

Legal Preparedness Reporter

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Special Note: Mandatory Vaccinations

On June 11, 2009 the World Health Organization (WHO) announced the onset of pandemic influenza in the entirely new H1N1 strain of the influenza virus. Shortly thereafter on July 24, 2009, Secretary of Health and Human Services, Kathleen Sibelius, declared the H1N1 swine flu to be a public health emergency. Since the first reported cases in Mexico this past March, public health officials have been predicting widespread infection comparable to and exceeding past pandemic influenza outbreaks. Previous pandemic outbreaks, three total, were the “Spanish Flu” in 1918, with a death toll of 600,000 in the US alone and more than 20 million worldwide, the “Asian Flu” in 1957, with nearly 70,000 deaths in the US, and the “Hong Kong Flu” in 1978 having a total of 33,800 deaths in the US.

Presently WHO projects that between 15%-45% of the world’s population, or between 1 and 3 billion people could be infected with the swine flu. Efforts to avert these and other dire predictions have some employers and state legislators taking legislative action. In particular, the NY state legislature and Commissioner of Health have enacted regulations requiring all healthcare personnel employed at healthcare facilities be immunized against influenza viruses as a condition of employment for both new hires and existing employees. The regulation in effect requires healthcare personnel to be vaccinated for both the seasonal and novel swine influenza or risk termination for noncompliance.

This seemingly simple regulatory requirement presents a kaleidoscope of complex legal questions that may ultimately be answered in the courts. Judicial resolution is much more likely when the definitive case on mandatory vaccinations, *Jacobson v. Massachusetts*, was decided by the Supreme Court in 1905. In *Jacobson v. Massachusetts*, the Supreme Court held that a mandatory vaccination ordinance was a valid exercise of the state’s police powers because the ordinance was substantially related to and enacted “to protect the public health and public safety.” While other states such as Alabama, Arkansas, California and Kentucky, have also enacted so called “mandatory” vaccination requirements for health care personnel. These state ordinances, contrary to New York’s law, permit health care personnel to refuse a vaccination in writing after they have been informed of health risks and likelihood of contracting influenza as health care personnel.

Legal challenges may be forthcoming based on the classic questions of due process and personal liberty. Due process under either the Fifth or Fourteenth amendments requires that an individual is afforded proper procedures before they can be deprived of any constitutionally protected liberty interest. The Supreme Court has determined those procedures to be notice and the “opportunity to be heard” usually in a hearing-type proceeding. Due process challenges in the employment context always require an initial determination of whether or not a “constitutionally protected liberty interest” exists in continued employment. A protected liberty interest will usually exist in the case of contractual employment, termination “for-cause” only employment, or as otherwise determined on a case-by-case basis.

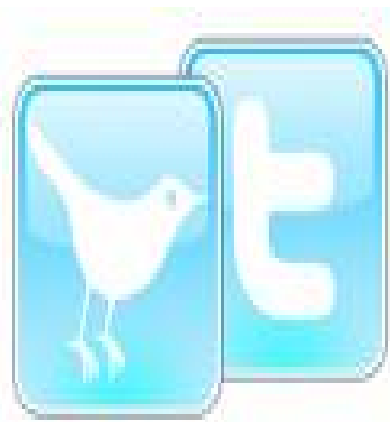
So, in the case of mandatory vaccinations for health care facility personnel, a legal challenge will generally turn on whether the individual state employee who refuses a vaccination has a constitutionally protected liberty interest in their continued employment.

Shelrese Best-Leach, Esq., Deputy Director, IPSJ-HSEM National Legal Preparedness Training Program

Legal Preparedness in the homeland security/emergency management context, speaks to the statutory and regulatory framework necessary to carry out those actions related to prevention, preparation, response, and recovery from terrorist incidents or catastrophic disasters. It precedes, co-exists with, and extends beyond the physical logistics of the preparedness cycle.

Even during an emergency... Watch what you Tweet!

A lawsuit has been filed that essentially indicates “tweeting” that alerts the public of emergencies may bring liability. Filed in the U.S. District Court for the Southern District of Texas, Plaintiff Tech-Radium Inc. alleges that Twitter Inc. has infringed upon its patent. According to the lawsuit, Tech-Radium develops, sells, and services mass notification



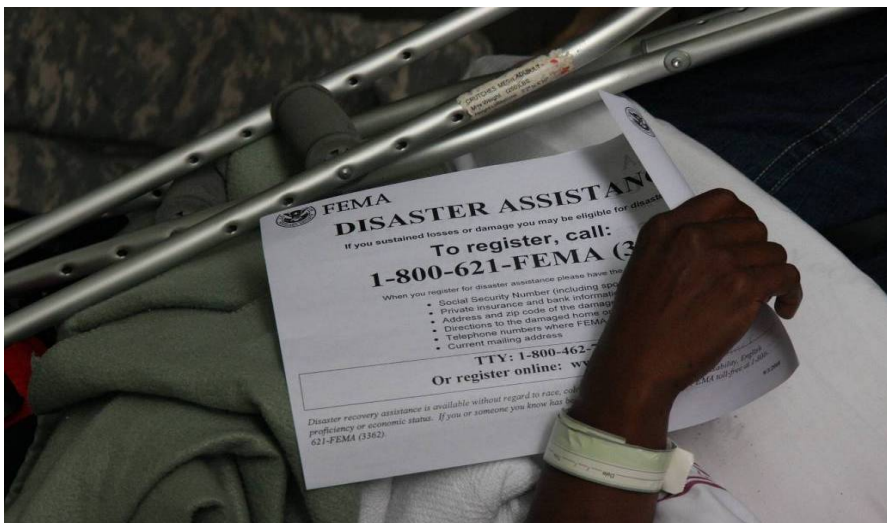
systems of which they own a Patent. At issue are Patent's that is technology for a digital notification and response system that uses an administrator interface to transmit a message from an administrator to a user. Tech-Radium claims the infringement occurs as Twitter offers for use a product or service under their Patents, which is a violation of Federal law. No doubt, interesting issues of law are being presented of which time will tell which party prevails. Until then, it's best that companies are aware of this litigation especially if “tweeting” is a part of the company's emergency notification plan. A copy of the actual complaint is available under the caption of Tech-Radium, Inc. v. Twitter, inc.

Picture retrieved on 10/01/09, from: <http://images.google.com/images?gbv=2&hl=en&sa=1&q=twitter++&q=f&oq=&aqi=g10&start=0>

Disability Organization seeks Emergency Management Assistance

The National Council on Disability (NCD) is seeking input from the public on emerging issues and trends affecting people with disabilities. Pursuant to the Post-Katrina Emergency Management Reform Act (PKEMRA) or (H.R. 5441), FEMA is mandated to have a National Disability Coordinator available to consult with NCD on issues such as emergency planning.

Since 2007, funding has been provided for NCD to develop a report on such issues as emergency management for the disabled. Emergency Management personnel interested in participating in the “National Disability Policy: A Progress Report”, are urged to contact the NCD as soon as possible. The NCD may be contacted thru their website of www.ncd.gov.



Picture retrieved on 10/01/09, from: <http://www.fema.gov/photodata/original/17410.jpg>

H1N1 Flu-Facts:

- Swine flu is a respiratory infection caused by influenza A viruses.
- The outbreak of what is popularly called swine flu involves a new H1N1 type A influenza strain that's a genetic combination of swine, avian and human influenza viruses.
- It can spread from human to human.

Symptoms:

- Fever
- Cough
- Sore throat
- Body aches
- Headache
- Chills
- Fatigue
- Diarrhea
- Vomiting

Causes:

Influenza viruses infect the cells lining your nose, throat and lungs.

H1N1 Flu Facts retrieved from:

<http://www.bing.com/health/article.aspx?id=articles%2fmayo%2f69B8C4C7502660FB4F6587C58ADE1F7E.html&br=lv&q=h1n1&FORM=K1RE>

FEMA is on the Move....Again!

In review, Hurricane Katrina was the impetus for some members of Congress calling for the disbanding of FEMA. While not disbanded, it was absorbed into the fairly new creation of the Department of Homeland Security (DHS) in



2003. Now, FEMA is once again on the move back to its own independence. Senate Bill 412 titled The Federal Emergency Management Act of 2009, attempts to break FEMA from the umbrella of Homeland Security and re-establish it as an independent agency. If the legislation is successful, the Director of FEMA will be appointed by the President with an advisory

function to the President, the Homeland Security Council, and the Secretary of Homeland Security. Interestingly, the President will also have authority to designate the Director of FEMA to serve as a Cabinet member for particular disasters. Last action on the legislation include the bill submission to the Senate Committee was it was read twice and referred to the Committee on Homeland Security and Governmental Affairs. Picture retrieved 10/01/09, from:



Pre-disaster Hazard Mitigation Enhancement Program Act of 2009

Rep. James Oberstar of Minnesota introduced the Pre-disaster Hazard Mitigation Enhancement Program Act of 2009. Titled as H.R. 1746, the bill is expected to amend the Stafford Disaster Relief and Emergency Assistance Act and reauthorize the pre-disaster mitigation program of FEMA. Aside from amending “Stafford”, it increases the amount of guaranteed funding to States entitled to such assistance and better; provides appropriations for the program through fiscal year 2012. As of April 2009, the bill passed in the House of Representatives. It now requires passage by the Senate, then signature from the President. Details and current status of the bill are available at www.govtrack.us/congress/bill.xpd?bill=h111-1746.

U.S. Representative Bennie Thompson (D-MS) introducing The Pre-disaster Hazard Mitigation Enhancement Program Act of 2009, The Hazard Mitigation For All Act of 2009, and The First Responder Innovation and Support Act of 2009.

Picture retrieved on 9/28/09, from: <http://images.google.com/imgres?imgurl=http://www.hynescommunications.com/hurricanerisk/wp-content/uploads/2009/06/RepThompson.jpg&imgrefurl=http://www.hynescommunications.com/hurricanerisk/>



Family Emergency Plans:

- Meet with household members to discuss the dangers of fire, severe weather, earthquakes and other emergencies. Explain how to respond to each..
- Find the safe spots in your home for each type of disaster..
- Discuss what to do about power outages and personal injuries..
- Draw a floor plan of your home. Mark two escape routes from each room.
- Show family members how to turn off the water, gas and electricity at main switches when necessary.
- Post emergency telephone numbers near telephones.
- Teach children how and when to call 911, police and fire.
- Instruct household members to turn on the radio for emergency information.

Cited from:

<http://ema.alabama.gov/FileLibrary/files/HomePage/PreparednessChecklist.pdf>

Lawsuit Over Historic Charity Hospital

A lawsuit has been filed in May 2009 by the National Trust for Historic Preservation in the United States against the US Department of Veterans Affairs and FEMA. The 23 page complaint was filed in the U.S. District Court for the District of Columbia and alleges that defendants Veteran Affairs and FEMA erred when they collectively declared that hospitals would yield “no significant impact” on neighborhoods. The complaint refers to findings documented pursuant to a federal review. The hospital, originally founded in 1735, has been in continuous operation for over 250 years. The existing hospital building, first



opened in 1939, has been closed since major flooding during Hurricane Katrina and is in dire need of significant restoration. A copy of the actual complaint is available at: [Http: blog.nola.com/news_impact/2009/05/HOSPITALCOMPLAIN.pdf](http://blog.nola.com/news_impact/2009/05/HOSPITALCOMPLAIN.pdf)

<http://www.melno.org/MCLNO/Images/CharityHospitalSmall2>.

Picture retrieved on 9/28/09 from:

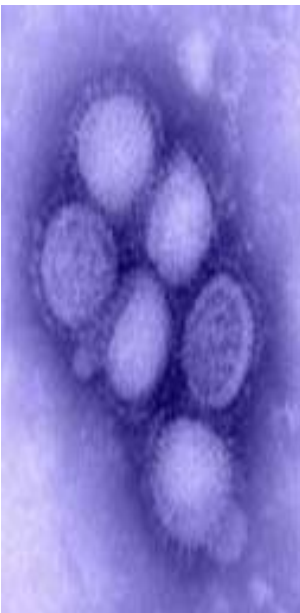
[http://images.google.com/images?](http://images.google.com/images?gbv=2&hl=en&sa=1&q=Hospitals+in+DC&aq=f&oq=&aqi=&start=0)

[gbv=2&hl=en&sa=1&q=Hospitals+in+DC&aq=f&oq=&aqi=&start=0](http://images.google.com/images?gbv=2&hl=en&sa=1&q=Hospitals+in+DC&aq=f&oq=&aqi=&start=0)

Government provides Flu Season Guidance to Business

With growing concerns over H1N1, the upcoming flu season is of major importance. Working with various Federal agencies, the Center for Disease Control and Prevention (CDC) released guidance to employers to assist in preparing for the upcoming flu season. In brief, hygiene continues to be a key point in prevention and the CDC advise that employers are wise to encourage stay-at-home policies and procedures to protect the workplace.

More on the guidance is directly available at the CDC's flu guidance website of <http://www.flu.gov>.



Pictures retrieved on 9/28/09 from: <http://images.google.com/images?gbv=2&hl=en&q=H1N1&sa=N&start=18&ndsp=18>



Home Remedies:

-Drink plenty of liquids. Choose water, juice and warm soups to prevent dehydration. Drink enough so that your urine is clear or pale yellow.

-Rest. Get more sleep to help your immune system fight infection.

-Consider pain relievers. Use an over-the-counter pain reliever such as acetaminophen (Tylenol, others) or ibuprofen (Advil, Motrin, others) cautiously, as needed.

Prevention

- Stay home if you're sick. .
- Wash your hands thoroughly and frequently.
- Avoid contact.
- Reduce exposure within your household.

Retrieved 10/1/09 from, <http://www.bing.com/health/article.aspx?id=articles%2fmayo%2f69B8C4C7502660FB4F6587C58ADE1F7E.html&br=lv&q=h1n1&FORM=KIRE>

The *Homeland Security/Emergency Management - National Legal Preparedness Program (NLPP)* results from a Cooperative Agreement between the Department of Homeland Security, Federal Emergency Management Agency and the University of the District of Columbia to establish a national scope training program for legal issues in preparation, response, and recovery from terrorist incidents and catastrophic events.



INSTITUTE FOR PUBLIC SAFETY & JUSTICE

Translating Research into Policy—Translating Policy into Practice

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