

## WHAT'S NEW at RUBIN THOMLINSON LLP

### Announcing RT Podcasts Coming this Fall!

Please watch our website [www.rubinthomlinson.com](http://www.rubinthomlinson.com) this September for our first two podcasts on termination of employment.

Short, snappy and entertaining (we hope), these podcasts will help you to better understand employment law issues.

Let us know what you think by emailing us at: [podcasts@rubinthomlinson.com](mailto:podcasts@rubinthomlinson.com)

**Janice Rubin** appeared on CBC Radio Yukon on June 23. Janice was discussing the results of our survey, "Have We Turned the Corner?"

**Janice** was also a guest on Ontario Today on CBC Radio on July 16. She spoke about workplace morale.

This alert is prepared as a service for our clients and other persons dealing with employment issues. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered, and without seeking the advice of legal counsel. No part of this publication may be reproduced without prior written permission of Rubin Thomlinson LLP. This has been sent to you courtesy of Rubin Thomlinson LLP.

In June 2009, the World Health Organization (WHO) announced a pandemic alert, phase 6, for the H1N1 virus. This classification means that H1N1 is now a widespread human infection, although the WHO has indicated that it is only moderate in severity. This has serious employment law implications. In this brief article, we give you some practical advice to assist you as employers as you enter H1N1's first flu season as a widespread human infection. Our advice is based on questions we have already fielded from clients, as well as questions we expect to be asked.

## H1N1 Virus: Top 5 legal questions and answers for employers

**Question One: If an employee has H1N1 can an employer require that the employee remain away from the workplace?**

**Answer:** An employer has an obligation to maintain a safe and healthy workplace for its employees. In order to do this an employer must take every reasonable precaution to ensure the protection of its employees, including steps to ensure that infectious diseases are not spread in the workplace. To ensure the safety of the workplace, an employer should require that an employee infected with H1N1 remain away from the workplace. However in doing so, employers should be cognizant of any other potential legal issues (e.g., Human Rights and/or Privacy issues) that may arise from an employee's temporary removal from the workplace.

**Question Two: Can an employer require an employee to work while they are sick with H1N1?**

**Answer:** Unless there is an agreement, policy or legislation stating otherwise, employees generally do not have a legal right to be paid unless they work. Therefore, absent a legal right to take paid time off work, if an employee wishes to be paid while off of work, an employer can insist that they either work from home or take vacation time in order to get paid. Otherwise, employees may opt to take an unpaid leave while away from the workplace.

**Question Three: Can I require an employee to disclose the nature of an illness?**

**Answer:** Under the Ontario *Human Rights Code* (the "HRC"), employers are only allowed to request information that is relevant to the accommodation of a disability. While in general, the flu is not considered a disability under the HRC, it is unclear whether H1N1 will be considered a disability under the HRC, given its classification as a pandemic virus.

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## H1N1 Virus: Top 5 legal questions and answers for employers

Continued

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Employers should accordingly be aware of the potential for human rights complaints arising from mandatory disclosure of a diagnosis of H1N1. Employers must ultimately balance their obligation to maintain a safe and healthy workplace with an employee’s right to privacy with respect to an illness or disability. Therefore if an employee is exhibiting H1N1 symptoms, an employer should request that the employee obtain medical documentation indicating whether they are fit to continue to work and/or if they require any accommodations for the safety of themselves or other workers. However, an employer should avoid asking for a specific diagnosis of the employee.

**Question Four: What if an employee has a family member who is sick with H1N1 and requires care?**

**Answer:** The Ontario *Employment Standards Act, 2000* (the “ESA”) provides for a statutorily protected, unpaid leave for the care of prescribed family members (“Personal Emergency Leave”). If a prescribed family member suffers from a personal illness, injury or medical emergency, an Ontario employee will be entitled to take an unpaid leave for a total of 10 days per

calendar year. Note that an employer can require an employee taking a Personal Emergency Leave to provide reasonable evidence of the circumstances entitling them to the leave.

**Question Five: Can I make an employee get vaccinated?**

**Answer:** It is expected that in the following few months, a vaccine for H1N1 will be available to the public. While generally an employer cannot require an employee to get a vaccination, employers can encourage vaccination through free on-site vaccine clinics or by providing time off for employees in order to allow them to get vaccinated. Employers can also encourage employees to get vaccinated by sending out a memorandum advising them of the availability of a vaccination and outlining relevant policies relating to sick time and paid time off.

**Where can I get more information?**

This is only a brief overview of the legal issues that may arise while dealing with H1N1 issues in the workplace. For a more detailed analysis of the employment implications of H1N1, stay tuned for our “RT-Podcast” or contact one of our employment lawyers to discuss specific legal issues relating to H1N1 that your workplace may have. ●

## UPCOMING EVENTS

### September 15 and 16

The next session of **Conducting Internal Workplace Investigations** will take place on September 15 and 16. We are accepting registrations for this session. If you are interested in attending please contact us at (416) 847-1814 or [seminars@rt-law.ca](mailto:seminars@rt-law.ca) to register.

### September 23

**Janice Rubin** will be speaking at the 2009 Atlantic HR Conference in Halifax on September 23. Janice will be discussing what human resource professionals need to know about workplace investigations.

### September 25

**Janice** will also be speaking at the Out on Bay Street conference at the Courtyard Marriott in Toronto. She will be covering legal landmines in diversity management.

### October 14

Our next breakfast seminar will take place on October 14. The topic for the morning will be, “Legal Implications of Social Networking”. If you would like to attend, please contact us at (416) 847-1814 or [breakfast@rt-law.ca](mailto:breakfast@rt-law.ca) to register.

We work with employer clients to provide optimal legal solutions to their challenging workplace issues. If you would like to know more about our practice, please do not hesitate to contact us at (416) 847-1814 or via e-mail at [contact@rt-law.ca](mailto:contact@rt-law.ca).