

ZIKA VIRUS: WHAT DO EMPLOYERS NEED TO KNOW?

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Labor, Employment and Workplace Safety Alert

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The spread of the Zika virus across South and Central America, Mexico, and the Caribbean as well as locally acquired infections in parts of the United States, raises various issues for employers. On January 22, 2016, the U.S. Center for Disease Control (“**CDC**”) activated its Emergency Operations Center to respond to the Zika outbreak, and just over a week later, the World Health Organization (“**WHO**”) declared a Public Emergency of International Concern because of effects of Zika. Zika has come to the forefront as the CDC warned against travel to affected areas for pregnant women (and their partners). The spread of the virus and associated travel warnings have implications for U.S. employers under various federal laws, including the Occupational Safety and Health Act (“**OSH Act**”), the Americans with Disabilities Act (“**ADA**”), the Family and Medical Leave Act (“”), and Title VII.

BACKGROUND ON ZIKA: SOURCES, SPREAD, AND SYMPTOMS

Zika was first discovered in Uganda in 1947, and spread to parts of Africa and Asia. Zika was first reported in Brazil in 2015, and since then has spread throughout South America and into the Caribbean, Mexico, and the United States. Although Zika has been reported in all U.S. states except Alaska, nearly all of those cases have been associated with travel. However, as of mid-September, 85 cases of locally-acquired Zika have been reported in Florida, concentrated in South Florida near Miami. Active Zika transmission also is occurring throughout the Caribbean, South and Central America, as well as Oceania, the Pacific Islands and Singapore. The only area of active transmission in Africa currently is Cape Verde.

The Florida Department of Health identified two areas in Miami with “active transmission” of Zika where adherence to travel and testing guidance for pregnant women, women of reproductive age, and their partners is recommended. One area has since been removed as an active transmission site. However, cautionary travel guidance is in place for the areas surrounding the active transmission zone in Miami-Dade County. Additionally, the CDC reports that American Samoa, the U.S. Virgin Islands, and Puerto Rico are experiencing widespread local transmission.

Zika can be transmitted through bites by infected mosquitoes as well as through transmission of bodily fluids (e.g., from a pregnant mother to her baby, during sex, and through accidental lab exposure). The incubation period may take up to two weeks. Only one in five infected people show symptoms, which most commonly include fever, rash, joint pain, and conjunctivitis (commonly called pink eye) and more occasionally muscle pain and headaches. Identification of Zika requires laboratory testing because its symptoms are similar to those of many other diseases (including diseases such as dengue and chikungunya spread by the same mosquitos that may

spread Zika). Zika symptoms may last for up to a week and rarely require hospitalization. Zika is seldom fatal. However, Zika has been linked to birth defects, including microcephaly, and other pregnancy related problems. CDC research also shows a strong association between Zika infection and Guillain-Barré syndrome.

WORKERS IN AFFECTED AREAS

Workers in affected areas who are exposed to mosquitos or to body fluids of infected individuals may be at risk for occupationally-acquired Zika infection. The Occupational Health and Safety Administration (“**OSHA**”) has issued Interim Guidance for Protecting Workers from Occupational Exposure to Zika Virus. These guidelines lack the force of law, but following them would satisfy an employer's duty under the OSH Act to provide employees with safe workplaces.

OSHA's guidance recommends that employers train employees about their risks of Zika exposure. OSHA further advises employers to train employees about modes of transmission and how to protect themselves as well as to provide information to workers who are pregnant or may become pregnant (and to those whose sexual partners are or may become pregnant) about possible links to birth defects. Practically speaking, employers should provide the same training and information to all employees who may risk exposure rather than attempting to determine which employees may be affected by pregnancy (or have the desire to become pregnant). In addition to requiring compliance with universal precautions for potential blood borne pathogen exposure (described in current regulations at 29 C.F.R. § 1910.1030) and personal protective equipment standards (29 C.F.R. § 1910, Subpart I), OSHA recommends additional employer action for employers whose workers are at risk for Zika exposure, especially outdoor workers and healthcare or laboratory workers.

Outdoor Workers

OSHA recommends employers take the following actions for outdoor workers (including mosquito control workers):

- Inform workers about their risks of exposure to the Zika virus through mosquito bites and train them how to protect themselves. Check the CDC Zika website to find Zika-affected areas.
- Offer insect repellents and encourage their use according to OSHA's guidance. (OSHA's interim guidance sets out detailed guidance on the use of insect repellants).
- Provide workers with, and encourage them to wear, clothing that covers their hands, arms, legs, and other exposed skin. Consider providing workers with hats with mosquito netting to protect the face and neck.
- Encourage workers to wear lightweight, loose-fitting clothing in warm weather to protect workers against the sun's harmful rays and provide a barrier to mosquitoes.
- Eliminate sources of standing water (such as tires, buckets, cans, bottles, barrels) whenever possible to reduce or eliminate mosquito breeding areas. Train workers about the importance of eradicating areas where mosquitos can breed at the worksite.

- *If requested by a worker*, consider reassigning anyone who indicates she is or may become pregnant, or who is male^[1] and has a sexual partner who is or may become pregnant, to indoor tasks to reduce their risk of mosquito bites.

Workers who perform tasks involving pesticides may need additional protection because of their exposure to hazardous chemicals. The interim guidance points to the EPA's Agricultural Worker Protection Standard, which provides a model for protecting these workers. It further notes that these workers may require respirators, which should be used in accordance with the existing OSHA Respiratory Protection standard (29 C.F.R. § 1910.134).

Healthcare or Laboratory Workers

OSHA also recommends that employers whose healthcare or laboratory workers may be exposed to contaminated blood use standard precautions to expand their universal precautions, including use of expanded personal protective equipment (“**PPE**”). The interim guidance lists hand hygiene and use of PPE (such as gloves, gowns, masks, and eye protection) as examples of standard precautions. Additionally, laboratories must ensure they are meeting the appropriate biosafety level for the work they are conducting. Additionally, OSHA emphasizes the following requirements for healthcare and laboratory workers:

- Follow workplace standard operating procedures (e.g., workplace exposure control plans) and use the engineering controls and work practices available to prevent exposure to blood or other potentially infectious materials.
- Do NOT bend, recap, or remove contaminated needles or other contaminated sharps. Properly dispose of these items in closable, puncture-resistant, leak-proof, and labeled or color-coded containers.
- Use sharps with engineered sharps injury protection to avoid sharps-related injuries.
- Report all needlesticks, lacerations, and other exposure incidents to supervisors as soon as possible.

WORK RELATED TRAVEL TO AREAS WITH ACTIVE ZIKA TRANSMISSION

As a preliminary matter, where an employee's job requires travel to a Zika affected area, employers should explain the risks and how to mitigate those risks through appropriate preventative methods. OSHA also recommends employers whose employees are traveling to or through Zika-infected areas to follow the same mosquito prevention precautions outlined above. Even after employees are provided with the relevant information from a neutral source like the CDC or WHO, some employees may not wish to travel to Zika infected areas.

Pursuant to the OSH Act, an employee may refuse to work where he or she has an objectively “reasonable belief that there is imminent death or serious injury.” Where such a belief exists, the company is obligated to accommodate the employee. However, if an employee refuses to work absent when he/she lacks an objective, reasonable belief of death or injury, an employer may take disciplinary action. This standard is unlikely to be satisfied absent factual circumstances, such as pregnancy, given that Zika infection is largely preventable with appropriate precautions. While it is clear to evaluate how to handle a pregnant employee's objections, it is much murkier to address how to handle the objections of a person trying to get pregnant or the spouse of a person trying to get pregnant.

Given CDC travel warnings and OSHA recommendations, employers should consider delaying travel for workers who are or may become pregnant or whose sexual partners may become pregnant who request it. OSHA further recommends employers consider allowing flexibility for workers concerned about Zika exposure. Similarly, the Office of Personnel Management has propounded guidelines which encourage federal agencies to “utilize all available human resources flexibilities, along with providing workplace accommodations, if appropriate, to support employees who have a significant risk of a severe outcome due to contracting the Zika virus—for example, female employees who are pregnant.”^[2] This includes, for example, permitting a worker to telecommute to avoid the outdoors.

PROHIBITING CERTAIN WORKERS FROM TRAVELLING OR WORKING IN AFFECTED AREAS

The Pregnancy Discrimination Act prohibits treating pregnant employees differently than any other employees. Employers should refrain from asking any employee whether she is pregnant or plans to become pregnant, or any man if his significant other is pregnant or if he plans to become a father. If employees volunteer such information, it should be treated as confidential. Pregnant employees or female employees of childbearing age should not be prohibited from travelling or engaging in work based upon the threat of Zika exposure. The Supreme Court in *Automobile Workers v. Johnson Controls, Inc.* held that employers cannot prohibit women from performing jobs that may negatively impact their reproductive health.^[3] Instead, employers must inform all employees, including any potentially pregnant women, of any inherent risks ensuring that employees educated on the Zika virus's symptoms and modes of transmission in the workplace, as well as on the precautions they should take to avoid mosquitoes and the risk of infection. Employers should encourage (but not initiate) discussions with workers about their concerns with travel into Zika infected areas.

WORKERS WITH SUSPECTED OR CONFIRMED ZIKA

Because Zika is not transmitted via casual contact, the CDC and other agencies have not imposed any quarantines on persons travelling from areas of active Zika transmission. As a result, employers cannot take any action to quarantine or otherwise isolate employees returning from areas where Zika has been detected. Similarly, employers cannot require medical testing of any employees suspected of having come into contact with the virus. Under the ADA, medical testing must be justified by business necessity. Employers may only request medical information or require medical examinations where an employer has an objectively reasonable belief that an employee will pose a “direct threat” to others because of a medical condition. Neither the CDC nor any state or local public health authority has declared an illness a public threat which would satisfy the applicable standard. Any employer who seeks to quarantine employees or require medical testing risks liability under various federal and state laws, including medical privacy, discrimination, and state wage and hour laws.

Similarly, employers in active Zika transmission areas must take care with regard to any suspected or confirmed cases of Zika among their employees to ensure they do not run afoul of medical privacy laws and the ADA.

OSHA also recommends specific training for workers with suspected or confirmed Zika. This training should be conducted with caution to avoid disclosure of private health information of particular employees. For that reason, particularly given that Zika's symptoms mimic those of so many other common illnesses, employers may want to consider providing this training before Zika is suspected with reminders at regular intervals.

Employers should also provide leave as required by the FMLA and other laws to sick workers. Finally, if an employee contends he was infected while working, the employer should report the workplace injury to its workers' compensation insurance provider.

ACCOMMODATING PREGNANT EMPLOYEES

According to the Equal Employment Opportunity Commission (“**EEOC**”), an employer must accommodate a pregnant employee working in a job that would subject her to a risk of becoming infected with the Zika virus to the same extent as it accommodates other employees who have work restrictions for reasons unrelated to pregnancy. “For example, an employer would have to allow a pregnant employee to take leave, to telework, or to work in a different job temporarily in order to avoid exposure to the Zika virus if the employer allows other employees to take leave, to telework, or to work in another job temporarily due to restrictions unrelated to pregnancy (such as injury or illness).”^[4] If an employee requests an accommodation, employers should consider the request, the potential risks based on the individual workplace, and whether a reasonable accommodation can be made without undue hardship on the company. The EEOC also has counseled that treating accommodation requests by pregnant workers differently than other accommodation requests—for instance through expedited processing—would not violate the EEO laws.

CONCLUSION

The key takeaway for employers with business operations in Zika transmission areas is to ensure they provide adequate training for all of their employees regarding Zika—including means of transmission and identification of symptoms—and undertake precautions and protective measures to prevent their employees from contracting or spreading the disease on the job. For employers considering sending employees to active transmission areas, be sure to inform them of the potential risks and allow for any necessary accommodations for anyone at risk.

NOTES:

^[1] Although OSHA's guidance specifically mentions male employees whose partners may become pregnant, employers should provide the same accommodations to female employees whose female partners may become pregnant to avoid allegations of discrimination under the EEOC's Title VII guidance.

^[2] Office of Personnel Management Memorandum, CPM 2016-13 dated September 16, 2016 (“**OPM Guidelines**”) available at <https://www.chcoc.gov/content/human-resources-flexibilities-and-authorities-federal-employees-affected-zika-virus>.

^[3] *Automobile Workers v. Johnson Controls, Inc.*, 499 US.187 (1991).

[4] EEOC Resource Document “EEO Laws for Employees Affected by the Zika Virus” attached to OPM Guidelines, *supra* n. 2.

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