

SPECIAL BULLETIN

May 1, 2009

Responding to the H1N1 Influenza (Swine Flu).

Recent announcements by the World Health Organization and extensive media coverage have generated great concern among school districts, community college districts, and other educational institutions regarding a possible pandemic.

On April 29, 2009, the World Health Organization (WHO) announced that the current H1N1 influenza (swine flu) outbreak meets the criteria for a Phase 5 Pandemic. The elevation to Phase 5 signals that “a pandemic is imminent and that the time to finalize the organization, communication, and implementation of the planned mitigation measures is short.”

The experts cannot predict how severe the outbreak will be. However, we know that numerous school closures have taken place in California and other states.

Liebert Cassidy Whitmore has received inquiries from a number of school districts and community college districts regarding the consequences of possible school closures in their areas. Our preliminary analysis of some of the legal and operational issues facing our clients follows:

What is H1N1 Influenza?

H1N1 influenza is a respiratory virus. In the past, it has been confined mainly to pigs. Recently, it has begun to spread through the human population via person-to-person transmission in the same way as a "seasonal" flu - e.g., coughing, sneezing, and contaminated surfaces.

Individuals infected with the virus may be able to transmit the disease to others about one day before symptoms develop and up to seven or more days after becoming ill. Symptoms of H1N1 influenza include fever, cough, sore throat, body aches, headache, chills, fatigue and possibly diarrhea and vomiting.

Guidance Regarding School Closures

Authority to close schools in order to control the spread of pandemic influenza is vested in local city and county health departments, working in coordination with the California Department of Public Health (CDPH). In addition, the State Department of Health Services may quarantine or take other measures to protect the public health, including closing schools. Various federal agencies are also authorized to order school closures in an emergency.

1. CDPH's Interim Guidance on Dismissal

The CDPH has issued the following “Interim Guidance on Dismissal”

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addressing school closures due to influenza outbreaks:

- Dismissal of students should be strongly considered in schools with a confirmed or a suspected case epidemiologically linked to a confirmed case.
- Decisions regarding broader school dismissal within these communities should be made by local authorities in coordination with CDPH taking into account the extent of influenza like illness (ILI) or swine influenza in the community.
- If a school dismisses students or a childcare facility closes, they should also cancel all school or child-care related gatherings and encourage parents and students to avoid congregating outside of the school.
- Schools and childcare facilities should dismiss students for a time period to be evaluated on an ongoing basis depending upon epidemiological findings.
- If no additional confirmed or suspected cases are identified among students (or school-based personnel) for a period of seven days, schools may consider reopening.
- Large gatherings linked to settings or institutions with laboratory-confirmed cases should be cancelled, for example a school event linked to a school with cases. Other large gatherings in the community do not need to be cancelled at this time.

2. U.S. Department of Education

On April 29, 2009, the U.S. Department of Education issued a guidance document entitled “H1N1 Flu & U.S. Schools: Answers to Frequently Asked Questions.” The guidance discusses closures of both K-12 schools and institutions of higher education.

Like the CDPH, the U.S. Department of Education recommends that school closures be considered where there is a confirmed or suspected case of H1N1 flu among the students or staff in a school. The guidance can be accessed: at <http://www.ed.gov/admins/lead/safety/emergencyplan/pandemic/guidance/flu-faqs.pdf>. Also see the U.S. Department of Education's ,Guidelines for Emergency Influenza Outbreak Planning, <http://www.ed.gov/admins/lead/safety/emergencyplan/pandemic/index.html>.

With respect to questions about the affect of possible school closures on NCLB requirements, readers are directed to a separate guidance explaining the Department of Education’s waiver authority, which can be found at: <http://www.ed.gov/admins/lead/safety/emergencyplan/pandemic/guidance/pan-flu-guidance.pdf>.

3. Centers for Disease Control

The Centers for Disease Control and Prevention, U.S. Department of Health and Human Services has developed an interim planning guidance with respect to influenza pandemic planning. Among other valuable resources, a “Pandemic Flu Planning Checklist for K-12 School Districts,” and “Pandemic Flu Planning Checklist for Colleges and Universities” which can be found at www.pandemicflu.gov/plan/school/index.html and www.ed.gov/admins/lead/safety/emergencyplan/pandemic/planning-guide/index.html.

4. California Department of Education

The California Department of Education has also posted answers to frequently asked questions, as well as sample letters regarding school closures and information for parents and guardians, at <http://www.cde.ca.gov/ls/he/hn/pandemicflufaq.as>.

Relevant Education Code Provisions

1. ADA

The California Department of Education has confirmed that local education agencies (LEA) will continue to receive the ADA for closed schools pursuant to Education Code sections 46390 and 46392. The CDE website explains the process to follow in the event of school closures.

2. Length of Term

Education Code section 37202 establishes an exception to the requirement that schools be maintained for an equal length of term during the school year.

3. School Safety Plans

California Education Code section 32282 provides that California schools must maintain a comprehensive school safety plan. The school safety plan should address public health emergencies including pandemics.

Employment Considerations

1. What actions can employers take to prevent the transmission of influenza and limit the impact of the current outbreak?

- Remind staff that frequent and thorough hand washing can help prevent the spread of infection, as can proper hygiene techniques like covering one's coughs and sneezes and avoiding touching one's eyes, nose and mouth.
- Direct employees to stay home if they, or a member of their household, become ill with flu-like symptoms.
- Prepare for the possibility that some employees may have to stay home in the event of school closures or childcare concerns.
- Provide staff with information about how to prepare themselves for a pandemic. Resources are available at www.pandemicflu.gov/plan/individual/checklist.html
- Identify essential job functions that must continue to be performed even if absenteeism rises as the result of a pandemic.
- Consider telecommuting and similar options that allow employees to work at home and avoid close contact with others who may be infected.
- Ensure that common areas in the workplace, including computer keyboards that are used by more than one person, are kept clean and disinfected.
- Inform employees that information regarding medical conditions is kept strictly confidential and they will not suffer retaliation for reporting that they are ill or if they need to take a family or medical leave.
- If applicable, refer to the agency's pandemic or health protection policy for further guidance.

2. What if an employee has been, or may have been, exposed to H1N1 influenza?

- Follow federal, state and local laws, as well as any agency policies and/or collective bargaining agreements provisions, covering family and medical leave entitlements, and confidentiality requirements.
- Review any applicable guidance from the Occupational Safety and Health Administration (OSHA) on precautions to protect other employees from occupational exposure to influenza.
- Review the "Human Resource Policies and Pandemic Planning Workplace Questions" issued by the U.S. Department of Health & Human Services ("HHS"), available at http://www.pandemicflu.gov/faq/workplace_questions/human_resource_policies/index.html
- The HHS website discusses issues such as leave policies (including FMLA), return to work, lay-off/termination/firing, sending workers home, refusal to work, pay policies, work restrictions, working at home and social distancing, re-employment rights, child care at the workplace, liability issues and pre-pandemic workplace planning
- Because California law may differ significantly from federal law, consult with legal counsel before implementing or applying new policies or procedures.

3. Do existing laws governing the confidentiality of medical information still apply?

- Yes, these laws still apply unless and until legislative changes or emergency orders issued by authorized governmental agencies are implemented.
- Avoid asking employees questions about any known or suspected medical condition or medical history.
- Report known or suspected cases of H1N1 infection to your county public health department or other appropriate agency.
- Adhere to your agency regulations and all laws regarding privacy of medical information.

Liebert Cassidy Whitmore continues to monitor employment issues related to H1N1 influenza and will issue ongoing bulletins.

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*If you have questions about this issue, please contact our
Los Angeles, Fresno or San Francisco office.*