

## Influenza A (H1N1) 'Swine Flu' – PSA Guidance for Members

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### Introduction

Members will be aware of recent publicity about influenza A (H1N1) or 'swine flu'. This flu originated in Mexico, where it was characterised by a number of fatalities, although the exact numbers are difficult to establish and the reported numbers are changing regularly. There have been outbreaks in the United States and other countries, including New Zealand, with USA, Canada and Costa Rica, suffering a small number of fatalities. It appears that those suffering from swine flu in countries other than Mexico are exhibiting mild symptoms only.

### The risks

While knowledge about threat posed by swine flu is constantly changing, this outbreak has the potential to become a pandemic. Members should note that the term 'pandemic' alludes to the spread of the disease, not the severity. There is a risk that the influenza A (H1N1) virus could mutate into a more lethal strain at some future point and become much more dangerous, particularly if widespread.

At this stage, the mortality rate appears to be relatively low but evidence suggests that this form of influenza is far more contagious than seasonal influenza and could affect up to one third of the New Zealand population if precautions aren't taken. As well as having obvious health effects, this could mean that up to one million people would require at least a week off work, disrupting public services and impacting significantly on our economy.

There are many unanswered questions about swine flu, the answers to which will become clearer as the disease progresses. Information on the flu is being updated regularly by the Ministry of Health and the World Health Organisation. Members, delegates and organisers wishing to find out more about swine flu and the latest updates should refer to the following sites:

[http://www.who.int/csr/don/2009\\_04\\_29/en/index.html](http://www.who.int/csr/don/2009_04_29/en/index.html)

<http://www.moh.govt.nz/moh.nsf/indexmh/mexican-swine-influenza-update-270409>

## Purpose of this Guidance

The purpose of this guidance is to focus on the implications for the workplace, and public sector workplaces in particular, should the virus become a pandemic.

## Pandemic Preparedness – WHO and the Ministry of Health

Both the World Health Organisation and the New Zealand Ministry of Health have developed a system to describe the alert status that applies as the disease progresses, to assist with planning around a pandemic. As at 4 May the WHO described their alert status as being at ‘phase 5’ out of a possible 6. To assist with understanding this system of alerts phases, the most relevant phases are:

**Phase 4** - which is “characterised by verified human-to-human transmission of an animal or human-animal influenza reassortant virus able to cause ‘community-level outbreaks.’” “ Phase 4 indicates a significant increase in risk of a pandemic but does not necessarily mean that a pandemic is a forgone conclusion.”

**Phase 5** - which is “characterised by human-to-human spread of the virus into at least two countries in one WHO region. While most countries will not be affected at this stage, the declaration of Phase 5 is a strong signal that a pandemic is imminent and that the time to finalize the organisation, communication, and implementation of the planned mitigation measures is short.”

**Phase 6** – which is the pandemic phase is followed by ‘post peak’ (which carries the possibility of recurrent events) and ‘post pandemic’ phases.

In New Zealand the following alert codes apply.

STAGE	NEW ZEALAND STRATEGY	MoH/DHB ALERT CODE
1	Plan for it (planning)	WHITE (information/advisory)
		YELLOW (standby)
2	Keep it out (border management)	RED (activation)
3	Stamp it out (cluster control)	

4	<b>Manage it</b> (pandemic management)	
5	<b>Recover from it</b> (recovery)	GREEN (stand down)

As at 28 May 2009 New Zealand is at code yellow.

The Ministry has put in place the NZ Pandemic Action Plan which can be found at <http://www.moh.govt.nz/moh.nsf/indexmh/nz-influenza-pandemic-action-plan-2006>

### **Pandemic Preparedness in the Workplace**

Most workplaces should have put in place pandemic planning policies during the heightened awareness over avian flu in 2005/6. All should now be checking that there are appropriate plans in place. There are a several guides to assist with this process.

#### *Ministry of Economic Development*

The Ministry of Economic Development has produced a booklet entitled *Influenza Pandemic Planning: Business Continuity Planning Guide*, which sets out the type of planning businesses and organisations should be putting in place. These include:

- Identifying essential services, facilities etc.,
- Planning for up to 50% staff absences for periods of 2-3 weeks at the height of the pandemic, and lower levels of staff absences for a few weeks either side of the pandemic
- Assessing core staff and skill requirement needs, and ensure essential positions are backed up by an alternative staff member
- Identifying ways to increase “social distancing” in the workplace, reduce movement etc
- Considering organisational policies to encourage the sick to stay home
- Identifying ways to minimise illness among staff and clients and consider how essential messages (e.g. basic hygiene) can be communicated to staff
- Identifying needs for personal protective equipment and cleaning equipment and check air conditioning. Purchase additional contingency supplies

This document can be found at <http://www.med.govt.nz/upload/27552/planning-guide.pdf>

#### *Department of Labour*

Guidance from the Department of Labour on the implications for the workplace in general can be found at <http://www.dol.govt.nz/initiatives/workplace/pandemic/index.asp>

This guide advises that industrial and health and safety legislation provides a useful framework in dealing with issues arising out of an epidemic but that planning should be based on consideration of the relationships involved and on good faith obligations. It addresses employment issues in the form of frequently asked questions such as:

- If there is a pandemic what happens if my staff have to stay at home to care for family? (answer: work through all leave possibilities – paid and unpaid – before considering frustration of contract)

- If there is a pandemic what happens if my staff are concerned that the work situation is unsafe? (answer: stay informed about the epidemic and involve your staff in infection planning. If you take reasonable steps to protect your workplace then employees have an obligation to attend work)
- If there is a pandemic what can I do if the workplace is still operating and my staff are not reporting for work? (answer: if staff choose not to work without talking to the employer about their concerns or about ways to protect themselves, they are placing their employment at risk)

### *State Services Commission*

The State Services Commission has addressed workplace issues that may arise in the state sector in *Pandemic Planning Guidelines for the State Services*. The main points from that advice (and the PSA's comments about those points) are set out in Schedule A to this guidance.

The full guidelines can be found on <http://www.ssc.govt.nz/display/document.asp?docid=5305>

### **Legal Issues**

The legal issues raised by the possibility of a pandemic are complex and varied. This represents a summary only of the relevant points and is necessarily general. The best defence is to organise around the issues above, before they become a problem.

#### *Health and safety at work*

Under the Health and Safety in Employment Act employers are obliged to take "all practicable steps" to ensure the safety of employees at work.

What steps are "practicable" will depend on the circumstances. Factors such as the nature and severity of the potential harm, the state of knowledge about that harm and the means available to head it off, and the availability and cost of those means, will all be relevant.

There would first need to be an assessment of the particular risk. It may be in some instances where there was a low risk of the disease being transmitted from person to person that the provision of appropriate masks and the application of stringent hygiene provisions would be regarded as meeting the test.

In other, higher risk situations, the closure of the workplace could be regarded as the only appropriate remedy.

Many PSA members may have an increased likelihood of having to work during a pandemic flu emergency. This possibility can arise:

- Through the nature of the industry - essential or emergency services
- Because of duties arising under some special statute
- Through professional duties

Members in such situations would want any increased likelihood of having to work during the emergency factored into the health and safety planning and risk assessment. In situations of greater risk and the likely necessity of work, our members need to expect as high a level of workplace protection as possible.

Employees also have personal obligations regarding health and safety at work. They must take “all practicable steps” to ensure their own safety at work (including the use of protective clothing and equipment), and to ensure that no action or inaction at work causes harm to anybody else.

Employees also have a right to refuse to do work if the employee reasonably believes that doing the work is likely to result in serious harm. Once again, what is practicable or reasonable will depend on the circumstances.

#### *Employees told to stay home*

An employer would be justified in requiring employees who are ill to stay at home, in order to protect the health of other employees. The normal sick leave provisions would apply, although (as identified above) employees may require more leave than they are entitled to.

However, the employer may go further and decide to close the entire workplace. This would affect employees who are not ill.

The normal rule is that if an employee is available and willing to work, the employer is obliged to pay him/her even if the employer has no work for the employee. It's arguable that if the employer decides to close the workplace then employees who are not ill themselves would still be entitled to be paid.

That could be different if the employer is ordered by health authorities to close the workplace, particularly if the closure is prolonged. In those circumstances the doctrine of “frustration of contract” may intervene.

Frustration of contract arises where the parties both wish to perform their contractual obligations but are prevented from doing so by some intervening event which is beyond their control. A natural disaster such as a calamitous earthquake or tsunami which obliterated the workplace would be a classic example of frustration of contract. A serious outbreak of disease could be regarded in the same way.

The legal consequence is that neither party can enforce the contract against the other. The employer may not have to pay.

The Holidays Act gives employers the ability to “close down” the workplace for a fixed period after giving their workers 14 days notice. During this time, employees would be required to take their annual leave, whether or not they had any to take. However, this is likely to be of limited use because of the notice requirements and the fact that annual leave may be quickly used up.

#### *Employee opts to stay home*

Where an employee who is ill stays at home normal sick leave entitlements would apply, although again this would be limited by the extent of such entitlements, and indications are more leave may be required.

When an employee (who is not ill) reasonably believes that staying home is necessary to protect his/her health and safety, whether he/she would be entitled to be paid could be determined by such things as the risk of infection and whether the steps taken by the employer to deal with that risk were what a fair and reasonable employer would have done. There is no easy answer here.

### **PSA Advice on Industrial and Workplace Issues**

1. The PSA must have a role in planning for business continuity planning and identification of hazards. Probably the place for this to occur is the health and safety committee with union representation,

but there may be a need to set up regular discussions with employers in addition, given the nature of the threat.

2. The MED booklet suggests the identification of an influenza manager to co-ordinate activities. If an influenza manager role is established it must have a clear relationship with the health and safety committee.
3. Sick leave – the PSA will seek a waiving of normal sick leave rules so that those who are ill, or are suspected to be ill, must be allowed the time necessary to recover so that they do not feel any pressure or obligation to remain at work or return to work too early.
4. There needs to be a similarly flexible approach to dealing with employees who may have to look after dependants, such as those who are ill or children who have to be kept home when schools close.
5. Working from home may be an appropriate means of minimising hazards or dealing with the need to look after dependants, but not all jobs lend themselves to this approach. There needs to be equity between how different employees are treated. Also, where an employee has to care for a family member it will be very difficult to actually work while in the home. This circumstance should be dealt with by means of a flexible approach to leave.
6. There needs to be agreement on when a service or workplace is closed down and what happens to employees who are not ill under those circumstances. Again the PSA will be seeking payment under these circumstances and the protection of existing sick leave entitlements.
7. There needs to be agreement on how to deal with employees who decide not to come into work because they fear infection from the workplace.
8. There needs to be training for the staff and additional training for the health and safety committee.
9. There needs to be contingency planning for core staff who have to stay at work because the service cannot close down e.g. health professionals, corrections officers etc. This should take into account staffing needs and back up resourcing (such as a shift system), the opportunity for regular breaks and rest (i.e. to opportunity to return home, or at least the provision of a rest room), access to food and drink, time off lieu, support for families whose parents/caregivers and spouses/partners are providing essential services, and the opportunity for debriefing and/or counselling.
10. Employers should provide support for employees who are involved in voluntary activities in the community providing care for others.

## **SSC Guidelines**

## **PSA Comment**

### **Attendance**

- ❑ Service delivery should continue to the fullest possible extent
- ❑ Chief Executives should lead with a strong message that the Public Service has a duty in times of national emergency to maintain government services
- ❑ Unless on leave State servants should be expected to be at work during a pandemic
- ❑ Stopping work without discussing their concerns or appropriate safety measures with their employer could put their job at risk

The PSA understands the rationale behind this approach but believes that there should be a quid pro quo in terms of a flexible approach to leave and other conditions of employment.

### **Working from Home**

Employers should prepare for staff to work remotely (usually from home) as part of social distancing, closure of public transport, isolation of the workplace by a Medical Officer of Health or the requirement to care for sick family members

The PSA supports working from home but not all jobs lend themselves to this approach. There needs to be equity between how different employees are treated. Also, where an employee has to care for a family member it will be very difficult to actually work while in the home. This circumstance should be dealt with by means of a flexible approach to leave.

### **Salary Payments**

Additional paid leave should be provided on top of normal sick leave, but only when trying to keep the virus out of NZ or when trying to “stamp it out” in a contained area before it spreads to the wider community. There is a strong emphasis on keeping entitlements in line with the wider community.

The PSA supports this, but not just limited to the stages identified. At the time that the pandemic is in the wider community and being “managed” is likely to be when employees need the extra leave. The risks and pressures that state servants face in their work could be reflected in a greater flexibility in leave provisions than available to the wider community.

Leave should be taken in the order of sick and domestic leave entitlements first, then any advances on sick leave, then any special approved leave. Only at this point should any unused annual leave be used, and then only at the employee’s discretion.

The PSA supports this order of taking leave entitlements. This approach to annual leave is an improvement on earlier versions of the draft.

Organisers should check the sick leave provisions in their collective agreements. In education it is common to have epidemic or pandemic leave, which grants unlimited sick leave in the event of a pandemic. Similar provisions are unlikely in the rest of the state sector, but it is worth checking the exact nature of sick leave entitlements in each CA.

### **Alternative Duties During a Pandemic**

It is likely that most duties needing coverage by

This approach is understandable but the processes

other staff will require the employees agreement. Therefore:

- ❑ Employers are recommended to commence an approach to staff as soon as possible, seeking their agreement to undertake different work functions
- ❑ Agencies with low priority functions should consider exploring their employees assisting priority service delivery with other agencies

### ***Workplace Closure***

In the event of a workplace closure (probably as a result of a decision of a Medical Officer of Health) the following advice is given:

- ❑ Workplace safety measures still apply
- ❑ Employees should work from home if possible
- ❑ If this is not possible employees could be directed to use accrued annual leave, bridging any notice period with paid special leave
- ❑ Alternative duties with another workplace could be offered

recommended should involve the union in order to guard against unfair or unreasonable pressure to undertake duties that an employee may feel unqualified to undertake. Employees should have the right to consult the union before making a decision.

Workers in the health sector might be under particular pressure to undertake alternative duties.

The PSA has concerns with annual leave being used in this way.

Concerns about pressure to undertake alternative duties still apply.