

# Addressing Zika's Continued Threat to the Workplace

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The growing prevalence of the Zika virus in the United States has already presented a number of hurdles for employers striving to create a safe and healthy workplace environment for their employees. These concerns are more immediate than ever. The [recent and continuing outbreak in Florida](#) and the [emergence of state-to-state transmission](#) within the U.S. reinforce the need for employers to stay informed of best practices for minimizing workplace health risks without overstepping critical legal boundaries between employer and employee.

## **What is the Zika Virus?**

While scientists are still learning more about the Zika virus (and we cannot stress this enough), it is primarily known by the public as a mosquito-borne illness that a pregnant woman may pass to her unborn baby, which can cause microcephaly and other severe fetal brain defects and has been linked to problems in infants including eye defects, hearing loss, and impaired growth.

For the large majority of others, however, one in five infected people may experience a fever, rash, joint pain, and conjunctivitis. (There is some research suggesting a strong correlation between the Zika virus and reported instances of Guillain-Barré Syndrome (GBS), a nerve-damaging autoimmune condition that can lead to temporary or, even in very rare cases, permanent paralysis, but this represents a very small fraction of infected people and the condition is treatable in most instances.)

Besides through mosquitos, a person may become infected with the Zika virus through sexual contact or blood transfusion, but scientists have not found any evidence that an infection may occur through normal person-to-person contact such as shaking hands.

To date, the Zika Pregnancy Registry of the Center for Disease Control and Prevention (CDC) reports eighteen liveborn infants in the US with birth defects in cases with laboratory evidence of possible Zika virus infection. Further, the number of reported incidents in the U.S. continues to rise each day with the CDC reporting as of this writing a over 3,100 travel-related infections in a multitude of states and 43 locally acquired infections in Florida. In addition, infected cases have been reported in Mexico, the Caribbean, Central America, South America, the Pacific Islands, and Cape Verde.

U.S. health experts do not expect an epidemic similar to that of Brazil – a conclusion that is due, in part, to the fact that Americans live in less dense populations and use window screens and air-

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conditioning. Notably, the species of mosquitoes that carry the Zika virus currently live in localized areas in the Southern U.S. Nevertheless, precautions should be taken to avoid mosquito bites in high-risk areas, particularly for employees working outdoors in warm climate regions.

## **Be Careful of Supposed Common-Sense Responses that May Violate the Law**

Now that there are reported incidents of local Zika-infected mosquitoes and state-to-state transmission of the Zika virus within the U.S., it is important for concerned employers to ensure that any employment-related actions are compliant with the Americans with Disabilities Act (ADA), the Occupational Health and Safety Act (OSHA), Title VII of the Civil Rights Act of 1964 (Title VII) and other local, state and federal employment laws. Employers must consider these laws when tailoring their response strategies in order to reduce their exposure to employee claims and their employees' exposure to infections.

- **Employee Medical Examinations.** The ADA prohibits mandatory medical examinations unless the employer has a reasonable belief that an employee's medical condition poses a "direct threat" to the workplace, i.e. there is a business necessity to do so. Because the Zika virus does not spread through typical employee-to-employee interactions, including through casual contact (i.e. a handshake, use of a water cooler), neither the CDC nor state or local public health authorities have determined that the virus is a direct threat. Employers therefore should think twice before requiring medical examinations for employees exhibiting symptoms or returning from affected areas.
- **Employee Quarantines.** Public health agencies have not taken steps to isolate or quarantine individuals who exhibit symptoms, live in affected areas in the United States (such as Florida), or travel to and from affected areas. As a result, any attempt by an employer to do so could be met with criticism and impose potential liability under a myriad of state and federal laws aimed at preserving medical privacy and prohibiting discrimination, including based on disability, race, and national origin. Therefore, in line with medical examinations, employers should be careful before forcing an employee to stay home rather than report back to work.
- **Pregnant Employees.** Gender discrimination is a violation of Title VII and many other state and local discrimination laws, and a claim could arise if employers ask employees whether they or their partner are pregnant or plan to become pregnant, enforce a travel prohibition against pregnant women or women of child-bearing age, or against men with pregnant partners, or otherwise subject employees to other restrictions to "protect" against infection. In other words, employers should not make health-based decisions for their employees, including their pregnant employees, even if they believe it is in the best interest of the employee. Further, some discrimination laws require employers to reasonably accommodate pregnant employees and therefore, if a pregnant employee requests an accommodation, i.e. against traveling to an affected area to perform services on behalf of the employer, then the employer must engage with the employee in an interactive process to determine what accommodations, if any, are reasonable. The recent incidents of the Zika virus in the U.S. may also prompt pregnant employees to request to work remotely due to a fear of exposure for their unborn children. Employers should conduct the same reasonable accommodation analysis as described above in order to assess the request, the risk in the workplace, and the effect of the accommodation on the workplace.
- **Employee Safety.** OSHA permits employees to refuse to work when there is an objectively "reasonable belief that there is imminent death or serious injury." Because the Zika virus can

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be prevented by taking appropriate precautions, an employee's presence in an affected region is not likely to cause imminent death or serious injury, absent possibly where the employee is pregnant. For this reason, OSHA's regulation may not apply to employees who refuse to perform their job duties in an effort to protect themselves against the Zika virus. That said, given the amount of public attention around the Zika virus, employers should consult with counsel before making an adverse employment decision based on an employee's refusal to perform his or her job.

## **So What Should Employers Do?**

So if employers generally cannot require employees to undergo medical examinations, cannot quarantine employees who have recently traveled to affected regions, and cannot enforce targeted travel prohibitions, what should they do?

- **Communication/Education**. Employers should educate employees about the risks of travel to and from affected regions, the possible symptoms of the Zika virus (fever, rash, joint pain, and red eyes), the modes of transmission (mosquitoes, blood transfusions, and sexual contact), and proper precautions to avoid infection ([outlined here by the CDC](#)). Appropriate communication should effectively undercut any campaign of misinformation that has navigated its way through the workplace and instill confidence in employees that they can continue to perform their job duties without fear of infection if they take the proper precautions. This is especially crucial for employers who have pregnant employees or employees who have pregnant partners.
  - As employees who work outdoors are at the highest risk of exposure to the Zika virus through mosquito bites, their employers should consider (1) informing them about this risk, (2) providing insect repellants and encourage proper use (per CDC guidelines), (3) ensuring these employees wear clothing that covers exposed skin, and (4) eliminating sources of standing water and training employees to do the same. Per employee request and the reasonable accommodation analysis above, employers should consider reassigning individuals to indoor tasks if they or their partner are or may become pregnant.
  - Healthcare and laboratory workers should be reminded of effective infection control and biosafety practices. These include, but are not limited to, hand hygiene and the use of personal protective equipment (gloves, gowns, masks, eye protection, etc.) to avoid direct contact with blood and other potentially infectious materials. Laboratories should confirm that their facilities meet the appropriate Biosafety Level for the work being conducted.
- **Reinforce Sick Leave Policies**. Employers should consider training managers to send sick employees home for the day until they are better and reminding employees that if they are sick or are feeling sick to stay home and take advantage of the employer's sick or other leave policies. Under the Family and Medical Leave Act, employers with more than 50 employees must provide eligible employees with up to 12 weeks of unpaid leave for certain medical situations and there are also many state laws and local ordinances that require employers to provide sick leave (some paid, some not paid).
- **Consider a Travel Opt-Out Policy**. The CDC maintains updated travel advisories for areas

affected by the Zika virus both in the [United States](#) and [internationally](#). Employers may allow all of their employees to opt out of company travel to affected areas, but it cannot limit this offer to pregnant women, women of child-bearing age, or men with pregnant partners. American Airlines, United Airlines, Lufthansa Airlines, Air France and Carnival Cruise Lines are all permitting employees to decline travel to Zika-affected areas without repercussion to their continued employment or advancement.

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