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COVID-19 Guidance for Institutions of Higher Education: Holland & Knight

Highlights

- The fast-changing developments of COVID-19 have left institutions of higher education scrambling to address a wide range of unexpected legal issues.
- This Holland & Knight alert addresses some of the questions more frequently asked by colleges and universities, which should exercise caution and continue to monitor official guidance from federal and state agencies.

The fluid and fast-changing impact of the new coronavirus (COVID-19) has left institutions of higher education (IHEs) scrambling to address unexpected legal issues. This guidance addresses some of their more frequently asked questions.

1. What Happens When IHEs or Their Vendors Cannot Perform Contracts Due to the Virus?

The coronavirus is certain to test jurisprudence pertaining to force majeure clauses, impossibility of performance, and, relatedly, so-called "acts of God." State law will govern these issues. Force majeure clauses are typical in commercial contracts. The ultimate resolution of their applicability will depend closely on the terms of the contract and the specific circumstances concerning performance. Such clauses usually identify "causes beyond the control" of the contracting party. Disputes about whether the clause applies in a given case will commonly focus on what is causing one party to fail to perform a contractual obligation. Those clauses that specifically reference epidemics or pandemics will have the greatest force.

Impossibility of performance or commercial impracticability can be defenses to contract performance. Under the impossibility of performance doctrine, a party is discharged from performing a contractual obligation when the obligation is impossible to perform due to unforeseeable circumstances. Mere inconvenience or increased cost does not ordinarily meet the standard. An "act of God" may be the reason for the impossibility of performance. "Acts of God" are also commonly listed in force majeure clauses. Each state addresses this issue slightly differently, but Acts of God have been described as acts or occurrences "so extraordinary and unprecedented that human foresight could not foresee or guard against" them and for which negligence or want of diligence, judgment or skill played no part. See *Fla. Power Corp. v. City of Tallahassee*, 154 Fla. 638, 646, 18 So. 2d 671 (1944); *Cain v. Atlantic Coast Line R. Co.*, 74 S.Ct. 89, 54 S.E. 244, 247 (1906).

2. May IHEs Inquire of Employees About COVID-19 Exposure? When May They Have a Duty to Inquire?

The General Duty Clause of the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1), and many corollary state statutes, require employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." Accordingly, the Occupational and Safety Administration (OSHA) advises that employers implement policies that will result in the "prompt identification and isolation of

potentially infectious individuals." OSHA requires employers to record COVID-19 illnesses among the workforce when the virus is contracted in the workplace. These records must be submitted to OSHA on Form 300A and maintained onsite.

An employer's failure to inquire of employees about exposure could give rise to legal claims. Workers' compensation claims are also possible for respiratory diseases to the extent an employee can establish causation from the workplace environment and that his or her occupation presents a particular hazard of the disease occurring so as to distinguish other occupations. Therefore, IHEs should consider excluding or sending home an employee who is symptomatic or returning from travel from high-risk locations specified by the Centers for Disease Control and Prevention (CDC).

During a pandemic, exceptions to the American with Disabilities Act's (ADA) restrictions on employer health inquiries allow employers to inquire about an employee's potential infection with the disease and travel from high risk locations. See the U.S. Equal Employment Opportunity Commission's (EEOC) Pandemic Preparedness in the Workplace and the Americans with Disabilities Act. The ADA's "direct threat" rule allows inquiries because an employee infected with COVID-19 will pose a direct health and safety threat to co-workers and others in the workplace. 29 C.F.R. § 1630.2(r). The bona fide occupational qualification defense may also be applicable on these facts. In contrast, an employee who is ill with something else such as the seasonal influenza does not have a disability under the ADA. State and municipal disability laws should also be consulted.

The CDC recommends that employers separate sick employees from other employees. Asking an employee who has been absent from work for a medical reason for the absence is not a violation of the ADA. Nor is requiring an employee to provide a doctor's note certifying fitness to return to work. The CDC also recommends that if an employee is confirmed to have COVID-19, employers should inform co-workers immediately so that they can seek appropriate medical screening or care. Employers should provide general information to employees if an employee is infected, but should not specifically disclose the identity of any infected employee, except, as discussed below, with persons who can prevent or lessen a serious and imminent threat to the health or safety of the public. See 45 C.F.R. § 164.510(a); cf. 45 C.F.R. § 164.508. The personal information disclosed should be the minimum necessary to accomplish the purpose.

Employers may ask employees if they believe they have come into contact with someone who has been exposed to the virus, but may not ask employees whether they have a medical condition that could make them especially vulnerable to the virus. Furthermore, due to the Genetic Information Nondiscrimination Act (GINA) and corollary state laws, employers are restricted from inquiring about family members or their recent potential exposure. 42 U.S.C. §199gg-91(d)(16)(A); 29 C.F.R. § 1635.3(c) (protected genetic information includes "[t]he manifestation of disease or disorder in family members of the individual (family medical history)"). An employee who is asked by the employer to self-quarantine for the COVID-19's incubation period (which is currently identified as 14 days) may be eligible for protected leave under the Family and Medical Leave Act (FMLA) and corresponding state laws. Any information gathered about an employee's health must be kept separate from his or her general employment file and treated as a confidential medical record.

3. May IHEs Inquire of Students About Coronavirus Exposure? When May They Have a Duty to Inquire?

Colleges and universities are commonly places of public accommodation with on-campus housing. The ADA provides that a public accommodation may exclude an individual if that individual poses a "direct threat" to the health or safety of others that cannot be mitigated by appropriate modifications in the public accommodation's policies or procedures, or by the provision of auxiliary aids. 28 C.F.R. § 36.208(a). In addition, according to the U.S. Department of Justice (DOJ), "The Fair

Housing Act affords no protections to individuals with or without disabilities who present a direct threat to the persons or property of others." State and municipal public accommodation and housing discrimination laws should also be consulted.

The failure of an IHE to inquire of students about exposure could give rise to legal claims. State landlord and tenant laws commonly require landlords and tenants of residential properties to comply with the requirements of applicable health codes. Landlords are ordinarily responsible for the sanitary condition of common areas. Threats or dangers to public health may also constitute a public nuisance under applicable municipal laws. Were tenants in client facilities to become infected with COVID-19, the buildings or portions of buildings could be deemed unfit for human habitation until remediated.

The Federal Housing Administration's Office of Multifamily Housing (MFH) recommends that property owners and agents follow CDC guidelines and the direction of local health officials, especially in the event of property quarantine. Accordingly, IHEs may have a duty to inquire about the potential exposure of students to COVID-19 and to separate them from others. The information solicited should be the minimum necessary to accomplish the purpose. Any records created by personnel on behalf of the IHE are likely to be "education records" within the meaning of the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g(a)(4)(A); 34 C.F.R. § 99.3 (definition of "education records). Records created and maintained by a healthcare worker not acting for the school would not qualify as education records.

4. Must Institutions Report a Threat of Exposure and, if So, What Should They Report?

The CDC recommends, and the U.S. Department of Education endorses, sharing accurate information with staff, students and faculty about steps the IHE is taking to prevent and limit exposure risks. In addition to the obligation as an employer to report confirmed-cases to OSHA, IHEs should also notify local health officials about potential virus exposure, as permitted by local law.

In emergencies, when necessary to prevent or lessen a serious and imminent threat to the health or safety of the public, healthcare providers may share protected health information (PHI) without prior written consent with persons in a position to prevent or lessen the threatened harm. See Joint Guidance on the application of FERPA and the Health Insurance Portability and Accountability Act (HIPAA); 45 C.F.R. § 164.512(j). According to the U.S. Department of Health and Human Services (HHS), examples include state and local health departments, the U.S. Food and Drug Administration, and CDC.

Similarly, FERPA provides that personally identifiable information (PII) from a student's education records, including student health records, may be disclosed by educational agencies and institutions to appropriate parties in connection with a health or safety emergency, without the consent of the parent or eligible student, if knowledge of the information is necessary to protect the health or safety of the student or other individuals. 20 U.S.C. § 1232g(b)(1)(I); 34 CFR §§ 99.31(a)(10) and 99.36. HHS has stated that an emergency includes the outbreak of an epidemic. 45 C.F.R. §§ 164.501 and 164.512(b)(1)(i).

A school that provides healthcare to students in the normal course of business, such as through its health clinic, may be a "health care provider" under specific HIPAA analysis. If a school that is a "health care provider" transmits any PHI electronically in connection with a transaction for which HHS has adopted a transaction standard, it typically would be a covered entity under HIPAA. However, many schools that meet the definition of a HIPAA-covered entity do not have to comply with all of the requirements of HIPAA rules as related to students because, with limited exceptions, the school's student health records are considered "education records" or "treatment records"

under FERPA. See 45 CFR § 160.103 (definition of PHI ¶¶ (2)(i), (ii)). The HIPAA Privacy Rule specifically excludes from its coverage those records that are protected by FERPA by excluding such records from the definition of PHI. As relates to the records of nonstudents (such as staff) treated at a school healthcare clinic, those records would be regulated by HIPAA.Likewise, the records of hospitals associated with IHEs would be regulated by HIPAA.

HIPAA permits covered entities to disclose PHI, without a patient's authorization, to persons at risk of contracting or spreading a disease, 45 C.F.R. § 164.512(b)(1)(iv), and PHI about the patient as necessary to treat the patient or to treat a different patient.1 Treatment includes the coordination or management of healthcare and related services by one or more healthcare providers and others; consultation between providers; and the referral of patients for treatment. See 45 CFR §§ 164.501, 164.502(a)(1)(ii), 164.506(c).

With students and staff in dozens of countries across the world, institutions may face a request from a foreign government agency or institution for health information in order to combat COVID-19. For staff medical records, HIPAA allows disclosures to foreign government agencies, but only if a domestic public health authority directs the disclosure. 45 C.F.R. § 164.512(b)(1)(i). Requests from partner foreign institutions (for either staff or student records) cannot be satisfied, absent written authorization. For student records, FERPA allows for disclosure to foreign public agencies if "it is necessary to protect the health or safety of the student or other individuals."

5. When Institutions Cancel Classes, Educational Programs or Close Their Campuses, What Are Their Obligations Under Title IV?

Many IHEs are extending spring break or closing their campuses. The CDC reports, "When classes are suspended, IHE may stay open for staff or faculty (unless ill) while students temporarily stop attending in-person classes. Keeping the IHE facilities open a) allows faculty to develop and deliver lessons and materials electronically, thus maintaining continuity of teaching and learning; and b) allows other staff members to continue to provide series and help with additional response efforts."

On March 5, 2020, the U.S. Department of Education issued "broad approval" for IHEs to use online technologies to continue students' educations without violating Title IV or the Higher Education Act (HEA). The Department is also allowing IHE accreditors to waive their distance education requirements for institutions implementing distance learning solely due to COVID-19. For distance education, institutions may communicate with students via email, use chat features, set up conference calls, and allow for submission of work electronically. DOE has also authorized IHEs to enter into temporary consortium agreements with other institutions, so that students can complete courses. In addition, an IHE may continue to pay federal work-study wages to students during a closure if it occurred after the beginning of the term, the institution is continuing to pay its other employees and the institution continues to meet its institutional wage share requirement.

If an institution ceases operation during a payment period or a student fails to return when an institution reopens, the requirement for return of Title IV funds kicks in. But if an institution reopens during the same payment period and students return to class at that time, the students are considered to have reentered the same period and retain Title IV eligibility. Importantly, IHEs may also petition DOE to approve a reduced academic year.

6. When Students Withdraw from Classes or Educational Programs, What Are the Consequences Under Title IV?

The U.S. Department of Education is permitting students to take an approved leave of absence for COVID-19-related concerns or limitations, even if a student notifies the institution in writing after an

approved leave of absence has begun. In such an event, the institution may retain the Title IV funds to apply when the student continues enrollment and must ensure that the student is permitted to complete the coursework. IHEs are invested with professional discretion to adjust on a case-by-case basis the cost of attendance. IHEs may offer non-standard term schedules to students who have been recalled from travel abroad programs or canceled out of experiential learning opportunities after the semester began.

7. May Quarantines Be Enforced Against Employees and Students?

COVID-19 meets the definition for "severe acute respiratory syndromes" as set forth in Executive Order 13295, as amended by Executive Orders 13375 and 13674, and, thus, is a federally "quarantinable communicable disease."2 Apart from a public order, private employers may require employees to self-quarantine if they pose a "direct threat" or "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."3 The assessment by the CDC or public health authorities would provide the objective evidence needed for this determination. If the condition is met, the individual is not protected by the ADA in this context.

OSHA advises employers to "develop policies and procedures for immediately isolating people who have signs and/or symptoms of COVID-19, and train workers to implement them." OSHA recommends isolating people "suspected of having COVID-19 separately from those with confirmed cases of the virus to prevent further transmission."

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