

# H1N1 Flu: Practical and Legal Considerations

with Eric Hobbs

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**Editor's Note:** Our interview with Eric Hobbs reflects his best advice given what we know at this time, and, thus, as the situation changes, so could some of the counsel offered in this article. Mr. Hobbs' legal practice and experience focuses on Wisconsin and Illinois law; readers are urged to contact their own legal counsel regarding issues that are defined and determined by their respective state laws.

*What is the general area of concern with H1N1 for employers?*

Every employer must be prepared in the event of an H1N1 outbreak in the workplace. There may be no outbreak, or it could be sporadic and not any more problematic than the seasonal flu or the cold. But you must be prepared for a real wallop if your workplace is one of the unlucky ones.

*Historically, has this kind of epidemic brought with it legal, practical or business consequences?*

We really haven't seen anything like this before. That's why there's such interest in the area. Employers are concerned that they're not going to be able to meet supplier demands

or contractor demands, especially if they're in a critical field. If the supplies are critical, that could be disastrous.

*What should you do if an employee or a student comes into your college with H1N1 symptoms? Is there a difference between employee and student from a legal or practical perspective?*

There is a difference from a legal perspective. There are more laws regulating the employment relationship than there are regulating the educator/student relationship. My answer will also differ depending on whether the institution is public or private.

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There are implications to the steps that public institutions take that we don't have to worry about in the private sector. Let's talk about employees first. H1N1 isn't a disabling condition, so we don't have to worry about disability discrimination unless the virus triggers something else of a chronic nature in somebody. So we're really looking at possible workers' compensation implications if employees contract the virus as a result of work, and at implications under the

federal, and any state, *Family and Medical Leave Act (FMLA)*.

In most states, if I claim to suffer an occupational disease or contract the virus, I have to show that it occurred in the course of employment and that it arose out of the employment to collect workers' compensation benefits. It's tough to prove that if you're talking about a cold or the flu, but probably a little easier if you're talking about something more discreet like H1N1. If I'm working in a cube with one or two people who are infected and we know it, and I don't have three children ages 2, 4, and 6 running around my house, it would be easier for me to say I got H1N1 as a result of work. But workers' comp is a side issue and I don't want to distract from this.

More importantly, is H1N1 a serious health condition for the purpose of the *Family and Medical Leave Act*? Illinois doesn't have a *FMLA*, but Wisconsin does, as do several other states. For the most part, the definition of serious health condition tracks both the federal and Wisconsin statutes. Other states that have *FMLAs* have

similar definitions. So is the H1N1 flu going to qualify as a serious health condition for *Family and Medical Leave Act* purposes? Likely so. If the employee or an employee's dependent contracts H1N1, is there a right of the employee to take *FMLA* time, or a right by the employer to require the employee to take *FMLA* time? That's another issue.

*So what is the answer?*

If the flu otherwise qualifies as a serious health issue; that is, it takes the person down for at least three days and there's at least one doctor's call and a follow-up or something prescribed. It could be TheraFlu®, which is effective with H1N1, or some other care where the doctor might say he or she wants to see you a second time. That would be enough for that condition to qualify as a serious health condition, if it disabled the person from performing the employee's essential functions in any way on a temporary basis.

Can an employer say you may not come into work? Sure, an employer can say that. Should an



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In addition, he is involved in the community, serving as chairman of the advisory board for the School of Environmental and Occupational Safety and Health at the University of Wisconsin–Whitewater, vice chairman of the Milwaukee Symphony Orchestra's board of directors, a director of the Board of Forensic Document Examiners, Inc., a director of the Meier Clinics Foundation, Inc., and chairman of the Milwaukee County Commission for Persons with Disabilities, and others.

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employer say that? I think under these circumstances, yes. If the employer suspects that an employee has the H1N1 virus, I think it would be unwise for the employer not to say to the employee you may not be at work; you need to go home.

*But the employer is not a trained medical professional. How can he or she make that assessment?*

First, the employer has to become educated as to what the symptoms generally are. They might choose to tell the employee, "I suspect you have the H1N1 virus because of this symptom or that symptom. Go see a doctor and come back to me and tell me what the doctor said."

But the employer doesn't have to do that. The employer doesn't have to know for a fact that it's H1N1 to take the cautious route and say go home. It's perfectly lawful for the employer to do that.

The tougher question is if the employer tells an employee to go home, should that employer pay that employee while he or she is at home? The virus will be active in the system for about seven to ten days after the first symptoms are evident. Right now the Centers for Disease Control and Prevention and various states' departments of health are saying don't come back to work while you're contagious. Some are saying don't come back to work for seven days. Probably more accurately, others are saying don't come back to work until 24 hours after your fever goes away without the use of ibuprofen or aspirin or some other thing that would suppress a fever. So the time at home could be awhile.

*Is the status of a tuition-paying student different?*

Yes, it is different because a student has a contract with the institution. In fact, some institutions have written contracts. I'm not as familiar with those, but I have seen them. In fact, a national association recently sent out an e-mail asking if anybody has drafted a policy that provides for tuition reimbursement in the event a student drops out because of H1N1. Right now there is counsel that institutions ought to give reimbursement.

*Can you prohibit employees from non-essential travel—for example, attending a conference or convention in Las Vegas or Orlando—if outbreaks have been confirmed there?*

If the employer is footing the bill for the employee to go, you can and should prohibit non-essential travel. Right now we don't know where the outbreaks will be. It was a little more discreet in the spring when we knew we didn't want to send people to certain parts of Mexico. Right now the international world is saying, "Don't go to Wisconsin," although Wisconsin isn't the problem people perceive it to be.

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When it comes to recreational activity out of state or into an area where there's a greater risk of exposure, employers can control that, too. Employers can't tell their employees they can't go, but they can tell them if they go that they will have to sit out seven days once they come back, for example. In other words, it takes about seven days for the infection to evidence itself in symptoms and to become symptomatic in an adult.

*So if an employee or student goes to Mexico on vacation, knowing that it has an outbreak of H1N1, would you require them to wait seven days before returning to school?*

The institution can have a policy like that and I've recommended to clients that they have such a policy, particularly if they know there is a risk of infection. But we don't want to scream the sky is falling either.

*So how specific do you have to be in such a policy? Is there a number, like 28 confirmed cases, that you must reach?*

It's truly a judgment call. Last year, the worst of the outbreaks was in the Mexico City area. So

some employers were specifically saying if you go to Cancun, that's fine. If you go to Puerto Vallarta, that's fine. If you go to Los Cabos, that's fine. But if you travel through Mexico City to get there, that's not fine.

*According to the Centers for Disease Control and Prevention Web site, doctors are going to be too busy to write notes documenting that students or employees can return to school. What do you think?*

I don't know if that's true. The real problem is that most doctors are not going to test an individual to find out if he or she still has the virus. The doctor is going to ask you if you still have a fever, feel nauseated or have diarrhea, or if you're sneezing or coughing has decreased. Those are the same kind of questions that an employer legitimately can ask an employee who wants to return. Since the doctor is going to base his or her answer on what the employee tells the doctor, the employer can just as easily ask the questions and get those answers. It's perfectly lawful for the school to ask those questions and draw its own conclusions at that stage.

*If schools are drafting a faculty-absence policy for resident schools about H1N1, what would they need to include?*

That's a difficult question to answer. If you require your faculty to have face-to-face time, in either the classroom or the office, you may decide that those faculty members should be replaced temporarily or that their classes be suspended for that period of time. The institution also could decide to allow distance teaching, and make video and audio feeds available to students.

*Many proprietary institutions already have online capability for their courses, so it might be simple to switch students to an online environment.*

Yes, they could do that, so long as their contracts, written or not, with the institution allow it. There's no legal mandate or prohibition of any such thing that you or I just described. It's an accommodation issue, in the non-legal sense,

of trying to make certain that our students get what they paid for, via the faculty whom we've hired to give it or some other faculty member, and consistent with our promises.

*What about the whole issue of missing school and/or employment because of sick family members, childcare issues and so on?*

That really comes back to *Family and Medical Leave Act* issues. If a child, other dependent or elderly dependent parent has the H1N1 virus, and it qualifies as a serious health condition for *FMLA* purposes, then the employee has the right under the *FMLA* to stay home and care for that person. Now, what if a school that your employee's child attends closes because there's an outbreak, but the employee's child isn't one of those who has the H1N1? That's a childcare issue and that's not *FMLA* covered. The question would be: does the institution allow for that kind of leave under its existing policy? It's like a snow day. What does a college do when one of its faculty members has to stay home to take care of a child because of a snow day?

*Many proprietary college students have externships where they work in businesses and are out in the field. Does that provide any particular issues or problems?*

The argument could be made that they're more likely to be exposed to the H1N1 if they're moving from point A to point B, C, D or E rather than staying on campus. But there is no affirmative obligation that I'm aware of to provide them with anything more than notice. You would probably want to give them notice that if they start dancing around different workplaces as part of an externship, they may be more likely to be exposed to H1N1 or something else, if there's been an outbreak elsewhere. It would be the right thing to do even if the law didn't mandate it.

*There's also a possibility of delayed graduation or additional costs to tuition because of an interruption in education. Do you have any thoughts on that?*

If there's an outbreak among the faculty and we have to delay or postpone classes, that comes

back again to issues of contract, either explicit or implicit. This is much like an act of God, even though it wouldn't be treated that way. It's not like an earthquake or a flood, but it certainly is no less outside of the control of the institution. So if there were no reasonable way for the institution to accommodate the absence of all the faculty, for example, it would likely be treated the same way as it would for an earthquake or a flood. But schools should review their student contractors and policies to be sure they allow for such an event.

*In reality, it might be sporadic disruptions, which is much more complicated than all being gone for a while.*

What you've described is more likely the way it's going to happen. It likely would be sporadic. So if five faculty members out of 50 are affected, what is the likelihood of an interruption to the extent that it would delay somebody's graduation? At what percentage do we have an obligation contractually? I don't know the answer to that. The legal terminology is to mitigate the damage or to pay the damages. In other words, at what point would we have to allow students to come back for an extra year at our cost rather than theirs because our faculty couldn't fulfill our obligation to them. That would depend upon the contractual relationship between the parties.

*So officials would really have to look at their potential liabilities and not make corrections post-contract?*

Correct, not unless the other party agrees to the correction. If it's before the student has begun to matriculate, but the student has agreed to come at the invitation of the institution, then arguably you could make the change, with notice, before the student arrives. But once the student arrives and starts matriculating, it would be tough without the student's agreement.

*What about requiring proof of shots or requiring getting the immunization shots?*

This question was raised early on. Can an employer, or in this case an institution of higher ed,

require employees or students to be vaccinated? In the private sector I don't see any legal prohibition, legal impediment or legal obstacle to that. I think an employer can require it. It is a much tougher question for public institutions to answer.

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Is it wise to do so? I don't know the answer to that. It really depends upon, in the institution's mind, what the likelihood is of an outbreak that would ravage the school. We're really gazing into a crystal ball. I don't yet think I've had a client tell me that they're going to require a vaccination of employees—or certainly students.

*Assuming that you did, would you then be liable for adverse effects of people responding to the shots?*

Absolutely. In the case of employees, there's a limitation of that liability because workers' compensation, for the most part, exclusively protects against lawsuits by employees who contract A, B or C as a result of work. Now, if the institution were reckless, that would be enough to put them outside of the workers' compensation system and its exclusive remedy in some states. Students would have a right to pursue a school for having required vaccination generally only in the event the institution were negligent or reckless in making the requirement (not likely), or in the provision of the vaccine.

*How would you be negligent or reckless in requiring shots?*

For instance, if it were determined you didn't look carefully enough into the quality of the vaccination you were providing or of the clinic you contracted with to give it, you could be considered negligent. It's not common for people to contract chronic disease or even die from vaccinations. A failure to do "quality

control” to the extent reasonable and within the institution’s capacity could be negligent or reckless.

*If you were going to require this as an institution, would you have to give a list of contraindications?*

If you’re going to mandate vaccination, you might choose or not choose to give the warnings. Warnings generally are given to people who are submitting themselves to vaccination voluntarily, not involuntarily. So you don’t have to give warnings if you tell the workforce or the student body they have no choice. But I suggest it would be wise to do so in any event, in order to guard later on against a claim by an employee or student that you failed negligently to disclose what you knew to be true.

If you’re going to invite people to come and be vaccinated because you’re going to provide it at your cost, then it’s a good idea and warnings are appropriate. These institutions, probably unlike a lot of other more traditional institutions and colleges, don’t have a health center. So they’re going to bring in third parties, and that is an extra layer of insulation. It’s the third party who will give the notices and get the individual to sign the waiver.

*Would that be the preferred way of doing it?*

Absolutely. You shift responsibility for determining quality of vaccination, quality of provision of the vaccination, etc. to an “expert” third party. I’d suggest the institution get some indemnification promise from the third party in the event the third party acts negligently or recklessly. And the institution should be sure to do its homework and choose a reputable provider.

*Can we talk about Americans with Disabilities Act (ADA) involvement?*

ADA doesn’t apply to the extent that the symptoms are limited to just the H1N1 virus. If it were to trigger something in someone that has chronic issues, or exacerbate a problem so that it became a disability, then that would be a

different issue. But the H1N1 virus itself isn’t going to qualify as a disability.

Institutions need to remember, however, that asking employees about their health status, unless the inquiry is job-related and consistent with business necessity, even if the employee has no disability, is covered by the ADA. So an employer can’t ask, for example, if an employee has a chronic condition that might be made worse by a flu shot, unless it does so in the context of other non-medically-related questions. The EEOC has published helpful guidance on this topic.

*Do we have to set a clear policy on Family Leave pay consideration?*

Definitely. Part of having a plan in place would be to figure out in advance whether or not—if somebody goes home sick, or more likely if I send somebody home because I think they’re sick—I am going to pay them for that time. FMLA leave time is unpaid time. But an employer can choose to pay for it or say to the employee I’m going to send you home and I’m going to dock you FMLA time, but you can pull cash from your sick pay bank or from a short-term disability bank.

*Potentially, could the employee be home for a week or more?*

Yes, likely. The virus generally lasts from seven to 10 days.

*That would have quite an impact on their income.*

Yes, that could significantly impact them, as could the payment of that time by the employer impact the employer.

*What about OSHA considerations in terms of a safe workplace?*

OSHA has the General Duty Clause. That clause of the *Occupational Safety and Health Act* says every employer has the obligation to provide all of its employees with safe employment and a safe place of employment. It applies to recognized hazards. This, I think, clearly is a recognized hazard.

The possibility of an H1N1 outbreak is a recognized hazard so the employer has to take reasonable steps to prevent against infection in the workforce to the extent it can do so. I have heard that a hospital in Queens, New York, either has received or will be receiving a General Duty Clause citation for having failed to protect workers against H1N1 by providing them with respirators as recommended by the Centers for Disease Control and Prevention.

But I don't think OSHA is going to be out there proactively enforcing the *OSHA Act* against employers that have outbreaks of H1N1. Could an employee complain and bring OSHA in to investigate? Yes, an employee can do that and OSHA would have to inspect. But unless really forced into it, OSHA is taking the position, at least informally, that they're not going to seek out employers to cite them for each H1N1 virus outbreak.

*An interesting situation with cosmetology schools, massage therapy schools and some of the healthcare schools is that they run a clinic open to the public. Do they have the right to refuse service to people who are exhibiting symptoms? How would you safely make that assessment?*

To the extent that schools are offering those services to the public for any fee, even if only to cover expenses, they become what is known as "public accommodations" like Target or a local grocery store. They're not doing this as an educational institution; they're doing it in the form of an entity now offering services to the public for a price, however reasonable.

*They're doing it as part of their educational process.*

That's incidental as far as the law is concerned. The important part is that they're saying here's the service and the public is invited to come purchase it. So the obligations imposed upon the entity at that point are the obligations that are being imposed on any business that invites the public to come. The standard is a bit higher because we have an obligation to all our patrons to keep them safe. In other words, we can't be

negligent or reckless. That's where this issue that you've raised would come in. Can we say to an individual who's exhibiting the symptoms of H1N1 that you're not going to be served because we're concerned that you'll give it to our workers and the rest of our patrons? The answer depends on state law.

*I checked with local school owners and asked them what their policy was. They told me they currently refuse service to people with hygiene issues, and suggest they go home and correct that issue and then come back.*

That's interesting. The problem is an *ADA* and similar state statute problem, more than it is a general liability problem. We can't discriminate based upon race, sex, sexual orientation or disability in the provision of products or services. In fact, the *ADA* puts affirmative obligations on places to accommodate reasonably. That's where the hygiene issues might turn into disability issues because body odor, for instance, can be the symptom of some chronic health condition. Dirty hair, on the other hand, wouldn't be. We probably don't have a disability issue here because H1N1 is a short-term problem vs. a chronic problem somebody has.

*Hopefully, hygiene isn't a chronic issue. Now let's take the other perspective. If you have students serving the public, do you have a liability if one of your students has the flu and passes it on to one of your paying clientele?*

The exposure there is the same as in the event an employee of the institution were to expose the patron. The obligation to the patron isn't dependent upon the role of the institution's agent who is offering the services.

*So there is a liability?*

There could be. It would be an issue of negligence or recklessness, as we discussed earlier in other terms.

*Is that liability any different than a faculty person exposing students?*

I don't think so. We invite students to matriculate.

*As part of our culture, we treat students as customers.*

That's exactly where I'm coming from. They become invitees or patrons just the way an individual we brought into a cosmetology school for a hairstyle would become one. So no, I don't think the exposure is different.

*So can we line up our faculty and staff and take their temperature every morning?*

Yes, you can if it's job-related and you have a business need—in the event of a pandemic, for instance. But I don't know if that is a wise business step. It would be labor intensive and potentially an HR nightmare. But there's nothing, in the event of a

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pandemic really threatening the school, to prohibit a daily assessment, or to tell the faculty and staff that if they begin to think they might have the H1N1 virus we need to know immediately so that we can take appropriate steps.

*Are there other considerations unique to an educational institutional?*

The issue of cross-training is a big deal in some business establishments. This is an opportunity for employers who haven't trained employees to do A, B, or C jobs in addition to their own to do just that. It's a little tough in the educational setting, at least among faculty in their area of expertise. You hire Sue because she's Sue and not just because she's an expert. So it's a combination of personality and expertise. You can't train Joe to be Sue. I don't think that applies, at least to the

faculty. But cross-training on the staff level is a good opportunity, depending on how many employees you have and how many jobs they do. The smaller the employer or institution, the more important cross-training is. That's because if six of your 10 employees come down with H1N1, you've got only four people to get the job done.

*How important is it for an institution to now have a written policy for dissemination?*

It's important because it forces the institution to address these issues, each one in order, and to come to a conclusion as to how to face the problem before the problem arises. Dissemination is important so everyone is on the same page. It's important to have it in writing and distribute it so that everybody understands what the policy is. But there's no legal requirement for that; it's just good practice.

*And they should do it now?*

Yes, they should do it now. The reason we've been doing breakfast briefings for clients is because they need to think about it now before it's a problem. When you react to problems rather than taking proactive steps, you often run into consistency problems.

*Talk to me about consistency. You have to treat everybody the same, but circumstances change.*

It's unwise to react on a case-by-case basis because the likelihood of being inconsistent increases. If you have a policy and you decide up front that you're going to apply it across the board, you're much more likely to apply it across the board. You'll be able to say on the back end, even if it appears that you treated all the members of a protected class (race, sex, age, etc.) one way, that you came up with this policy and applied it consistently with its terms without knowing who would be subject to it.

But if you're simply reacting to people who are reporting to you that they have H1N1 symptoms, or if you're identifying them, then it can appear that you're targeting people. You're



not insulated completely from liability just because you take all these steps in advance, but it helps tremendously in proving the case.

*As an employer, what kind of documentation do you need regarding both students and employees in terms of assessment of their symptoms?*

It's always important to record the decisions you're making and why you're making them. In these cases, you'd want to keep a record of who you're telling to go home and why, so if the person who just came down with H1N1 also happens to have multiple sclerosis or morbid obesity or any other chronic condition that might qualify as a disability, it's clear that you made your decision based on the H1N1 infection, or likely H1N1 infection, and not on the disability. You also want to be able to show that it wasn't because the people sent home were of a particular color, race, national origin, sex, etc. Because similar anti-discrimination requirements apply to students, you'd want to document the decisions you're making in their cases and why, and make them consistent with the policy.

*Don't you also want consistent documentation?*

Absolutely. However, depending upon the institution, you may have more than one decision maker. That's why it's important to have a plan and disseminate it so everyone is on the same page. It's easier if you only have one decision maker. If you have only one decision maker, then that decision maker is more likely to be consistent. But each decision-maker's steps in the process ought to be consistent—even if they come to different conclusions.

*Is there anything else we need to consider or worry about and keeps us awake at night?*

Depending upon the setting of the school you might have third parties like vendors or others coming onsite. Or you might have a contingent workforce where you bring in temporary workers, whether it is Manpower's or Kelly's or somebody else's. That also may become an issue if a bunch of your staff is out with H1N1 and you need to replace them temporarily.

*What issues does that present on the workforce?*

There are all sorts of quality assurance issues when it comes to people coming in through a third-party agency like Manpower or Kelly. Setting those aside, there are also potential

**Q:** H1N1 or the swine flu could make students miss school for a week or more, force schools to close or delay graduation for students, but could it also have implications for Title IV funding?

**A:** Not likely, school officials say, since absences or school closings caused by H1N1 would likely be treated like any other illness, absence or closing.

"If a student missed the time, it would be treated like any other illness and the work would have to be made up," said Sally Samuels, senior vice president for regulatory affairs for FAME Inc. "In a school that is required to take attendance, the sick time could be documented. If the school has to close for a week or so, make-up days would be required. There are a few schools and a few states that will require the student to be terminated based on excessive absences."

Julia M. Brown, senior vice president of sales and marketing for FAME Inc. agreed. "The absence per student is like any other absence and would need to follow the school's attendance policy," she said. "Should the school close...it would be handled similar to a snow day and time would have to be made up."

Sharon Bob, with Powers Pyles Sutter & Verville, P.C., said about half of the states require schools to take attendance. "If a student misses classes at a school not required to take attendance, the missed attendance may affect the student's grades. Some schools not required to take attendance have attendance policies, such as a student will be dropped if he or she misses X number of days. But as far as schools closing, schools may have to provide make-up days just like when schools have unexpected snow days."

health-related issues. If I'm a temp and I've worked at four workplaces in the last two weeks, I've been exposed to a lot more people than the person who has been on my campus or in my building for those same two weeks.

*So should we throw out all the technical salesmen and other people who go campus to campus?*

No, but it becomes an issue. If you have a vendor's employee who comes on the premises and who is exhibiting the symptoms, then you should tell the vendor not to send the employee back because it appears the employee has an infection that might spread to your workforce or to your students. I'd even suggest sending vendors a notice that you're depending on them not to send people potentially infected with H1N1 to your school, and that they'd better take steps to prevent against it.

*Do you have any final words of counsel?*

We need to be careful not to fear monger and to cry out that the sky is falling. It's not. In my

practice lifetime, I don't know that we've faced anything like this before; the potential of a pandemic seems to be real. But at the same time, we'll get through this the way we've gotten through every other HR crisis.

We shouldn't over-react, but we should, nevertheless, approach the issue deliberately. Think it through before it becomes a problem, and figure out what the policy ought to be and why. Memorialize that policy and disseminate it; make sure that people are trained to administer the policy so there's consistency. Then let students and employees know that in the event of an H1N1 outbreak, this is what you will do as an institution.

That education element is very important. We need to educate our employees that these are the symptoms of H1N1 and if they either see them in themselves or someone else, that they should not jeopardize their short-term health or the health of the people around them by coming to work sick.

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