

## TOPIC:

### H1N1: Campus Legal Issues

## INTRODUCTION:

“H1N1” ... “Swine Flu” ... “Pandemic” have been part of the daily vernacular on campus this academic year. By January 16, 2009, an estimated 41 to 84 million people in the United States were infected with H1N1 and President Obama had declared the 2009 H1N1 [\[1\]](#) influenza pandemic a national emergency [\[2\]](#). Institutions of higher education (“IHEs”) face challenging questions about how to handle their roles as employers, educators, and, in many instances, full-time residential facilities. This Note addresses some of the legal questions that arise in influenza pandemic planning and briefly discusses the impact of the President’s emergency declaration [\[3\]](#).

## DISCUSSION:

### I. IHEs AND THEIR EMPLOYEES

An influenza outbreak, whether on campus or in the surrounding community, can significantly impact a school’s workforce. Employees become concerned about workplace exposure to the virus, absenteeism increases, employees get sick, or must care for sick family members. IHEs have to balance concerns about maintaining their operational functions with their public health responsibility to prevent the spread of disease [\[4\]](#). In striking that balance, IHEs should be mindful of federal laws such as the Occupational Safety and Health Act (“OSHA”), the Fair Labor Standards Act (“FLSA”), the Americans with Disabilities Act (“ADA”), the Family Medical Leave Act (“FMLA”) and related privacy issues, and the National Labor Relations Act (“NLRA”) discussed below [\[5\]](#).

#### **The Occupational Safety and Health Act (“OSHA”)**

As an overriding principle, workplace safety law requires employers to provide a workplace free from recognized hazards likely to cause death or serious physical harm. Contingency plans to protect employees during a flu outbreak can trigger employment law and benefit issues. OSHA specifically requires that employers provide their employees with employment free from recognized hazards causing or are likely to cause death or serious physical harm.

IHEs covered by OSHA must take steps to minimize the risks to their employees related to a pandemic flu. Recently, OSHA issued informative guidance on pandemic planning in the workplace [\[6\]](#). Although many of the OSHA recommendations are probably already part of your institution’s informal efforts to avoid an influenza outbreak, your IHE should formally document them in the school’s pandemic plan. This will allow your IHE to demonstrate compliance with OSHA’s general safety requirement and defeat a charge that your institution allowed an abnormally dangerous work environment to exist on campus in violation of OSHA.

#### **The Fair Labor Standards Act (“FLSA”)**

If an H1N1 outbreak occurs on campus, the FLSA may be implicated. If, for example, your workforce is

depleted by illness, but the school remains open, with or without classes being held, your IHE may need to temporarily reassign job functions or work hours. Even if your institution closes, it will need a skeleton crew of essential employees on campus. These employees may be required to work nontraditional hours, either to cover necessary operations or to encourage social distancing with staggered work shifts.

- What are your obligations regarding overtime pay in carrying out a pandemic plan?

The FLSA requires all employers to pay non-exempt employees time and one-half their hourly rate of pay for all hours actually worked in excess of 40 hours in a 7-day work week, or public IHEs may grant time and one-half of compensatory time instead under certain circumstances [7]. Some IHEs, either by policy or collective bargaining agreement, have pay plans under which employees who work “out of class” are compensated at a different rate of pay applicable to the type of work performed. The terms of such provisions can vary. Some attach different rates automatically to all “out of class” work, while others may require a minimum period of time performing “out of class” work before a different pay rate attaches. If you have such a practice, you must compute the affected employee’s overtime pay rate at 1½ times his/her effective hourly rate for workweek that you assign him or her to a variety of duties at different hourly rates to cover staffing shortages arising from an H1N1 outbreak [8]. For example, if you require a public safety employee to perform custodial work and different bona fide rates apply, overtime is calculated on the effective regular rate for both jobs combined. On the other hand, your institution is not obligated to pay exempt employees (e.g. typically administrators, faculty members) overtime or any additional pay beyond their regular salary. So long as additional assigned duties to exempt employees meet the emergency exception and thus do not negate the otherwise applicable “primary duty” elements for the various exemption tests, the exemption continues to apply and no additional pay is required [9]. But check the terms of any applicable employment contracts or collective bargaining agreements (“CBAs”); they may require you to pay additional compensation.

- If your school cancels classes and reschedules its exempt employees (e.g. administrators) to work just one or two days per week, can it pay their salary on a pro rata basis just for the days that they actually work or pay them on an hourly basis?

No. You must pay exempt employees their full weekly salary for each workweek in which they perform any work for the employer. If an employer fails to do so, it may lose the exemption for that pay period.

- If your school cancels classes and instructs non-exempt employees (e.g. custodial staff) not to report to work, must the IHE pay these employees?

Federal law does not currently require you to pay non-exempt employees for time not worked. But check your school’s policies, any applicable CBA, and your employment agreements because they may provide for paid leave under these circumstances. Also, IHEs should be aware that bills have been introduced in both the House and Senate to require a certain level of paid sick leave due to pandemic absences. While the two bills differ somewhat, both versions would require employers to provide paid sick leave to an employee for a certain level of pandemic-related absences. Both also contain anti-retaliation provisions [10].

- Can you require employees to perform duties and functions that are outside the scope of their regular job, change their schedule, and/or require them to work overtime?

not prohibit your school from requiring an administrative assistant to serve lunch in the cafeteria. But, again, your institution's policies or employment agreements may contain restrictions. Additionally, as discussed below, if the employees are unionized, the extent to which your institution can make these changes is probably governed, or at least limited, by the CBA.

### **The ADA, FMLA and Related Privacy Issues**

During a campus H1N1 outbreak, the primary concern is your employees' and students' health and safety. When planning how to maintain your healthy employees' health and prevent H1N1 from spreading through the entire school, you must consider certain laws, including the ADA and FMLA, before taking certain preventative emergency measures.

- Can an IHE require an infected employee (or suspected to be infected) to isolate him or herself? If so, what are his or her leave options?

Yes, an IHE can require its sick employees to stay away from campus, if it has a pandemic plan that permits it to send employees home or to self-isolate. But the plan and the employment decisions must comply with the laws prohibiting discrimination in the workplace on the basis of race, sex, age (40 and over), color, religion, national origin, disability, or veteran status [11]. It would also be prudent to notify employees (and if applicable, their bargaining unit representatives) about any plans and policies developed with regard to the isolation of sick employees.

What will most concern employees ordered to stay away is whether they will be paid. Assuming compliance is more likely if they are, the IHE should review its sick leave policies to determine how existing policies will impact employees in such situations and whether adjustments may be warranted [12].

If an employee is unable to work due to the illness, the FMLA may apply. Generally speaking, absences due to an employee's serious health condition are protected under the FMLA, provided that the employee meets the eligibility requirements for FMLA leave [13]. H1N1 influenza, particularly with complications, could constitute a serious health condition [14]. An employer may require certification of the illness by the employee's healthcare provider, as well as certification that the employee is medically able to return to work when that time comes. On the other hand, the Center for Disease Control and Prevention (CDC) has suggested that in the event of an influenza outbreak, employers may decide from a practical standpoint to loosen their requirements for "doctors' notes" documenting excused absences, regardless of whether paid or FMLA leave is being used.

The troublesome issues for IHEs are: How to determine when someone is infected? Who makes the call, particularly with respect to suspected infections? What if the employee objects or disagrees with the call? Can you require a medical exam and shared diagnosis? How would this actually work in the face of objection, especially when there is such a small temporal window of contagiousness? The problem is that public health authorities have not mandated isolation, but have merely encouraged it [15]. So for public institutions, in particular, this makes it difficult to use the public health authority recommendation *to require* employees or students to stay home sick.

- Must the IHE grant employees time off to care for a child, spouse or parent who has the flu?

The FMLA [16] provides limited protection to "eligible employees" [17] by permitting employees to take up to twelve "workweeks" of unpaid leave during any twelve month period. In this way, the FMLA affords protection from employment termination to employees who are infected with a contagious disease or who care for relatives infected with a contagious disease. Under the FMLA, the IHE is required to grant the eligible employee time off if s/he is needs to care for his/her sick child, spouse or parent. The IHE may require medical certification of the family member's illness by that person's

healthcare provider. But if an employee falls outside the scope of eligibility, the FMLA does not necessarily prohibit an employer from terminating the employee [18].

- Is the H1N1 virus covered by the ADA?

Under the ADA, qualified individuals with disabilities may not be discriminated against in considering an individual for employment [19]. The “qualification standards” for an individual may include “a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace. [20]” A “direct threat” is a “significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” [21] In the vast majority of cases the illness is no worse than the seasonal flu, which means it is a transitory virus that is likely to be cured with or without medication in a few weeks. Although it is an impairment of bodily systems, it is not substantially limiting, and therefore, not covered by the ADA [22].

- Where does the ADA fit into pandemic planning?

An IHE cannot discriminate against employees who fall into high risk categories for acquiring an influenza virus when developing and implementing its pandemic plan. Similarly, an IHE cannot discriminate against an employee based on his or her “association” with such an individual (e.g. an employee who cannot risk exposure to the virus because his child suffers from an autoimmune deficiency). Although this latter situation does not carry an obligation to reasonably accommodate, IHEs should be sensitive to treatment of employees with associations under the Equal Employment Opportunity Commission’s (EEOC) caregiver guidance [23].

- Can an IHE require employees to take preventative infection control measures?

Yes. The EEOC has provided guidance stating that an employer can require employees to adopt infection control practices because doing so does not implicate the ADA [24]. In fact, as discussed above, it may be required under OSHA. Additionally, although an IHE can require employees to wear personal protective equipment (e.g. requiring employees who have to enter the dormitory rooms of sick students to wear face masks or gloves), if an employee with a disability needs a reasonable accommodation under the ADA (e.g. non-latex gloves, if allergic), the IHE should provide the accommodation.

- Does federal law require IHE employees to be vaccinated against the H1N1 flu virus?

Currently there is no federal law or regulation requiring IHE employees, including healthcare workers, to get any kind of flu shot [25].

But as noted above, state and local governments have the primary responsibility for protecting public health. Many states have laws providing for mandatory vaccinations during a public health emergency or communicable disease outbreak, so IHEs should consult their local public health departments for guidance on this issue [26]. Local authorities tend to follow the CDC's lead. The most recent recommendations antedated ready availability of the vaccine, and did not recommend that vaccination be required [27].

- May an IHE tell other employees when a particular employee is diagnosed with a pandemic flu virus?

In general, Health Insurance Portability and Accountability Act (HIPAA) privacy rules do not govern uses and disclosures of health information related to H1N1, unless IHEs get the health information from their health plans. Furthermore, HIPAA may permit certain disclosures of public health information that are necessary for public health reasons, in this case, to prevent to control the spread

But the best practice is for IHEs to exercise prudence and discretion, circulating only limited information regarding the status of an employee in order to sustain business operations (e.g. “Professor X is not currently at work and may be out for several weeks, requiring another individual to cover his classes), but without disclosing confidential medical information about the employee because HIPAA does not address the privacy prohibitions that may be contained in other federal, state or local confidentiality laws.

IHEs should also consult their state medical privacy rules regarding this issue.

### **The National Labor Relations Act (“NLRA”)**

If your private institution has a unionized workforce, it cannot unilaterally adopt and implement a pandemic plan without first notifying and giving the union an opportunity to negotiate its terms. Flu or no flu, the IHE’s CBA is a binding contract. The NLRA requires an employer to bargain in good faith with the employees’ union representative concerning wages, hours and other terms and conditions of the employees’ employment, and a pandemic plan necessarily impacts these areas. If the IHE and the union reach a true impasse in negotiations, however, the IHE can implement the terms of its last proposal to the union, provided that it does not conflict with the provisions of any applicable CBA [29]. For public institutions, collective bargaining obligations are generally governed by state law, so it is important to check your jurisdiction’s law for the parameters of any bargaining obligation.

## **II. IHEs AND THEIR STUDENTS**

At the start of the 2009-2010 academic year, most flu cases being reported to the CDC were H1N1. As a result, most IHEs have stopped testing students and are treating all cases as H1N1 [30].

### **Preventing and Containing an H1N1 Outbreak**

With students living, eating, and studying in close quarters twenty-four hours a day, IHEs face unique challenges to preventing and containing a flu outbreak on campus [31]. Non-residential schools face other challenges with students traveling to and from campus each day, bringing with them the viruses they acquire at home and in the community.

- Does federal law require IHE students to be vaccinated against the H1N1 virus?

As with employees, currently no federal law exists requiring mandatory H1N1 vaccination for college and university students [32]. While several states have specific college and university student vaccination or immunization laws mandating that students demonstrate immunizations for measles, mumps, rubella, meningococcal disease and hepatitis B, as of the start of the 2009-2010 academic year, no state laws exist mandating H1N1 vaccination.

Nevertheless, IHEs may want to update and revise their immunization policies to strongly recommend that students receive the H1N1 vaccination. Remember too that under the Higher Education Opportunity Act, policies on vaccination are a mandatory disclosure element for IHEs [33]. Institutions should promote open communication between students and their healthcare providers regarding the vaccination. IHEs seeking to open a vaccination clinic on campus should contact their local and state health department officials.

- What does the CDC recommend regarding to student self-isolation?

The terms “isolation” and “quarantine” do not mean the same thing, although they are often used interchangeably. “Isolation” refers to the separation of an infected individual from the uninfected. “Quarantine” refers to separating those exposed to an infection, but not yet sickened, from those unexposed to infection. From a practical standpoint, 95 percent of campuses must rely on students to take “self-isolation” measures, separating themselves from their peers, in order to thwart the spread of

an influenza virus [34].

The CDC separates its self-isolation recommendations into two categories depending on the severity of the outbreak [35]. “Scenario 1” applies if the severity of the flu is similar to that of the H1N1 outbreak of spring/summer 2009. “Scenario 2” applies if the **severity** of the flu increases.

Under both scenarios, the CDC recommends that IHEs facilitate “self-isolation” of residential students with flu-like illnesses. In other words, infected students should not attend classes and should limit their interactions with other people, except to seek medical care. In short, they should stay in their dormitory room or apartment. This is the case even if the ill students are taking antiviral drugs to treat the flu [36].

Under Scenario 1, the period of self-isolation should last for at least 24 hours after the students no longer have a fever, or signs of a fever, without the use of fever-reducing medicines. Under Scenario 2, the period of self-isolation is increased. The CDC advises those with flu-like illnesses to remain isolated for at least 7 days after the onset of flu symptoms, even if they have no more symptoms. Students who experience flu symptoms after this 7-day period should stay home until they are symptom-free for a full 24 hours.

The significant number of IHEs with a non-residential student body should also encourage students to stay off campus for the period of self-isolation the CDC recommends. The difficulty is that making this call may affect IHE budgets that depend upon revenue generated by crowd-drawing academic, cultural and athletic events.

Most states, at the federal government's post-9/11 urging [37], have updated their laws regarding the use of isolation and quarantine, the most controversial methods of stopping the spread of infectious diseases. But state laws vary widely on the powers given to state and local officials, particularly regarding isolation and quarantine, i.e. when it can be ordered, and what, if any, due process or hearing should be provided. Therefore, IHEs should also consult their state public health laws on the subject.

- What are some social distancing options for healthy students during a severe (Scenario 2) outbreak?

The CDC advises that IHEs explore ways to increase distances between seemingly healthy students if the severity of the flu outbreak increases. Several suggestions for accomplishing this are:

- permit students, faculty, and staff at high risk for flu complications to stay home [38];
- explore creative means of increasing social distances (e.g., moving desks farther apart, leaving vacant seats between students, or holding classes outdoors);
- make increased use of technology to communicate with students and facilitate distance learning until the outbreak passes [39].

Schools may have to consider suspending classes as either a reactive or preemptive measure. Reactive class suspension may be appropriate when the IHE is experiencing a high rate of absenteeism due to flu-like illnesses among students, faculty, or staff, or when the IHE is not able to function normally due to severe flu conditions in the community. In considering whether to suspend classes, IHEs should balance the risk of acquiring the flu while out in society against the disruption suspending classes will cause in both education and the wider community. When IHEs suspend classes, they should communicate through multiple channels a clear message explaining the decision and the implications for students, faculty, staff, and the community.

### **Tuition and Financial Aid**

In addition to the health and safety of their students, IHEs must consider the tuition and financial aid related issues that will arise in the event of an H1N1 outbreak.

- How will absences or class cancellations impact federal student aid?

The U.S. Department of Education (ED) has indicated that if class cancellation affects the length of the academic year, its Federal Student Aid (FSA) School Participation Team will assist IHEs in determining the continued eligibility of programs for Title IV assistance. Additionally, ED's Secretary, Arnold Duncan, is encouraging school financial aid administrators to use the professional judgment option available to them to make adjustments to the cost of attendance and family contribution to reflect a student's special circumstances. Similarly, if a student is not making satisfactory academic progress, he has suggested that schools should apply the "other special circumstances" exception before cutting aid [40]. Schools that make use of either option are advised to document their decision-making in detail [41].

- Should an IHE refund tuition to a student who is forced to withdraw as the result of influenza-related illness?

Generally speaking, an IHE should answer this question after reviewing its own policies regarding refunds and medical leaves of absence. ED, however, strongly encourages IHEs to make full refunds or to provide credit towards subsequent semesters. ED also encourages flexible re-enrollment practices for students who are forced to withdraw due to illness.

### **III. DECLARATION OF NATIONAL EMERGENCY**

President Obama's October 23, 2009 declaration giving the H1N1 virus the status of a national emergency empowered the Secretary of Health and Human Services (HHS), Kathleen Sebelius, to waive certain "legal requirements that could otherwise limit the ability of our nation's health care system to respond to the surge of patients with the 2009 H1N1 influenza virus. [42]" Specifically, the declaration allows health care providers to apply to the Secretary of HHS for a narrow class of Section 1135 waivers to avoid certain requirements related to Medicare, Medicaid or the Children's Health Insurance Program (CHIP), the Emergency Medical Treatment and Labor Act (EMTALA), and the HIPAA [43]. The declaration has the effect of suspending certain federally protected patient and privacy rights in order to enable healthcare facilities to offer appropriate care during emergencies and to fully implement disaster operations. It also permits hospitals to request setting up alternative screening locations for patients away from the hospital's main facility [44]. But it does **not** relax the employer requirements of OSHA, FLSA, ADA, FMLA, or NLRA.

Consequently, communication remains one of the most effective tools in an IHE's pandemic planning arsenal.

### **IV. COMMUNICATE YOUR PANDEMIC PLAN**

An IHE should communicate its pandemic plan to students and their families, faculty, and staff. The school website is a good way to convey such information [45].

Maintaining strong communication with students and their families, faculty, and staff is important not only for IHEs to provide information and reinforce hygiene and self-isolation, but also for the surveillance and reporting of illness. Additionally, open communication helps to allay fears of the unknown, particularly when schools expect their employees and students to report to campus for "business as usual" in the face of pandemic rumors. IHEs should consider a variety of methods of communication, including emails, text messages, phone calls, campus radio, and even social networking tools. IHEs should also maintain communication with local public health authorities, emergency preparedness groups, and hospitals regarding surveillance, case identification and reporting, control measures, and the provision of health care, resources, and supplies.

## CONCLUSION:

Although individual IHEs have been hit hard by influenza outbreaks, the severity of infection has not yet had the universal devastating impact initially feared. Regardless, H1N1 outbreaks can be debilitating on a local level. With much of the 2009-2010 influenza season still ahead, and with new information available on an almost daily basis, schools should continue considering and discussing the issues above in order to be as prepared as possible when the flu arrives on campus.

## FOOTNOTES:

**FN1.** [The Center for Disease Control and Prevention \(CDC\) Estimates of 2009 H1N1 Influenza Cases, Hospitalizations and Deaths in the United States April – October 17, 2009](#) (last accessed February 16, 2010). “Though flu activity, caused by either 2009 H1N1 or [seasonal flu](#) viruses, may rise and fall, it is expected to continue for several more months.” <http://www.cdc.gov/h1n1flu/>

**FN2.** [Proclamation No. 8443, 74 Fed. Reg. 55,439](#) (Oct. 23, 2009).

**FN3.** Public health in the United States is primarily a state responsibility. Consequently, IHEs should, at a minimum, familiarize themselves with their state’s public health emergency laws, which are beyond the scope of this Note.

**FN4.** According to the Congressional Research Service’s (CRS) Report on The 2009 Influenza Pandemic: Selected Legal Issues,” employment questions are among the most significant issues posed by a pandemic because employees, fearing lost wages or employment, may fail to comply with certain public health measures. Kathleen S. Swendiman & Nancy Lee Jones, [The 2009 Influenza Pandemic: Selected Legal Issues](#), Congressional Research Service Report, Sept. 1, 2009, at 34.

**FN5.** Due to NACUA’s diverse national and international membership, this article discusses only U.S. federal law. But, readers should also familiarize themselves with state and local laws specific to their respective jurisdictions. As a general rule, federal law preempts state law when the two conflict. But this principle does not apply universally to the interaction between state emergency laws and federal employment laws. Preemption is ultimately a matter of congressional intent. (See, e.g., *Gade v. National Solid Wastes Management Ass’n*, 505 U.S. 88 at 96 “[T]he question whether a certain action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone.”) Attorneys advising their clients should undertake an original analysis of conflicting state emergency law and federal employment law on a case-by-case basis because there is no black-letter rule regarding preemption for each of the federal laws highlighted above.

**FN6.** While state and local government employers are excluded from the definition of “employer under 29 U.S.C. §§652(5); this guidance requires state OSHA administrations to set their job safety and health standards at levels that are “at least as effective as” comparable federal standards. See [Guidance on Preparing Workplaces for an Influenza Pandemic](#), Occupational Safety and Health Administration, United States Department of Labor. See also [Preparing for the Flu \(Including 2009 H1N1 Flu\)—A Communication Toolkit for Businesses and Employers, Centers for Disease Control and Prevention](#).

Currently 22 states and jurisdictions are operating complete state plans (covering both the private sector and state and local government employees) and four states -- Connecticut, New Jersey, New York and the Virgin Islands -- which cover public employees only. (Eight other states were approved at one time but subsequently withdrew their programs). A state must conduct inspections to enforce its standards, cover public (state and local government) employees, and operate occupational safety and health training and

education programs. State programs will also need to be well versed on these new standards concerning the H1N1 Influenza A virus. Each program may access free consultative services through the Federal OSHA program to implement the necessary training regarding the standards.” (See [National Conference of State Legislatures, Federal Public Health Emergency Law](#)).

**FN7.** See 29 C.F.R. §§ 553.20 and .21

**FN8.** The effective hourly rate is computed by multiplying each hourly rate by the number of hours worked at that rate, adding those amounts together, and dividing the sum by the total number of hours worked in the 7-day workweek.

**FN9.** See 29 C.F.R. §541.700 for details regarding the “primary duty” aspect of the test for exempt employees, and 29 C.F.R. §541.706 for the emergency conditions exception.

**FN10.** See [H.R. 3991](#), introduced on November 3, 2009, and [S. 2790](#), introduced November 17, 2009.

**FN11.** Because pregnant women are at a higher risk for H1N1 than the general population, administrators may want to know if they can require them to stay away from work. [The Pregnancy Discrimination Act of 1978 \(PDA\)](#) added pregnancy as a form of sex discrimination, and case law has interpreted the PDA as prohibiting stereotypical decisions based on pregnancy even where it is believed to be in the women’s best interest. See [International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.](#), 499 U.S.187 (1991). But because the [CDC places pregnant women in the high risk group for H1N1](#), IHEs’ H1N1 policies should be sufficiently flexible to allow employers to accommodate pregnant employees and others in high risk groups, while not running afoul of PDA non-discrimination requirements.

**FN12.** As noted earlier, the importance of protecting paid employment was recently recognized by the proposed Emergency Influenza Containment Act ([H.R. 3991, \(111th Cong.1st Sess. 2009\)](#)). The act was introduced in the House on November 3, 2009 by Rep. George Millar of California. The purpose of this Act is to ensure that American workers are able to follow, without financial harm, the recommendations of their employer and public health authorities to stay home when they have symptoms of a contagious disease that may put co-workers, customers, or the public at risk.”

**FN13.** To be eligible for FMLA leave, the employee must have been employed by the IHE for at least 12 months (need not be consecutive) *and* must have worked at least 1250 hours in the previous 12-month period.

**FN14.** The U.S. Department of Labor has issued a Q&A document to help answer FMLA questions. See [Pandemic Flu and the Family and Medical Leave Act: Questions and Answers](#).

**FN15.** [“IHEs should review, and revise if necessary, their sick leave policies to remove barriers to faculty and staff staying home while ill or to care for an ill family member.”](#)

**FN16.** 29 U.S.C. § 2601-2654 (2009) (commonly known as the FMLA).

**FN17.** 29 U.S.C. § 2611(2)(A)(“eligible employee” means an “employee who has been employed--(i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period”).

**FN18.** *Id.* at 39. But see, e.g., [Reynolds v. Inter-Industry Conference on Auto Collision Repair](#), 594 F.Supp.2d 925, (N.D.Ill. 2009) and cases cited therein on retaliation protections for otherwise ineligible employees.

**FN19.** 42 U.S.C. § 12112 (2009) (commonly known as the ADA).

**FN20.** 42 U.S.C. § 12113(b) (2009).

**FN21.** 42 U.S.C. § 12111(3) (2009). Thus, although the ADA “provides nondiscrimination protections to individuals with contagious diseases by not allowing discrimination against otherwise qualified individuals, the ADA is also designed to protect the health and safety of other individuals. Therefore “an individual with a contagious disease does not have to be given access to...employment if such access would place other individuals at a significant risk. The CRS Report, [“The Americans with Disabilities Act \(ADA\) Coverage of Contagious Diseases,”](#) provides more information regarding the ADA.

**FN22.** The ADA may be implicated if the severity of the flu is greater. If so, the IHE is prohibited from treating employees with the H1N1 virus differently than those with similarly situated conditions that are equally or more contagious. In this instance, isolation efforts would be considered adverse actions, but could be defended as appropriate because the individual poses a direct health and safety threat to others.

**FN23.** See [Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.](#)

**FN24.** See [ADA-Compliant Employer Preparedness For the H1N1 Flu Virus](#), United States Equal Employment Opportunity Commission. See also [Equal Employment Opportunities & Privacy Issues Questions](#), United States Department of Health and Human Services.

**FN25.** An overview of the legality of mandatory vaccination can be found in a 2005 [report](#) prepared for the U.S. Congress by the Congressional Research Service. It notes that while the federal government does have the power to order quarantines, public health has historically been the states' responsibility. See, [Jacobson vs. Massachusetts](#) 197 U.S. 11 (1905). Information on federal vaccination policy, generally, can be found at <http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL31694.pdf>.

**FN26.** After 9/11, at the federal government's request, a number of states updated their state emergency laws, adopting the provisions of the [The Model State Emergency Health Powers Act \(MSEHPA\)](#), available at <http://www.publichealthlaw.net/ModelLaws/index.php>.

The Model Act authorizes the public health authority, during a public health emergency to “vaccinate persons as protection against infectious disease and to prevent the spread of contagious or possibly contagious disease.” *Id.* Article VI, Sec. 603.

**FN27.** See, [Use of Influenza A \(H1N1\) 2009 Monovalent Vaccine](#), (last accessed February 16, 2010).

**FN28.** See HHS guidance on [“Disclosures for Emergency Preparedness-A Decision Tool”](#), (last accessed February 16, 2010).

**FN29.** What is less clear is whether the provision of the CBA would prevail if they conflict with a state governor's exercise of power granted pursuant to a state's emergency law. See, *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) holding “[w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield”, suggesting that it might.

**FN30.** Mangan, Katherine, [Colleges Face Swine-flu Challenge as Number of Sick Students Surges](#), THE CHRONICLE OF HIGHER EDUCATION, Sept. 16, 2009.

**FN31.** The American College Health Association has issued guidelines that provide useful information for IHEs in developing a campus response to H1N1. See [ACHA Guidelines—Campus Response to Novel Influenza H1N1](#), American College Health Association.

**FN32.** See, footnote 19, *supra*.

**FN33.** See Public Law 110–315 at Section 485.

**FN34.** Mangan, Katherine, [Colleges Face Swine-flu Challenge as Number of Sick Students Surges](#), THE CHRONICLE OF HIGHER EDUCATION, Sept. 16, 2009.

**FN35.** [CDC Guidance for Responses to Influenza for Institutions of Higher Education During the 2009-2010 Academic Year](#), Centers for Disease Control and Prevention. See also [Technical Report on CDC Guidance for Responses to Influenza for Institutions of Higher Education During the 2009-2010 Academic Year](#), Centers for Disease Control and Prevention. [Preparing for the Flu –A Communication Toolkit for Institutions of Higher Education](#), Centers for Disease Control and Prevention.

**FN36.** An IHE's duty to insure the health and welfare of its students and to mitigate the spread of the H1N1 virus arguably supersedes its specific performance obligations in its student residence hall contracts. In mitigating the spread of the disease, IHEs can facilitate self-isolation by moving healthy students to a dormitory lounge away from their sick roommates. Schools may also create isolation housing completely separate from the "healthy" housing by making new dormitory assignments until the outbreak passes. If it takes this approach, an IHE should consider hiring nursing staff for the isolation housing. Schools should develop a strategy for monitoring the status of ill students who remain in their campus housing. Monitoring can include delivering meals, over the counter medications and supplies. Some schools use a telephone monitoring tool – calling to check on students daily.

**FN37.** The CDC backed the creation of a model emergency health preparedness law, subsequently drafted by the Centers for Law and the Public's Health in 2001. Civil liberties groups and some health law scholars disputed whether the model law sacrificed civil liberties to public health needs by giving states broad emergency powers to quarantine individuals on a compulsory basis and confiscate property and facilities, such as drug companies. In 2006, Congress enacted the Pandemic and All-Hazards Preparedness Act, giving the U.S. Department of Health and Human Services responsibility for improving the nation's response to emergencies.

**FN38.** After consulting with their governing boards and legal counsel.

**FN39.** In fact, Secretary of Education Arnold Duncan has encouraged institutions to develop alternatives for the delivery of educational programs – as opposed to cancellation – including distance learning through the school's existing systems or in partnership with other institutions. Regarding written agreements see 34 C.F.R. § 668.5 (2009).

**FN40.** 34 C.F.R. § 668.34(c) (3) (2009).

**FN41.** Institutions may have similar progress or grade requirements in their own scholarship policies. These need to be reviewed as well.

**FN42.** [President Obama Signs Emergency Declaration for H1N1 Flu](#), United States Department of Health and Human Services.

**FN43.** In accordance with Section 1135, Secretary Sebelius can waive requirements pertaining to, among other things, (1) conditions of participation or other certification requirements for an individual health care

provider or types of providers, (2) licensure in the state in which services are being provided, (3) deadlines and timetables for performance of required activities, and, perhaps most relevant to IHEs, (4) sanctions and penalties arising from noncompliance with certain HIPAA privacy regulations. 42 U.S.C. § 1320b-5(b).

**FN44.** For additional examples of Section 1135 waivers, see [President Obama Signs Emergency Declaration for H1N1 Flu](#), United States Department of Health and Human Services.

**FN45.** Several NACUA member institutions maintain very helpful websites. See, e.g., information posted by the University of Delaware at <http://www.udel.edu/healthalert>.

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## RESOURCES:

### Government Resources:

- [Presidential Declaration of H1N1 Flu Emergency](#)
- **CRS**
  - [The 2009 Influenza Pandemic: Selected Legal Issues, Kathleen S. Swendiman & Nancy Lee Jones](#)
- **CDC**
  - [Preparing for the Flu \(Including 2009 H1N1 Flu\)—A Communication Toolkit for Businesses and Employers, Centers for Disease Control and Prevention](#)
  - [CDC Guidance for Responses to Influenza for Institutions of Higher Education During the 2009-2010 Academic Year](#)
  - [Technical Report on CDC Guidance for Responses to Influenza for Institutions of Higher Education During the 2009-2010 Academic Year](#)
- **U.S. Department of Labor**
  - [Pandemic Flu and the Family and Medical Leave Act: Questions and Answers](#)
- **OSHA**
  - [Guidance on Preparing Workplaces for an Influenza Pandemic](#)
- **EEOC**

- [ADA-Compliant Employer Preparedness For the H1N1 Flu Virus](#)
- **State Law**
  - [National Conference of State Legislatures, Federal Public Health Emergency Law](#)

### **NACUA Resources:**

- [H1N1 \(Swine Flu\) Resources and Links](#)
- [Disaster Planning and Response Resources and Links](#)

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