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TOPIC:

LIABILITY CONSIDERATIONS FOR RETURN TO CAMPUS IN THE AGE OF COVID-19

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INTRODUCTION:

It is difficult to conceive of a more challenging time in the history of higher education. The coronavirus, or COVID-19, has upended every aspect of campus life, including where that campus life is taking place.

As of the date of this NACUANOTE, there is no uniformity on what can or should come next. The timing, nature, and extent of “reopening” varies not just from state to state, but county to county, and sometimes even municipality to municipality. “Reopening” also looks as though it may vary from campus to campus – some institutions have already announced a mostly-online format for fall 2020, others are aiming for a hybrid of on-campus and remote instruction, and some are indicating an intention to be fully and physically back on campus in the fall. This NACUANOTE focuses on “reopening” as most of us would ultimately conceive it – back on a physical campus, with employees in their offices, faculty in their classrooms, and students in their dormitories. Should your institution be engaging in some sort of “modified” or “hybrid” reopening, not every one of the considerations and concerns identified below may apply. Whenever and however reopening happens for your institution, however, that decision brings with it innumerable liability considerations. Innumerable, and if we are being honest, unknowable. This pandemic has proven the old saw that “you don’t know what you don’t know.”

The goal of this NACUANOTE is to focus on the most urgent concerns and apply what we can from past experience, case law, and common sense to outline liability concerns, defenses, and affirmative steps institutions can take to mitigate some likely areas of legal risk.

DISCUSSION:

I. GLOBAL NOTE ON PUBLIC vs. PRIVATE INSTITUTIONS

To frame everything that follows, liability considerations of course can differ between public and private institutions. Public institutions may have sovereign immunity or tort caps that limit the extent of their exposure to tort claims. At the same time, those public institutions are subject to constitutional claims that will not apply to private colleges and universities. To make this Note less cumbersome, the author will not constantly drop footnotes with this distinction but will highlight it if particularly pertinent.

II. PERSONAL INJURY CLAIMS / TORT LIABILITY CONSIDERATIONS

As we stand here in the middle of a pandemic, top of mind is the health and safety of our entire campus community. While this may go without saying, it nonetheless should be said—we often speak of legal risk after acknowledging this bedrock principle.

With this important point noted, a primary legal concern of colleges and universities is tort liability. What if we reopen, folks come to campus, and they get sick, or worse? What if our students go off campus to eat and drink in groups, and the local community believes our students are infecting the citizenry? Will we be sued for negligence? What do we think those claims might look like, and what would our defenses be?

a. An Initial Note on Immunity

At the time this Note was drafted, discussions were occurring on both state and federal levels about tort liability immunity, in whole or in part, for those colleges and universities that reopen their campuses.^[2] Any immunity that may be granted would override some or all of the guidance provided below.

Institutions would also be well-served to take a close look at an under-the-radar statute that may provide limited immunity to the extent your college or university is administering COVID-19 “countermeasures” after you reopen. The Public Readiness and Emergency Preparedness (PREP) Act of 2005, enacted in response to anthrax threats and the global SARS outbreak in the early 2000s,^[3] provides immunity from suit and liability under federal and state law “with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by and individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.”^[4] The PREP Act is triggered if two things happen: 1) the Secretary of Health and Human Services issues a declaration “that a disease or other health condition ... constitutes a public health emergency”^[5] and 2) the Secretary of HHS issues guidance in the Federal Register about the scope and nature of the declaration.

Both of these conditions have been met regarding COVID-19. As a result, the Secretary of HHS has issued a specific Declaration to “provide liability immunity for activities related to medical countermeasures against COVID-19.”^[6] This is worth brief mention because, while the PREP Act primarily focuses on device manufacturers, pharmaceutical companies, and health care professionals, it also applies to any “covered person” involved with the “promotion ... dispensing, prescribing, administration, licensing, or use of such countermeasure.”^[7] “Covered person”, in turn, means *any person or entity* that is “a distributor of such countermeasure” or “a qualified person^[8] who prescribed, administered, or dispensed such countermeasure.”^[9] In

the recently-issued Federal Register guidance, the Secretary of HHS confirmed that a “private sector employer or other ‘person’” can be covered by this definition when it is carrying out prescribed countermeasures.^[10] The liability protection offered by this Act, relative to COVID-19, may extend to October 1, 2024.^[11]

The author recommends consulting with your counsel about whether the PREP Act may provide defenses for your institution. While admittedly a limited scope of immunity, if you decide to reopen and you are administering “countermeasures”^[12] on your campus, the PREP Act may negate certain claims. For example, the Federal Register guidance makes clear that “the Act precludes a liability claim relating to the management and operation of a countermeasure distribution program or site, such as a slip-and-fall injury or vehicle collision by a recipient receiving a countermeasure at a . . . dispensing location”, or someone who asserts liability based on “lax security or chaotic crowd control” in conjunction with administration of countermeasures.^[13]

b. Possible Contours of Tort Duty

Acknowledging the possibility of limited statutory immunity, most of us are really concerned about tort liability when we speak of liability concerns. While each state’s law may vary *slightly*, the basic elements of a negligence claim are generally the same everywhere: 1) you had a duty; 2) you breached that duty; 3) that breach was the but-for and proximate cause of harm; and 4) the plaintiff suffered actual loss or damage. With COVID-19, there is a critical threshold issue that courts will have to wrestle with – what duties do higher education institutions assume with regard to a pandemic like coronavirus, or, perhaps phrased differently, what duties should higher education institutions be asked to assume in this regard?

Importantly, the determination of whether an institution owes a duty generally is a matter of law for the court,^[14] so courts will be hashing this out in the coming months and years. It seems fair to say that institutions cannot be the guarantors of the safety of everyone on their campus, whether employee, student, or visitor. As for our students in particular, while the 1970s saw a nationwide rejection of the doctrine of *in loco parentis* on our campuses, there is a gnawing sense that this doctrine is slowly creeping back, even if under different phrases like “special relationship”.^[15] We therefore cannot rule out that COVID-19 will be deemed, by some court somewhere, the type of special or “unique” situation that creates a heightened duty for an institution to provide a safe environment for its students, as has been found recently in situations involving things such as criminal attacks, sponsored events, and known mental health challenges.

Putting aside *in loco parentis*, an institution “generally owes a common law duty of care to another in a particular case only if the harm at issue is of a type reasonably foreseeable under the circumstances and, if so, imposition of such duty and liability comports with public policy under those circumstances.”^[16] Whether harm – here, harm from COVID-19 – is “of a type reasonably foreseeable under the circumstances” turns on whether it “occurs or occurred within the scope or zone of the risk of direct harm to other persons . . . reasonably likely to result from the subject conduct under the circumstances at issue.”^[17] If a court finds that the harm at issue “was of a type reasonably foreseeable under the circumstances, the existence of a legal duty then generally depends on consideration of relevant public policy considerations.”^[18]

With this background, one can see three most likely places for a court to find an institutional duty related to COVID-19: a) landowner liability; b) “negligence per se”; or 3) “gratuitous undertaking” to render aid or services to another. We will walk through these in turn, relying where we can on the Restatement of Torts.

1. Landowner Liability

As the above heading suggests, the duty in this instance comes from the institutional ownership or control of property. Focusing on employees and students, who are invitees on our property, the widely-followed Restatement (Second) of Torts § 343 explains the pertinent standard:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

It also is generally recognized that “Section 343 is to be read with [Restatement of Torts] section 343A, which adds that a possessor of land “is generally not liable for injuries resulting from ‘known or obvious’ dangers.”^[19] A condition is “obvious” under section 343A if “both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.”^[20]

These Restatement provisions fairly set the parameters of an institution’s potential duty as a landowner in light of the COVID-19 pandemic. It is not a stretch to see a plaintiff arguing that an institution of higher education—as with any other dangerous condition on campus—must take steps to regularly inspect campus to see if COVID-19 is present, respond to any findings of COVID-19, mitigate any risk or harm from COVID-19, and ensure that the particular risk is either eliminated or people are provided with adequate notice of the risk. Legally and practically, the duty cannot be to prevent every case—there is no way for a college or university to absolutely prevent COVID-19. But every institution is now aware of the possibility of COVID-19 on its campus and must take steps to make campus safe, which may involve mandated or suggested use of PPE, quarantining, temperature checks, or contact tracing for individuals, and perhaps deep cleaning or even closing campus on some regular basis to limit/eliminate contagion. If the institution does not do these things, harm that follows may fairly be said to be foreseeable. It is fair to argue that the “first” case is harder to foresee – someone could have gotten infected off campus at a bar one Friday night, for example, and brought it back late at night. But once an institution knows of that first case, certainly the second case, and the third, and every case after that may be considered “foreseeable.”

At the same time, Restatement Section 343A could be used as a defense to insulate an institution from liability if an employee or student knowingly comes into contact with someone with COVID-19 and then gets sick. In that instance, the “dangerous condition” on campus is obvious, as “both the condition and the risk are apparent to and would be recognized by a reasonable man, in the position of the visitor, exercising ordinary perception, intelligence, and judgment.” What is less clear at this point, and may be fleshed out over the coming years, is what else should be deemed an “apparent” dangerous condition and risk from COVID-19. Given all of the guidance and publicity around social distancing, is sitting within 6 feet of someone a risk that should be “obvious” to any reasonable person, such that if they get sick, there is no landowner liability? How about failing to wear masks? And how does all of this play out if a student or employee does everything right, but a fellow student or co-employee is

reckless and infects others? These long-established landowner liability principles will need some time to evolve in the post-COVID-19 climate.

One step that colleges and universities may want to take right now and reinforce prior to and at the time of any reopening is simple, but important. Communicate. Be transparent. Make crystal clear that your institution cannot possibly guarantee “zero cases” or prevent community infection, and that everyone who comes on to your campus: 1) understands and acknowledges this reality; and 2) understands and acknowledges that they must do their part to be safe, honor restrictions, follow CDC guidelines, and so on. These communications may be stand-alone emails and letters (the author has already seen a number of good ones circulated by many institutions), and may be reinforced through your enrollment contracts, handbooks, websites, etc. The point you are making is critical: this is a team effort. The institution will do its part, but everyone else needs to do their part. The entire “safety” burden cannot and should not rest on the institution.

2. “Negligence per se”

The doctrine of “negligence per se” is codified in the Restatement (Third) of Torts, Section 14:

An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.

While not every jurisdiction has adopted the third Restatement of Torts, the concept of negligence *per se* is well-established nationally. Applied in current circumstances, we can expect this theory of duty to be tied to statutes, laws, and health codes that have been and no doubt will be drafted not just regarding COVID-19 but regarding pandemics and health risks more broadly. Put simply, if your state legislature passes a law that says that to protect against the risk of virus transmission every landowner must do X, or every employer must do Y, or every institution of higher education must do Z, and you don’t do X, Y, or Z, it will be argued that you have breached that statutory duty and are negligent *per se*.

The point of negligence *per se* is important and worth flagging. At the moment, with everything around COVID-19 feeling so politically fractured, candidly it is hard to imagine this type of clear and forceful legislative mandate imposing a duty on colleges and universities. In fact, it is possible that lobbying and political efforts take us in the other direction, with either national or state-specific “safe harbors” being created—i.e., if an employer, landowner or institution takes legislatively-mandated steps A, B, and C, it cannot be liable for any harm that may result from COVID-19.

3. Gratuitous Undertaking

A third possible source of duty^[21] can be found in Restatement (Second) of Torts Section 324A, known as the affirmative or gratuitous undertaking rule. Specifically:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b)

he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

It is important to emphasize that Restatement Section 324A does not apply to every undertaking—it must be an undertaking in a situation where the institution “should recognize that such aid or services are necessary under the circumstances for the protection of other persons or property.”[\[22\]](#)

The application of these Restatement principles on “undertaking” to the current pandemic is relatively straightforward. If your institution takes steps on your campus to try and mitigate the impact of COVID-19 which arguably are “necessary under the circumstances for the protection of other persons”—social distancing in dorms, PPE in classrooms, temperature testing for employees—and you do not implement these measures properly,[\[23\]](#) someone who contracts COVID-19 on your campus will argue that you actually increased their risk of getting sick because they relied upon these measures your institution gratuitously undertook to keep them safe, you failed, and they were harmed.[\[24\]](#) This is all the more reason, as emphasized elsewhere in this Note, to be careful not to frame things in absolute terms. Every institution would like to “prevent” disease, or “ensure” safety, but you cannot. No one can. Look for these unconditional promises in your documents, and on your website, and consider softening them. This is not abdicating your responsibility, instead, it is harmonizing your language to what is realistic. Institutions may also consider including companion language emphasizing that safety is a shared duty, COVID-19 (and any transmissible disease) is a shared risk, and “all community members” must take steps toward health and safety.

c. Elements of Negligence –Breach, Causation, and Damages

We will not spend more than a sentence or two on these additional elements of a negligence claim. The crux of the legal battle to come will be on the duty front. If a court determines that duty exists, then whether there was a breach, whether that breach caused harm, and whether someone actually suffered damage will be fact-specific in each case. A hypothetical scenario would be something like that set forth in the following paragraph.

Your institution reopens campus next year. You implement temperature taking for employees, social distancing measures, and require PPE anywhere individuals may be in relatively close contact (dining hall, athletic facilities, etc.). Despite these steps, a student living in a dormitory contracts COVID-19, although you cannot know for sure whether they contracted it on campus, or at home during a weekend trip, or during a quick trip to the local Target. Your institution learns of this diagnosis because by early fall 2020, you have COVID-19 testing kits in your campus health center. The student immediately goes home and must quarantine in isolation at home for two weeks. This all happens late on a Friday. Unfortunately, folks get distracted with other things, and by the time they remember to do some sort of contact tracing and follow up, it is Monday morning. By now, at least 5 other students from the same dormitory are reporting symptoms of COVID-19. Whether under a landowner liability theory, a negligence *per se* theory, or a gratuitous undertaking theory, those students will claim that you had a duty that you breached, which was the but-for and actual cause of their harm.

d. Defenses and Practical Steps to Mitigate Risk

Separate white papers have and will be written on the practical steps institutions can take to mitigate risk, and some of them have been referenced above— PPE, temperature

taking, social distancing, etc. This Note will briefly describe possible legal defenses to a tort claim arising from COVID-19, and some other logistical steps to consider for mitigating risk.

1. Contributory and Comparative Negligence

As with any negligence claim, if the facts support it, you can claim that the plaintiff was contributorily negligent which may either bar or reduce their recovery, depending on your jurisdiction. This defense will require an analysis of what the plaintiff did to protect themselves from COVID-19. Did they use masks when suggested or mandated?[\[25\]](#) Did they social distance? Did they fail to timely report their symptoms?

2. Causation

To prove a negligence claim, a plaintiff must demonstrate that any breach of duty by the institution was both the but-for and proximate cause of their harm. In a case claiming physical injuries, they are going to need expert witness testimony as well. This means that someone claiming they contracted COVID-19 on your campus is going to have to prove, by a preponderance of the evidence, that they contracted the virus on your campus, as opposed to at the grocery store, or at home, or during a visit off-campus to friends, etc.

Sitting here today, this causation argument seems like an uphill battle for a sickened plaintiff. Unless that individual literally has not left their exact dorm or office cubicle for weeks,[\[26\]](#) a college or university can identify every place the individual traveled off-campus as a possible place they were infected. Presumably that individual's case will be strengthened if, for example, every student on a certain floor contracts coronavirus, or everyone who worked out in a certain section of the college gym contracted coronavirus, but the *source* of the virus would remain a fair topic for discovery and defense. Institutions may be well suited to retain a consulting medical expert, maybe even now, to assist them with any claims of COVID-19 sickness on campus that may arise.

3. Adherence to Standards of Care

Your institution will adhere to CDC guidelines and follow recommendations of your state and local health officials. Hard stop.

Document this. This serves as an affirmative defense to any claim of negligence. Perhaps as importantly, creating and maintaining comprehensive, thoughtful documentation is a best practice and will serve your institution well, now and in the future. It is easy (and human) in the fog of a crisis to forget to document what you are doing, and why. This is of critical importance, though. Documentation is not just liability protection, but it will allow you to perform an after-action review whenever things settle down, objectively evaluate what worked and what you might do differently, and, critically, can serve as a baseline plan for any future pandemics or similar crises on your campus.

Consider building information about your institution's COVID-19 mitigation efforts into communications to students and parents this fall, into employee handbooks, and into your student handbook. Make honoring all such efforts a condition of the code of conduct (and living in residential housing), particularly for students. In other words, you want to make clear that keeping your community as safe as possible is a shared responsibility, but you may also want to make a failure to honor this responsibility grounds for discipline. Encouraging good and decent collective behavior is the preferred message, but having ramifications in place for non-compliance may be necessary.

4. Waiver / Consent Forms, Other Related Communications

Many colleges and universities are currently considering at least two risk mitigation steps, either separately or in combination: 1) strong and transparent wording about the risks of returning to campus (for everyone), about the unpredictability of this virus, and about the need for every single member of the community to contribute and do their part to assist COVID-19 mitigation efforts; and 2) having students and employees sign waiver of liability or consent forms before they physically return to campus. These ideas are not mutually exclusive. We will address them in turn.

The first concept is easy to grasp, and relatively easy to carry out. The notion is to convey to every member of your campus community that we are in unprecedented times, that safety in the COVID-19 environment is a shared obligation, and that everyone who sets foot on your campus appreciates and will honor this obligation. Some sample language in this regard is linked as [Attachment A](#).

A waiver of liability or informed consent form would just be a much more affirmative representation of the foregoing concepts, with the signatory (student, employee, even visitor) signing their assent. These forms will similarly have an individual state that they recognize that the institution cannot guarantee an entirely COVID-19-free environment and that, knowing this, they wish to come onto campus and *waive any claim against the institution* should they suffer the effects of COVID-19. Whether liability waivers are enforceable, and to what extent, is a state-by-state determination. As a general matter, liability waivers will not be enforced as a matter of law if they are ambiguous, if they purport to waive liability for reckless or intentional conduct, or if they are “against public policy.”^[27]

The author’s suggestion is this. Follow the law of your jurisdiction on this point. If waivers are permitted, they still might not be the right way to proceed either with students or employees.^[28] Do we feel that this is something we want to send out to our community? That may be the determinative question. Factors to consider in weighing this decision may include: 1) the likelihood a waiver, as crafted, would be enforceable if challenged in court; 2) whether this stands out as an anomaly or starts a slippery slope of perpetual waiver drafting – do you have waivers for other risks on campus? Are you going to need to start drafting waivers for every other possible risk, or at least other disease-borne risks (measles, mumps, SARS, etc.)? 3) what the legislative tea leaves are saying in terms of governmental support for such waivers; and 4) perhaps most importantly, how a waiver aligns with your institution’s values, bylaws, and not to be dismissed – finances. Can you afford a major personal injury lawsuit? What insurance coverage would you have in place? What is your core institutional belief on who should bear the risk of COVID-19-related harm – the student entirely? The institution entirely? Some shared risk?

For further consideration as you may be weighing these factors, a sample, potential waiver form is linked as [Attachment B](#).

5. Arbitration Provisions

There are infinite additional considerations, but one that may be top of mind is whether your institution should build mandatory arbitration provisions into your employee or student handbooks, or into individual employment contracts, in an attempt to provide some certainty around litigation expenses. Arbitration provisions have been both accepted^[29] and rejected^[30] in the higher education employment context. To the extent an employee is purporting to waive

a workplace-related injury claim, there may also be a worker's compensation exclusivity issue that would preclude any attempted arbitration language of this type.

Finally, there is minimal case law regarding binding arbitration provisions for students, but it is something at least worth considering.

III. CONSTITUTIONAL / "PRIVACY" CLAIMS

As noted, health and safety measures that may accompany reopening will likely include, for employees, students, and perhaps visitors: 1) temperature checks,^[31] 2) testing for COVID-19 (or antibodies to COVID-19), and 3) electronic contact tracing/monitoring. Each of these may present its own constitutional or privacy concern.

Privacy concerns are myriad, including those arising under the Fourth Amendment, Substantive Due Process (Fifth and Fourteenth Amendments), the Health Insurance Portability and Accountability Act (HIPAA),^[32] and the Family Education Rights Protection Act (FERPA), as well as claims arising under individual states' laws.^[33] These concerns can essentially be broken down into two categories: 1) constitutional claims; and 2) other privacy claims. Constitutional claims will only apply for public universities, while the other privacy concerns apply to all colleges and universities.

a. Constitutional Claims

1. Fourth Amendment

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."^[34] In order for the Fourth Amendment to apply, the person or entity doing the searching must be a government actor.^[35]

As an initial matter, no Fourth Amendment analysis is necessary to the extent that any search conducted (e.g., taking a COVID-19 test) is done with consent. The simplest way to avoid entanglement with the Fourth Amendment analysis is the obtain consent from those being "searched". This may not always prove practical (or possible), but is worth noting.

Beyond this, it is impossible to determine the exact Fourth Amendment analysis for our COVID-19 world before knowing the particularized facts of a case. The Constitutional claims can basically be broken down, for our purposes, into: "Did a search occur?" and "Was it unreasonable?" We address these questions in turn.

In response to the initial inquiry of whether a "search occurred," a search occurred if it infringed on an individual's expectation of privacy,^[36] or it involved a government trespass.^[37] Taking an individual's temperature,^[38] conducting a mandatory test of an individual for COVID-19,^[39] and requiring an individual to participate in mandatory contact tracing^[40] could well be deemed "searches" under the Fourth Amendment.

The second question –whether such searches are *unreasonable* –is the more nuanced piece of the analysis. A reasonable search does not require a warrant, or probable cause. On our campuses, one type of search that has been found not to require probable cause and a warrant is an administrative search. Administrative searches, where the individual being

searched is not being investigated for a crime –particularly when the search involves the government’s important health and safety interests –do not require probable cause and a warrant.^[41] Another exception to the probable cause requirement is the “special needs” doctrine. This doctrine allows warrantless searches in “those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable”^[42] It is suggested that institutions of higher education can and should assert that any health-related “search” due to COVID-19 concerns is both an administrative search, and also one justified by the special needs of this pandemic.

It is also reasonably likely that even under a traditional “probable cause” analysis, mandatory testing for COVID-19, for example, could be justified by demonstrating probable cause to believe the individual is ill (coughing, sweating, or other signs of severe illness) and a danger to others. Recent Supreme Court precedent would seem to justify this approach.^[43] The practical benefits of temperature checks and mandatory COVID-19 testing are significant, and the constitutional concerns are relatively minor.

Mandatory electronic contact monitoring or tracing,^[44] on its face, is more problematic. As stated previously, consensual searches, are, by definition, not an unlawful search or seizure.^[45] So, to the extent that electronic contact monitoring is done on an opt-in basis, there is no constitutional violation. That is the way to go, if at all possible. The language could be very simple, something like the following:

It is critically important to the health and safety of the University to understand where those infected by COVID-19 are traveling, and quarantining, to maximize safety for all other community members. A recommended way to do this is to allow “electronic contact monitoring”, which means the University may, via Bluetooth technology and an application on your smartphone or other handheld device, track your whereabouts during the time you are on quarantine or in self-isolation (typically, 14 days). Once this period of time has expired, the application may be removed from your phone, and the electronic tracing will end.

By signing here, you agree to “opt-in” to this important safety effort:

There are various apps being developed for electronic contact monitoring, but most experts agree that these systems will be phone-based apps that rely upon Bluetooth proximity plus diagnosis with COVID-19 in order to determine exposure to the virus. A user (student, employee, campus guest, etc.) would be required to download the app and install it on their phone. It is unclear at this time what relationship the University might have with the app.

If needed, though, can a public institution *mandate* electronic contact tracing and monitoring? We will have to see what the technology looks like, but institutions should be aware that the Supreme Court has found that obtaining information about an individual’s location via cell phone data, without a warrant, can constitute a Fourth Amendment violation.^[46]

2. Substantive Due Process / Liberty Interests

If we fast forward to a point when there is a vaccine for COVID-19, schools will almost certainly wish to require vaccinations. In 1905, the Supreme Court ruled that mandating a smallpox vaccination in order to protect the public health and safety was a legitimate exercise of the state’s police powers that does not violate a constitutionally protected liberty interest.^[47]

3. Other Privacy Claims

A desire to share information about someone’s positive COVID-19 test, or even a high temperature, for the health benefit of the broader institutional community will immediately raise “HIPAA” concerns. Such data is only “protected health information”, though, for covered entities^[48] under HIPAA.^[49] As a rule, a college or university is not a “covered entity,” although a health clinic may be and a university hospital is.

Additionally, the Department of Health and Human Services (HHS) Office of Civil Rights issued a bulletin in February 2020 (“HHS Bulletin”) which, among other things, indicated

the [HIPAA] Privacy Rule permits covered entities to disclose needed protected health information without individual authorization: . . . [t]o persons at risk of contracting or spreading a disease or condition if other law, such as state law, authorizes the covered entity to notify such persons as necessary to prevent or control the spread of the disease or otherwise to carry out public health interventions or investigations.^[50]

Additionally, health care providers may share patient information with anyone as necessary to prevent or lessen a serious and imminent threat to the health and safety of a person or the public—consistent with applicable law (such as state statutes, regulations, or case law) and the provider’s standards of ethical conduct.^[51] The HHS Bulletin also clarified that “providers may disclose a patient’s health information to anyone who is in a position to prevent or lesson the serious and imminent threat, including family, friends, caregivers, and law enforcement without a patient’s permission.”^[52] In sum, even if you have “covered entities” on you campus, you have increased flexibility to share COVID-19 related diagnoses more broadly, in the name of public health and safety, without risking a HIPAA violation.

On a similar privacy note, and as is often the case in higher education, individuals will ask about how FERPA may intersect with COVID-19 issues. Barring certain exemptions and exceptions, FERPA forbids the sharing of personally identifiable information from a student’s education records, without a student’s written authorization, with anyone who does not have a legitimate educational interest in the information.^[53]

The U.S. Department of Education issued a FAQ in March 2020 specifically titled “FERPA and Coronavirus Disease 2019” (the FAQ).^[54] Pursuant to the FAQ, the Department confirmed that a school may disclose PII about a student whom the school believes has COVID-19 to public health officials, within certain parameters.^[55] A school may also disclose the existence of a student who has tested positive for COVID-19 to faculty, students, and staff, to the extent that it can do so while maintaining the anonymity of the student.^[56] If push comes to shove, the suggestion here is that any FERPA concern should ultimately be outweighed by the “articulable and significant threat” of a COVID-19 result, and individuals known to be in contact with the infected student may require more specific information about the particular student in certain circumstances.

IV. DISABILITY AND ACCOMODATIONS CONSIDERATIONS FOR COVID-19

a. Overview of Key Legal Principles

At the broadest level, the Americans with Disabilities Act (“ADA”) and/or Section 504 of the Rehabilitation Act of 1973 prohibit colleges and universities from discriminating against

qualified employees and students on the basis of disability. These laws also protect members of the public who may use our campus facilities from disability discrimination.

These laws really create two sets of obligations. First, an institution may not overtly discriminate against someone with a disability. For example, it cannot have a blanket rule of simply refusing to hire someone who is hearing impaired, and it cannot refuse to admit any student with a diagnosed mental health issues. This prohibition against overt discrimination can also extend to medical conditions, which is the first place these laws intersect with COVID-19 and related medical diagnoses.

Second, an institution has an obligation to try to accommodate someone who has a disability, if that can be done without placing an undue hardship on the institution (i.e., an undue burden or expense). If an employee requests modifications to their work environment, or a student requests living/learning changes due to a disability, an institution has a duty to promptly engage in an interactive process to explore and determine the limitations attendant to the disability and potential reasonable accommodations that could be made to overcome the limitations.^[57] At the heart of this interactive process is communication, and the institution must act in good faith throughout the process.

b. Disability and COVID-19

1. Obtaining Health Information Without Discriminating

While institutions are prohibited from making disability-related inquiries of its employees, the EEOC's recent guidance confirms that institutions may issue surveys to employees that are designed to elicit both potential medical and non-medical reasons for an employee's absence during a pandemic, so long as the employee is not required to specify the medical and/or non-medical factors that apply to him or her. Institutions might consider taking steps, consistent with this guidance, to identify which employees are more likely to be unavailable for work due to the pandemic during the fall, so that the institution can be prepared to take steps to accommodate those employees and plan for their opening in the fall accordingly.

Importantly, if an employee with a disability poses a "direct threat" despite accommodation, then that employee is not protected by the non-discrimination provisions of the ADA. This gets us to the heart of the COVID-19 question. The EEOC has determined that COVID-19 qualifies as a direct threat, and accordingly, that "a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time."^[58] It is appropriate, at the current time, for a college or university to refuse to have someone come to work if they have COVID-19 or symptoms thereof. In fact, you want to encourage any employee with symptoms to stay home.

For students, as has always been true under Section 504, you may not refuse admission or re-enrollment simply based on a disability, and you may not force students to disclose a disability. If and when there is a COVID-19 vaccine, you may require students to get that vaccine, subject to any religious or personal exemptions in your state. What your institution may wish to consider is asking a *voluntary* set of questions about a student's health history that might relate to COVID-19 without directly asking if they had the condition – were they ever in isolation? Did they quarantine? Etc. This comes very close to the line of affirmatively asking a student to disclose a disability or medical condition, but there are countervailing, compelling public health reasons that suggest disclosure of this type of information would be helpful not just to the student, but to everyone else on campus. Consult with your counsel if you are considering these "pre-admission" or "pre-enrollment" questions.

2. What Constitutes a Reasonable Accommodation?

a. Employees

If someone is sick, you do not want them on campus, period. Having said that, the EEOC's updated guidance on the "*Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*" recognizes telework as an effective control strategy and a potential reasonable accommodation under the ADA. Thus, when engaging in the interactive process with the employee, an institution might first consider whether the employee's job duties are such that he or she can complete his or her job by working remotely, and, to that end, whether that employee worked remotely in an effective manner during the spring of 2020.

If, however, the employee has job duties where hands-on experience may be required, the approach may be different. Let's take the example of an organic chemistry professor who generally relies heavily on in-class labs. In this situation, the institution might consider requiring the professor to teach remotely to the extent possible and hold on-campus classes when hands-on experience is necessary, but doing so while placing a limit on the number of students in the class at any one time. The institution might also consider using an acrylic glass barrier to shield the professor during an on-campus demonstration.

A different disability consideration may arise from an institution's requirement that employees wear personal protective equipment ("PPE") during the pandemic, such as face masks or gloves. Circumstances will arise where an employee with a disability requires reasonable accommodations relative to the PPE. For example, an employee with a hearing impairment who uses lip reading will not be able to see others' lips through a standard face covering. Therefore, an institution might conclude that it is appropriate, and a reasonable accommodation, to require other employees who work directly with this particular employee to wear modified face masks with a transparent window over the mouth. In any of these circumstances, and the dozens more that may arise, it is incumbent upon the institution to engage in the interactive process^[59] with the employee to come to a reasonable solution, if feasible, that doesn't cause the institution an undue hardship (including an unreasonable expense).

b. Students

It is equally incumbent on the institution to engage in the interactive process with a student with a documented disability to explore what might be a reasonable accommodation/program modification. For example, a student who is at a higher risk for severe illness due to COVID-19 might request to be placed in a single room with an attached bathroom, without a roommate, to reduce his or her chances of exposure to the virus. This begs the question: does the institution have sufficient housing to accommodate students who request single dorm rooms? If not, how will the institution accommodate these requests? What is **reasonable** for the institution under the circumstances?

As for classrooms, students might request to be seated in a designated area with an acrylic glass barrier that is a certain distance from other students and a separate time for entering and exiting the classroom to avoid contact with other students. Under these circumstances, institutions may have to consider repurposing large spaces around their campus, including gymnasiums or chapels, to hold classes there so that there is adequate social distancing. As for dining areas, at risk students might request that the school drop off meals to their dormitory room so that the student can avoid germ exposure by entering a dining hall. The permutations are endless, which is why it is critical for institutions to prepare for these

scenarios ahead of time and determine what accommodations might cause them an undue hardship.

Of course, remote learning is not without its own operational challenges for students with certain disabilities. In particular, students with hearing or vision impairments may request accommodations if classes are virtual. The Federal Student Aid Office recently issued guidance on this topic in which it states:

[I]n this unique and ever-changing environment, these exceptional circumstances may affect how education, including needed accommodations for students with disabilities, is provided. Institutions should not decline to provide distance instruction, at the expense of most students, to address matters pertaining to accommodations for students with disabilities. Rather, institutions must make decisions that take into consideration the health, safety, and well-being of all their students and staff.[\[60\]](#)

Critically, while this guidance provides support for a remote learning environment and *suggests* that more flexibility should be provided to educational institutions in the COVID-19 environment, it does not have the effect of absolving an institution from its legal obligations under the ADA and Section 504 to engage in an interactive process with a student who seeks accommodation due to his or her disability. As such, schools need to ensure that they continue effective disability accommodation practices if and as they continue increased distance education.

d. What if a Faculty Member, Employee or Student Refuses an Institution's Reasonable Accommodation?

If an employee refuses to accept the reasonable accommodation offered by the school, then his or her refusal can provide the basis for discipline, up to and including termination. This may even be "cause" for a tenured faculty member. Institutions should bear in mind, however, the optics of terminating an employee who feels unsafe working on campus during a pandemic due to a serious medical condition. The political fallout from such a decision may be significant, and should be weighed alongside the legal risk.

For a student, if they are demanding an accommodation you simply cannot provide – for example, "I must take every class by myself to avoid the possibility of contagion" – they are not otherwise qualified to participate in your program. There may be another institution out there that can accommodate their request and continue to provide a functional academic program that serves thousands, but yours cannot, so they will need to look elsewhere.

e. Steps to Take Right Now

Institutions should immediately re-examine their internal policies and procedures for engaging in the interactive process with employees and students who request accommodation due to their disabilities and re-training staff who are responsible for this process, emphasizing the critical need for documentation. Colleges and universities can expect a proliferation in accommodation requests, and institutions must be prepared accordingly.

Additionally, given that the EEOC has determined individuals with COVID-19, or symptoms of it, pose a direct threat to others in the workplace, institutions are encouraged to take measures to identify employees with COVID-19 and to protect against the spread of COVID-19. Under the EEOC's guidelines, for example, institutions are permitted to take the temperature of their employees to determine whether they have a fever. Institutions might

consider temperature check stations that employees have to go through each day before they enter campus. While not explicitly extended to students or visitors, if the purpose of this guidance is to maintain a safe environment, an institution may wish to have temperature check stations for everyone – before you leave your dorm, or before you enter a classroom, or if a visitor is driving on to campus, before they enter campus. Colleges and universities may be well suited to seek specific guidance from local and state health officials on these steps. If you take these measures at the direction of governmental officials, that certainly helps tamp down any argument that you are doing these things for discriminatory reasons.

The CDC also has indicated that institutions are permitted to require their employees to wear PPE (masks in particular) during the pandemic, so you should consider implementing this precautionary measure to curb the spread of the virus. And, as with temperature checks, seriously consider expanding this obligation to everyone on campus. As detailed above, perhaps make adhering to any COVID-19 safety “best practices” part of your handbooks, or codes of conduct, and most importantly, part of the shared obligation we all have to make our campuses safe.

Should your institution requires masks and other PPE, consider whether you will provide the PPE (can you require employees and students to purchase it, and maybe more importantly, do you want to even if you could?), whether the PPE is disposable, and if it is not disposable, what the requirements will be for sanitizing PPE. You will absolutely need to provide training on the safe use, care, and cleaning of any such PPE.

V. CONTRACT / REPRESENTATION CLAIMS

In the COVID-19 environment, we can expect that an institution may also face breach of contract, fraud, and/or “reliance”-based claims (e.g., promissory estoppel), mostly from students and their families. Practically speaking, however phrased, these claims will turn on the same thing – the language of your own written materials. These claims will assert reliance on written statements in your institutional materials, statements that: you will provide for a “*safe campus*”, you would “*work to eliminate COVID-19 on your campus,*” you would “*test every member of campus,*” and so on. The following section outlines breach of contract claims, discusses fraud and consumer protection laws, and provides a very high-level summary of the current “tuition class action” lawsuits.[\[61\]](#)

a. Likely Claims

i. Breach of Contract

The elements of breach of contract vary by state, but they generally are (1) existence of a contract between the student and the institution; (2) performance by student (payment, compliance with basic institutional expectations); (3) breach by the institution; and (4) damages. The existence of a contract at all, and essential terms of that contract, vary widely based on the nature of the institution, the nature of the claim, and the particular document(s) averred to form a contract.

The most likely breach of contract claim in the COVID-19 environment will assert that statements made in your handbooks, enrollment documents, and the like that offer a “safe experience” or promise comprehensive and productive health services for students form a contractual obligation, and if a student gets sick with COVID-19, they will contend that this purported contractual obligation has been breached. As an initial matter, in most states, not every piece of paper you provide to your students forms a contract; in some states, for example,

the student handbook is not a contract between the student and a public institution.^[62] Moreover, most courts have been reluctant to extend a university's representation to provide medical services and a "healthy environment" too broadly.^[63] Nonetheless, one can expect that students (and perhaps employees) will lean on your documents to create a contractual obligation for "safety" or "health" which they may claim that you breached.^[64] Schools may be able to ameliorate the risks that arise from these possible contract claims by creating clear and direct language about the risks of returning to campus that students must accede to prior to returning to campus.

ii. Fraud / Reliance / Consumer Protection Law Claims

A claim of this type is just a tweak on the breach of contract argument. Whether in common law or under a state's consumer protection law, a litigant will claim that your institution made "representations" that were fraudulent or unfair about the safety of their campus, that they relied on those representations in deciding to return, and that they were harmed as a result.^[65] There are two simple, but important, steps to take to mitigate these claims. First, scour your website and materials to see what representations you are making that could be related to health or safety on campus, and see if they need to be tweaked in light of COVID-19. Second, affirmatively add language wherever you can that "circumstances may change" or you seek to ensure safety "to the greatest extent possible", and so on. As COVID-19 has demonstrated, these additional caveats are not only protective, they are true.

b. Steps to Take to Mitigate Risk

You can use your written documents in both proactive and protective ways in this pandemic environment. First, strongly consider revisions to student codes of conduct, housing contracts, employee handbooks, and, if you can, your faculty handbooks to make adherence to COVID-19 safety measures a requirement of your institutional conduct codes. This sets expectations and concurrently increases institutional leverage to take action against offenders. Require your community members to take necessary precautionary steps as determined by the institution, state, and local officials, and make these obligations part of whatever "contractual" obligation you have to others.

Consider revising these documents right now. For instance, maybe students have already picked their housing and sent in a deposit for fall 2020. Extraordinary circumstances nonetheless warrant revisiting your housing documents. In that regard, your institution should make clear that wearing masks or other PPE, maintaining social distance, and adhering to other mandatory restrictions imposed by states/localities are also mandatory in dorms. Similar language may also be included in other policies, such as those relating to athletic facilities, visitor policies, etc.

c. Interplay with Pending "Spring 2020 Class Action" Litigation Matters

As of the time of this writing, nearly 100 institutions had been sued for changes necessitated by COVID-19 in spring 2020. As a general matter, these putative class action lawsuits seek reimbursement of tuition, room and board, and/or student fees because institutions moved to a remote environment as some point in the past couple of months. For room and board and student fees, the argument is simply that the institution promised housing/food/services for a full semester, the student did not get the full value, and a pro-rata refund should be provided. For tuition, the contention is more conceptual, contending that online classes are somehow "worth less" than in-person classes and that, therefore, a refund for the supposed delta should be provided.

These lawsuits are worth mentioning here for two reasons. First, in every one of these cases, there is a breach of contract claim tied to the very policies, handbooks, and website representations mentioned above. Second, as you are revisiting and revising documents for fall 2020, you should think about how any changes could tie in to these pending claims. Don't be constrained by these cases, but do be mindful of them. For example, if you add language making clear that a semester interrupted by COVID-19 entitles students to a pro rata refund, or if you outline that an online format will be made available as an option, and at a reduced cost – how does that impact your position in any potential spring 2020 claim? This is not a traditional “subsequent remedial measure” as these are not tort cases, but it is not clear that public policy or other evidentiary rules of exclusion would keep any fall 2020 changes you may make from being admitted in a lawsuit about spring 2020 issues. There seems a decent chance that an expert witness in one of these tuition class action cases would rely on any changes, particularly any tuition reductions for remote courses, as part of their expert report on how “online learning” is less than “in person learning”. Institutions will have to balance this lawsuit risk against the need to teach in the right environment in the fall, and also against having classes at attractive price points in what is certainly going to be a uniquely difficult admission and retention environment for many colleges and universities in fall 2020.

VI. FINAL PRACTICAL TAKEAWAYS

There is much, much more to be said about returning to campus in the post COVID-19 environment. The author recognizes that, by necessity, this Note is just a starting point and there may well be thirty other things the reader would like to discuss. As we all get through this time together, here are some additional practical thoughts and takeaways that may be helpful:

- Follow any applicable state requirements and CDC guidelines.
- Limit face-to-face meetings.
- Stagger work start and stop times.
- Consider means of ingress and egress for your buildings. Can you have separate stairwells?
- Work with your building maintenance folks to discuss creative ideas around choke points like elevators, building door entrances, escalators.
- Athletics are an entirely separate Note. Continue to monitor guidance from the CDC, the NCAA, and your conference.
- Have a plan in place for a probable or confirmed case of COVID-19 on campus. This may include:
 - Closing off all areas known to have been visited by the infected individual for at least 24 hours, and engaging in a deep cleaning;
 - Identifying others in close contact with that infected individual and encourage them to stay home, if they can, or take their temperatures each day and send them home if they have a fever over 100 degrees or are showing symptoms;

- Advising the sick employee to follow all CDC and state health guidelines for isolation and recovery; and
 - Determining if and how you will announce this information to the community in a non-personally-identifiable way.^[66]
- If you have a unionized workforce, take a close look at the Collective Bargaining Agreement (CBA). Does the CBA have a force majeure clause that allows you to make changes as needed in this extraordinary circumstance? Do you want to use force majeure, as the union may turn around and use that to refuse to work in certain situations?
 - Speaking of force majeure, as briefly alluded to above, consider whether force majeure allows you to cancel or modify contracts with vendors that no longer make sense or are economically infeasible right now.
 - Which physical locations on campus will require changes as soon as possible – everything from signage to literal reconfiguration? Here are some that should be top of mind: dining halls, gyms and exercise facilities, smaller classrooms, break rooms.

- - -

Good luck. We'll get through this, together.

END NOTES:

[1] James (“Jim”) Keller is the founder and Co-Chair of the Higher Education Practice at the law firm of Saul Ewing Arnstein & Lehr LLP. Based in Philadelphia, Jim advises institutions of higher education nationally on matters of compliance, policy, and risk mitigation, and serves as lead litigation counsel for colleges and universities on a routine basis. Jim is a frequent speaker and contributor for NACUA and has served on several NACUA committees.

[2] See, e.g., Kery Murakami, [“Colleges Worry They’ll Be Sued if they Reopen Campuses.”](#) *Inside Higher Education*, (May 15, 2020).

[3] Angela Marino, *The Cost of a Countermeasure: The Expansive Liability Protection of the Public Readiness and Emergency Preparedness Act of 2005*, 20 U. Fla. J.L. & Pub. Pol’y 199, 200 (2009).

[4] 42 U.S.C.A § 247d-6d.

[5] 42 U.S.C.A § 247d-6d(b)(1).

[6] Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198 (Mar. 17, 2020).

[7] 42 U.S.C.A. § 247d-6d(a)(2)(B).

[8] A licensed health professional or any other individual “authorized” to prescribe or administer countermeasures under the law of the pertinent state. 42 U.S.C.A. § 247d-6d(i)(8).

[9] *Id.* at § 247d-6d(i)(2)(B).

[10] Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. at 15,199.

[11] *Id.* at 15,200.

[12] Typically such things as medication, testing, vaccines.

[13] Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. at 15,200.

[14] *E.g.*, *Maryland Casualty Co. v. Asbestos Claims Court*, 460 P.3d 882, 895 (Mont. 2020).

[15] *E.g.*, *Regents of University of California v. Superior Court (“Rosen Case”)*, 413 P.3d 656 (Cal. 2018).

[16] *Maryland Casualty Co. v. Asbestos Claims Court*, 460 P.3d 882, 894 (Mont. 2020)(citing *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99-100 (N.Y. 1928)).

[17] *Id.*

[18] *Id.* See also *Munn v. Hotchkiss School*, 24 F. Supp. 2d 155, 196 (D. Conn. 2014) (public policy does not disfavor imposing a duty on a school to “warn students about, and protect students from, a foreseeable risk of insect-borne disease”).

[19] *Id.* (citing Restatement § 343A(1)).

[20] *Id.* (citing Restatement § 343A cmt. b.)” See, *e.g.*, *Smagala v. Embassy Suites Management LLC*, No. 17-cv-3648, 2020 WL 208804 at *1 (S.D. Ind. January 14, 2020).

[21] Depending on jurisdiction, there could be a dozen more theoretical bases for duty. See, *e.g.*, *Munn v. Hotchkiss School*, 24 F. Supp. 3d 155, 174 (D. Conn. 2014) (private K-12 school had a “duty to warn” student on study abroad trip to China to take protective measures to protect her from an insect bite and “insect-borne disease”). This Note covers the three bases for duty that seem most likely. The author strongly recommends consulting with your counsel about this issue, as well as all issues in this Note.

[22] Restatement Section 324A(2).

[23] An institution’s duty in this circumstance will be limited to those affirmative steps you actually undertake to render aid and assistance to your community. “[W]hen a duty is based on the voluntary undertaking of a task, ‘the extent of the undertaking defines the scope of the duty.’” *N.T. v. Taco Bell Corp.*, 411 F. Supp. 3d 1192, 1196 (D. Kan. 2019) (citing Restatement (Second) of Torts § 324A).

[24] See, *Wright-Young v. Chicago State University*, — N.E.3d —, 2019 IL App. (1st) 181073, at **13-14 (App. Ct. II. 2019) (where school voluntarily undertakes to increase security in an effort to make campus safer in light of prior incidents of violence, and school official sends letter promising increased security, student/parents can rely upon that letter in determining to return to campus, and subsequent harm to student may be breach of duty under Restatement Section 324A).

[25] *But see Rowe v. Gatke Corp.*, 126 F.2d 61, 65 (7th Cir. 1942) (failure to wear a respirator, absent evidence that it would absolutely prevent asbestos particles from causing disease, “could not amount to contributory negligence”).

[26] *Cf.* theories of liability asserted in *Estate of Benjamin v. JBS S.A. et al.*, Case No. 200500370, Philadelphia Court of Common Pleas, May Term 2020 (asserting that COVID-19 which was circulating in close quarters at meat-packing plant but allegedly kept quiet by employer was but-for and proximate cause of Mr. Benjamin contracting COVID-19, which ultimately proved fatal).

[27] See, *e.g.*, *Adloo v. H.T. Brown Real Estate*, 686 A.2d 298, 301 (Ct. App. Md. 1996).

[28] It should be noted that employees are generally covered by workers’ compensation laws. Workers’ compensation statutes are state-specific. Many provide compensation for “occupational diseases,” but exclude “ordinary diseases of life.” See, National Council on Compensation Insurance, [“COVID-19 and Workers Compensation: What You Need to Know – Frequently Asked Questions – Update”](#) (May 20, 2020). Some states, either through legislation or executive order, have modified their policies to permit certain workers to claim workers compensation benefits after diagnosis with COVID-19, despite the fact that COVID-19 is an “ordinary disease of life.” See, *e.g.*, Cal. Exec. Order 62-20; KY Exec. Order 20-277. Therefore, any effort to modify an employee handbook or employee policies must be done with a cautious eye toward not abrogating any workers’ compensation rights.

- [29] *Taylor v. University of Phoenix/Apollo Group*, 487 Fed. Appx. 942, 946 (5th Cir. 2012).
- [30] *Dehart v. Stevens-Henager College, Inc.*, 85 Empl. Prac. Dec. P 42, 191, 2005 WL 3277777, at *1-2 (D. Utah Dec. 2, 2005).
- [31] Care should be taken with using mandatory temperature checks for a variety of reasons, not the least of which because fever is not a reliable indicator that an individual has COVID-19. Jan Cortes, "[Fever Not Reliable Indicator of Coronavirus Infections, Doctors Say](#)," *Medical Daily* (May 14, 2020).
- [32] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191.
- [33] 20 U.S.C. § 1232g; 34 C.F.R. Part 99.
- [34] U.S. Const. Amend. IV.
- [35] *Id.*; *Wolf v. Colorado*, 338 U.S. 25 (1949).
- [36] *Katz v. U.S.*, 389 U.S. 347 (1967).
- [37] *United States v. Jones*, 565 U.S. 400 (2012).
- [38] See *Schmerber v. California*, 384 U.S. 757 (1966) (holding that taking a blood sample from a person suspected of driving while intoxicated who is receiving treatment in a hospital did not violate the Fourth Amendment).
- [39] *Id.*
- [40] See *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (holding that the acquisition of cell phone records in order to trace a suspect's movements constitutes a search under the Fourth Amendment).
- [41] *Camara v. Municipal Court*, 387 U.S. 523 (1967).
- [42] *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring) (emphasis added).
- [43] *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016).
- [44] Whereby an institution can track an infected community member, and those in close contact with that community member, via a smartphone or other electronic application to make sure they are honoring any quarantine or self-isolation requirements.
- [45] *Amos v. United States*, 255 U.S. 313 (1921); *Zap v. United States*, 328 U.S. 624 (1946); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).
- [46] *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (5-4).
- [47] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Justice Harlan, speaking for the majority, noted that imposing a fine for failure to comply with the vaccination requirement was acceptable, but that forced vaccination was not.
- [48] Consult your counsel to determine if you, or any part of your institution, may be covered by HIPAA.
- [49] The Health Insurance Portability and Accountability Act of 1996. Pub. L. 104-191. Stat. 1936. Web. 11 Aug. 2014.
- [50] U.S. Department of Health and Human Services, "[Bulletin: HIPAA Privacy and Novel Coronavirus](#)" (February 2020) and the applicable HIPAA regulations at 45 C.F.R. § 164.506, 45 C.F.R. § 164.510, and 45 C.F.R. § 164.512. See 45 CFR 164.512(b)(1)(iv).
- [51] *Id.*; see also 45 CFR 164.512(j).

[52] *Id.*

[53] 34 C.F.R. § 99.31(a)(1)(i)(A).

[54] U.S. Department of Education, "[FERPA & Coronavirus Disease 2019 \(COVID-19\) Frequently Asked Questions \(FAQs\)](#)" (March 2020).

[55] *Id.*

[56] *Id.*

Q: If an educational agency or institution learns that student(s) in attendance at the school are out sick due to COVID-19, may it disclose information about the student's illness under FERPA to other students and their parents in the school community without prior written parental or eligible student consent?

A: It depends, but generally yes, but only if that information is in a non-personally identifiable form. Specifically, the educational agency or institution must make a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information. See 34 C.F.R. § 99.31(b)(1). If an educational agency or institution discloses information about students in non-personally identifiable form, then consent by the parents or eligible students is not needed under FERPA. For example, if an educational agency or institution releases the fact that individuals are absent due to COVID-19 (but does not disclose their identities), this would generally not be considered personally identifiable to the absent students under FERPA as long as there are other individuals at the educational agency or institution who are absent for other reasons. However, we caution educational agencies or institutions to ensure that in releasing such facts, they do so in a manner that does not disclose other information that, alone or in combination, would allow a reasonable person in the school community to identify the students who are absent due to COVID-19 with reasonable certainty.

[57] See, e.g., 29 C.F.R. § 1630.2(o)(3).

[58] U.S. Equal Employment Opportunity Comm'n, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (March 21, 2020).

[59] See, e.g., *US Airways, Inc. v. Barnett*, 335 U.S. 391 (2002).

[60] U.S. Dep.'t of Educ., Federal Student Aid, *UPDATED Guidance for Interruptions of Study Related to Coronavirus (COVID-19)* (April 3, 2020).

[61] There are of course employee and vendor contract issues that may also come up in the COVID-19 environment, but in the interest of space, they are not separately discussed here. An employee may make the same "safety" arguments as a student. And every institution will be having contract discussions with its vendors, both as potential plaintiff and as potential defendant.

[62] See, e.g., *Cohn v. Pennsylvania State University*, No. 19-2857, 2020 WL 738496, at * 9 (E.D. Pa. Feb. 12, 2020) (collecting pertinent law of Pennsylvania on this point).

[63] See, e.g., *Shin v. Massachusetts Inst. of Technology*, 19 Mass. L. Rptr. 570, at *7 (Super. Ct. Mass. 2005) (representations about the purpose and availability of medical services for the "MIT community" are too "vague and indefinite" to form an enforceable contract).

[64] It is worth noting that in most jurisdictions, if a plaintiff brought concurrent contract and tort claims for the same harm, and the court found that there was a valid contractual claim, that contract claim would bar

any tort action under the “gist of the action” doctrine. See, e.g., *Powell v. Saint Joseph’s University*, No. CV 17-4438, 2018 WL 994478 (E.D. Pa. Feb. 20, 2018).

[65] *Hacker v. Natl. College of Business & Technology*, 927 N.E.2d 38 (Ct. App. Ohio 2010) (former students brought suit for breach of contract, fraud, and violation of state consumer sales practices act; issue of fact found as to whether unfair or deceptive representations made to incoming students about required externships being available in last term).

[66] Such a notification would also be consistent with the Clery Act § 668.46, as confirmed by April 3, 2020 guidance from the Department of Education. See U.S. Dep’t of Educ., Federal Student Aid, [UPDATED Guidance for Interruptions of Study Related to Coronavirus \(COVID-19\)](#) (Apr. 3, 2020).

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