originally thought.



H1N1 Vaccine: Bad News

- First batch of 3-4 million doses in early October will be mainly live virus vaccine (in nasal spray) which can't be taken by certain individuals:
 - Pregnant women;
 - Children under 2 years;
 - People with underlying health conditions; and
 - Adults over 50.



Concerns

- Most infected persons have suffered mild to moderate illness so far, with the more serious cases largely being persons from groups at high-risk.
- As we move into winter months (cold, dry air) may see more serious cases, greater spread. A large question also is the overlay with seasonal flu.

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Frequently Asked Questions

What Should (and Shouldn't) an Employer Do?





Pertinent Federal Laws

- Occupational Safety and Health Act (“OSHA”)
- Family and Medical Leave Act (“FMLA”)
- Americans with Disabilities Act (“ADA”)
- Fair Labor Standards Act (“FLSA”)



Helpful Websites

- <http://www.pandemicflu.gov/professional/business/index.html>
- www.flu.gov
- www.cdc.gov
- http://www.eeoc.gov/facts/h1n1_flu.html



Topics covered

- Planning and prevention
- Dealing with employees who have H1N1 symptoms
- Leave issues



Am I obligated to try to reduce the spread of H1N1 in my workplace?

- Yes.
- OSHA “general duty” clause (29 U.S.C. 654(5)(a)(1)) requires employers to provide a safe and healthy working environment to all employees.
 - OSHA has applied the “general duty” clause as a catchall regulation to require employers to maintain a workplace free of recognized hazards, such as those associated with H1N1.
 - Arguably requires employers to adopt preventative measures, to send employees diagnosed with or showing symptoms of H1N1 home, etc.



What does OSHA expect employers to do?

- Encourage sick employees to stay at home.
- Encourage your employees to wash their hands frequently with soap and water or with hand sanitizer if there is no soap or water available.
 - Also, encourage your employees to avoid touching their noses, mouths, and eyes.
- Encourage your employees to cover their coughs and sneezes with a tissue, or to cough and sneeze into their upper sleeves if tissues are not available.
 - All employees should wash their hands or use a hand sanitizer after they cough, sneeze or blow their noses.



What does OSHA expect employers to do?

- Employees should avoid close contact with their coworkers and customers (maintain a separation of at least 6 feet).
 - They should avoid shaking hands and always wash their hands after contact with others.
 - Even if employees wear gloves, they should wash their hands upon removal of the gloves in case their hand(s) became contaminated during the removal process.
- Provide customers and the public with tissues and trash receptacles, and with a place to wash or disinfect their hands.



What does OSHA expect employers to do?

- Keep work surfaces, telephones, computer equipment and other frequently touched surfaces and office equipment clean.
 - Be sure that any cleaner used is safe and will not harm your employees or your office equipment.
 - Use only disinfectants registered by the U.S. Environmental Protection Agency (EPA), and follow all directions and safety precautions indicated on the label.
- Discourage your employees from using other employees' phones, desks, offices or other work tools and equipment.
- Minimize situations where groups of people are crowded together, such as in a meeting.
 - Use e-mail, phones and text messages to communicate with each other.
 - When meetings are necessary, avoid close contact by keeping a separation of at least 6 feet, where possible, and assure that there is proper ventilation in the meeting room.



What does OSHA expect employers to do?

- Reducing or eliminating unnecessary social interactions can be very effective in controlling the spread of infectious diseases.
 - Reconsider all situations that permit or require employees, customers, and visitors (including family members) to enter the workplace.
 - Workplaces which permit family visitors on site should consider restricting/eliminating that option during an influenza pandemic.
 - Work sites with on-site day care should consider in advance whether these facilities will remain open or will be closed, and the impact of such decisions on employees and the business.
- Promote healthy lifestyles, including good nutrition, exercise, and smoking cessation.
 - A person's overall health impacts their body's immune system and can affect their ability to fight off, or recover from, an infectious disease.



May employers require employees to adopt infection control practices?

- Yes.
 - Requiring infection control practices, such as regular hand washing and coughing and sneezing etiquette does not implicate the ADA.



May employers require employees to be vaccinated?

- Probably, but this is not advisable, except in the healthcare field.
- Risk to non-healthcare employers
 - Would you really fire employee who refuses to be vaccinated?
 - Objection based on religion
 - Objections based on reasonable fear of vaccination
 - Objection based on potential for allergic reaction and other health issues



May employers require employees to use personal protective equipment?

- Yes.
- *E.g.*, face masks, respirators, gowns, gloves, etc.
- But if an employee has a disability and needs reasonable accommodation under the ADA (*e.g.*, non-latex gloves), the employer should provide these absent undue hardship.



May employers change work hours/schedules to minimize contact between employees?

- Generally, yes.
- Flex hours, staggered shifts, etc.
- Unless collective bargaining agreement or individual employment contracts define work hours or schedules.



May employers ask employees about factors that may cause them to miss work due to the H1N1 pandemic?

- Yes, if the employer asks broad questions that are **not** limited to disability-related questions.
- EEOC-suggested questionnaire
 - Directions: Answer “yes” to the whole question **without** specifying the reason or reasons that apply to you. Simply check “yes” or “no” **at the bottom**.
 - **In the event of a pandemic, would you be unable to come to work because of any of the following reasons:**
 - If schools or day-care centers were closed, you would need to care for a child;
 - If other services were unavailable, you would need to care for other dependents;
 - If public transport were sporadic or unavailable, you would be unable to travel to work, and/or;
 - If you or a member of your household fall into one of the categories identified by CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).
- **Answer: YES _____ NO _____**



May an employer encourage or require employees to “telework” as an infection control strategy?

- Yes.
- An employer may encourage or require employees to telework as an infection-control strategy, “based on timely information from public health authorities about pandemic conditions.”
- Telework also may be a reasonable accommodation (e.g., for “at-risk” individuals to minimize their exposure).



May employers require an employees with H1N1 symptoms to be tested?

- Yes.
- Under ADA, employers can require current employees to undergo medical examinations when such examinations are “job-related and consistent with a business necessity”—meaning that employer has a “has a reasonable belief, based on objective evidence,” that:
 - Employee’s ability to perform the essential functions of the job will be impaired by a medical condition; or
 - Employee will pose a “direct threat” to self or others due to a medical condition.



Should an employer require employees to be tested for H1N1?

- Practically speaking, no.
- Due to strain on healthcare system, CDC recommends that employers not require sick employees to see doctor, but instead to send sick employees home.



May employers send employees home if they show symptoms of H1N1?

- Yes.
- CDC recommends that employers promptly separate ill employees from other employees and send them home.
- Decision to send employee home should be motivated by desire to protect other employees at workplace.
- When deciding to send employee home, can't discriminate based on race, age, sex, disability or other protected status.



What should employers tell other employees when an employee has been diagnosed with or sent home with H1N1 symptoms?

- Employers should tell employees that they may have been exposed to an infected co-worker and that they should monitor themselves for flu symptoms.
- ADA prohibits disclosure to co-workers of sick employee's name or medical information except only to those with need to know.



How long should employees with flu symptoms stay at home?

- According to CDC, individuals diagnosed with H1N1 usually should stay home for at least 24 hours after they are free of fever without using medication.
 - For employees who have contact with high risk individuals (e.g., healthcare, nursing home, etc.), CDC recommends staying home for seven days after onset of symptoms or until the resolution of symptoms.
- Expect sick employees to be out for 3-5 days in most cases, even if antiviral medications are used.
- Some employees will not be formally “diagnosed,” so good general rule for all employees with flu symptoms.



May an employer discipline employees who stay at home to avoid getting H1N1?

- Yes, in most circumstances.
- Normal attendance standards apply.
- Exception
 - Employee is “high risk” and needs leave as reasonable accommodation under ADA.
 - Telework as alternative?



Are employees with H1N1 eligible for FMLA leave?

- If they meet the criteria for FMLA leave, yes.
- Employee's own "serious health condition."
 - Hospitalization
 - Or incapacity of more than three consecutive days, plus treatment by healthcare provider at least twice, or once with a continuing regimen of treatment.
- Employee's need to care for family member with "serious health condition."



May an employer provide unpaid leave to an employee diagnosed with H1N1?

- Yes.
- No requirement for paid leave.
- Normal company policies and practices or agreement with specific employees determine whether leave is paid.
- As always, may require paid leave and FMLA leave to run concurrently.



If there is a school closure, must I give employees time off to care for healthy children who have been dismissed from school?

- No.
- No law *requires* employers to provide leave to care for healthy children.
- Employees may use PTO or other available leave.
- Govt. encourages flexibility under these circumstances.



May employers require sick employees to provide a doctor's note to return to work?

- Yes, but. . .
- CDC recommends that employers not do so, in order to avoid overwhelming healthcare providers who are caring for those who are still sick.



May employers isolate employees who exhibit flu symptoms?

- Yes.
- If for some reason the employee cannot be sent home, he or she may be isolated from other employees.
- And required to wear a surgical mask, if tolerable.



May I re-assign sick employees' job duties to ensure that my business continues to operate?

- Yes.
- Depending on the percentage of time spent performing someone else's job, the employee may lose exempt status under FLSA if primarily performing nonexempt work.
 - Entitles employee to payment of overtime for hours worked in excess of 40 hours per work week.



Summary of Do's and Don'ts

- **Do**
 - Develop a flexible plan as to how you will respond to the pandemic. For suggestions, see <http://pandemicflu.gov/professional/business/businesschecklist.html#1.2>
 - Implement infection control practices now.
 - Encourage your employees to get vaccinated.
 - As usual, comply with FMLA, ADA and other applicable laws.
 - Send sick employees home promptly.
 - Encourage sick employees to stay home without fear of losing their jobs.
 - Revise existing leave policies to allow for sick leave.
 - Check government websites for latest information.



Summary of Do's and Don'ts

- **Don't**

- Wait until the epidemic hits your workplace to determine how you will respond.
- Don't force sick employees to come back to work while they are contagious.
- Don't disclose medical information to those without a need to know.
- Panic.