

Workplace Privacy Counsel

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Workplace Privacy and the MRSA "Superbug"

The rumors are flying: The TV news ran a story last night on the evacuation and decontamination of the local public school after one of the football players missed Saturday's game because of infection with the [MRSA](#) Superbug. One of your employees happens to have a son on the football team, and she called in sick on the Monday after the game. Employees who work in the area of her cubicle have "petitioned" HR not to let the mother return to work until she has submitted written documentation from her physician that she is not infected or contagious. Where does HR even start to unravel the privacy concerns of the mother and her child, and how should those concerns be weighed against the health interests of the mother's co-workers?

The legal analyses related to this issue are among the most complex in the area of workplace privacy, involving the interplay of the [Americans with Disabilities Act](#) (ADA); the [Family and Medical Leave Act](#) (FMLA); the [Health Insurance Portability and Accountability Act of 1996](#) (HIPAA); state privacy statutes, such as [California's Confidentiality of Medical Information Act](#); state common law; and, at least in California, state constitutional law.

Before wading into this quagmire, HR professionals should consider the following guidelines for balancing the privacy interests of potentially infected workers and the health interests of co-workers.

These guidelines would apply regardless of the type of infection — [MRSA](#), [Hepatitis A](#), [TB](#), [HIV](#), *etc.*

1. **Investigate**: Learn the facts; do not rely on rumors.
2. **Interview The Possibly Infected Employee**: If the facts indicate that an employee might be infected with the MRSA Superbug, designate a manager with the appropriate level of responsibility to get more information directly from the employee.
3. **Consult Counsel On How To Handle An Uncooperative Employee**: If the employee refuses to disclose information, consult counsel regarding whether the employee can be required to provide health information before taking any adverse action is against the

employee. If the employee already has been sent home, promptly involve counsel to minimize or resolve any possible liability risks.

4. Provide Notice Of Disclosure To A Cooperative Employee: If an employee voluntarily discloses infection with MRSA, explain that (a) the employer may need to disclose limited information about the employee's health condition to those with a need to know, such as government health officials and health care providers of co-workers to take precautions against the spread of the infection and to facilitate any needed treatment of others, and (b) the employer will limit disclosure to those with a need to know and then will disclose only the minimum information necessary.
5. Request Consent To Disclose: Ask the employee for permission to make the limited disclosures described above. If the employee refuses to consent, tell the employee that the entity may have no choice but to share information about the infection with others but will do so only to the extent permitted or required by law.
6. Avoid Identifying The Infected Employee: When disclosing information about the infected employee, avoid identification by name except when necessary to protect the health of co-workers who might have been infected or as required by law.
7. Instruct Supervisors On Confidentiality And Retaliation Risks: Instruct supervisors about the need to maintain the confidentiality of employee health information and provide guidance on how to respond to questions from other employees and supervisors so as to avoid undue panic and concern. Supervisors should be reminded of the need to avoid any claim of retaliation by the possibly infected employee or his/her family members. Educate supervisors on the spread of MRSA infections, types of treatment, and the Company's planned preventative steps.

There is no one-size-fits-all solution to the many complicated privacy issues that a Superbug infection in the workplace can raise. These guidelines, however, provide a starting point for what most likely will be a tense and fast-moving situation that raises a wide range of benefits issues and employment-related liability risks.

My colleagues in [Littler's Workplace Safety Practice Group](#), [Don Benson](#) and Pete Rice, are OSHA experts who will be presenting a webinar on Wednesday, December 12, 2007, on how to reduce the risks of an MRSA outbreak in your workplace and how to respond when one occurs. You can get more information about the webinar [here](#).

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