

## Public Health Agencies as Employers: Obtaining and Using Employee Health Information for Preparedness Planning and Response

### Issue Brief

#### Introduction

Public health agencies have a unique challenge when it comes to the collection, use, disclosure, and protection of employee health information. Public health agencies serve many roles, including employer, healthcare provider, and public health authority. These roles might create tension with regard to employee health information, especially during a public health emergency. Public health agencies—like other employers—must ensure the safety and health of their workforce and continuity of operations in the event of an emergency. Consequently, CDC and the Occupational Safety and Health Administration (OSHA) have published guidance and tools to help employers prepare for emergencies, such as pandemic influenza.<sup>1</sup> Additionally, the U.S. Department of Labor Office of Disability Employment Policy provides resources to help employers and employees prepare the workplace for everyone, accounting for the needs of people with disabilities during a workplace emergency.<sup>2</sup>

Collection and use of information is an important part of emergency preparation. However, when employers seek or obtain information about employees' health or illness, they must use care to ensure that their actions are consistent with laws that protect employees from discrimination based on disability. In particular, state and local public health agencies must understand information practices that are limited by the Americans with Disabilities Act of 1990 (ADA) and other federal or state laws that protect employees' health information. This issue brief discusses the legal framework for information collection and sharing within the workplace for public health emergency planning and response, with a specific focus on ADA.

#### I. Laws affecting the collection, use, and disclosure of employee health information

There are numerous reasons why an employer might collect, use, or share employee health information, including administering leave under the Family and Medical Leave Act<sup>3</sup> or complying with provisions of occupational safety and health laws. To ensure an adequate workforce to provide essential services during an emergency, public health agencies may want to monitor their employees' health. A successful response to a public health emergency depends on available workers to manage the emergency and maintain vital services to the community. Tracking employee health would be especially important during a pandemic, biochemical release, or another emergency that may expose employees to disease, illness, or injury. Monitoring employee health ensures that employees whose health is compromised would receive prompt treatment and not expose coworkers, patients, and members of the public to related health threats.

Before employee health information is collected, used, or shared, it is important to consider several questions:

##### Collection:

- Under what role is the public health agency collecting the information (e.g., public health authority, healthcare provider, or employer)?
- What health information is being collected?
- What is the purpose of collecting the information?

- In what form is the information being collected (e.g., written, electronic, etc.)?

Use:

- What is the data being used for?
- Is the use appropriate and legal?
- If required, has the employee authorized the use of his or her health information?

Disclosure:

- Who is requesting the data disclosure?
- What is the purpose for the information request?
- What specific information is being requested?
- Is the information requested limited to the minimum necessary to fulfill the purpose?
- Is the disclosure appropriate and legal?
- If required, has the employee authorized the disclosure of his or her health information?

No federal laws specifically address public health agencies collecting and using employee health information during a public health emergency. Even so, as employers, public health agencies must comply with certain laws regarding their employees regardless of whether an emergency exists. The following two laws are the most pertinent to this issue brief, although this list is not exhaustive and other federal laws may apply:

**Occupational Safety and Health Act (OSH Act)<sup>4</sup>**

The OSH Act requires employers to provide employees with a safe and healthful workplace by setting and enforcing standards.

**Americans with Disabilities Act of 1990 (ADA)<sup>5</sup>**

ADA is a broad civil rights law that prohibits discrimination on the basis of disability.

Although the federal Privacy Rule,<sup>6</sup> adopted under the Health Insurance Portability and Accountability Act (HIPAA),<sup>7</sup> sets national standards to protect identifiable health information, the rule does not protect information that is included in employment records held by a covered entity in its role as employer.<sup>8</sup>

Although state law is beyond the scope of this issue brief, a public health agency must identify, understand, and comply with all state laws that govern this area. All areas of state law that could affect the collection, use, disclosure, and protection of employee health information must be considered. Possible areas of state law to consider include:

- Laws governing public health agencies.
- Laws governing health facilities.
- State privacy and health information privacy laws.
- Data collection and management laws, including laws that apply to electronic information.
- Freedom of information laws.
- Emergency preparedness laws.
- State occupational safety and health laws.
- State common law (i.e. law developed through court opinions).

Public health agencies should also review collective bargaining agreements and workplace policies and procedures to ensure that they comply with applicable laws and to address any obstacles that they present to effective preparedness and response.

## **II. Occupational Safety and Health Act**

Under the OSH Act,<sup>9</sup> employers are responsible for providing a safe and healthful workplace for employees. The OSH Act covers most employees in the private sector, either directly or through a state program approved by the Occupational Safety and Health Administration (OSHA).<sup>10</sup> State-run health and safety programs must be at least as effective as the federal OSHA program.

State and local government workers are excluded from federal coverage under the OSH Act.<sup>11</sup> Still, states operating their own state workplace safety and health programs under OSHA-approved plans are required to extend their coverage to public sector workers in the state. States must set job safety and health standards that are at least as effective as comparable federal standards and most states adopt standards identical to the federal OSH Act. Twenty-two states and jurisdictions currently operate under this model.<sup>12</sup> OSHA regulations also permit states without approved plans to develop plans that cover only public sector workers. In these states, private sector employment remains under federal OSHA jurisdiction. Five states and jurisdictions operate public employee-only plans.<sup>13</sup> Finally, the Environmental Protection Agency (EPA) regulations extend OSHA's hazardous waste operations and emergency response standard<sup>14</sup> to state and local government employees engaged in hazardous waste operations in states that do not have an approved state plan.<sup>15</sup>

States without OSHA-approved state job safety and health plans may voluntarily provide safety and health protection to their governmental workers. Many states without approved safety and health programs do provide coverage to public employees, to varying degrees, through programs that do not receive federal funding and are not subject to federal OSHA oversight.<sup>16</sup>

Covered employers must comply with the OSH Act's general duty clause, which requires employers to keep their workplace free of serious recognized hazards.<sup>17</sup> Employers can be cited for violating the general duty clause if there is a recognized hazard and they do not take reasonable steps to prevent or abate it. For example, OSHA has published guidance on what employers should do to help reduce the risk of occupational exposure to pandemic influenza based on the degree of risk that each type of workplace poses.<sup>18</sup>

Covered employers must also comply with occupational safety and health standards promulgated by the U.S. Department of Labor, including general industry standards<sup>19</sup> that apply to all workplaces, such as hazardous material and blood-borne pathogen exposures. Depending on the nature of an employee's duties, employers may be required to conduct medical screening and surveillance programs to monitor employee health and workplace exposure levels. Medical screening and surveillance program standards are specific to each toxic or hazardous substance. Each standard details which employees should be tracked, the frequency of examinations, the maximum level of exposure that an employee may receive, and the information an employer must record and maintain for each employee.

An employer must take care to protect its workforce from pandemic influenza and other serious health threats, as well as exposure to specific hazards that might be encountered while protecting the public's health. That said, when seeking information about employees for this purpose, an employer must ensure that any medical inquiries or examinations are conducted in compliance with ADA, as discussed below.

## **III. Americans with Disabilities Act**

Title I of ADA<sup>20</sup> prohibits most private employers and state and local governments from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment.<sup>21</sup> Title II of ADA<sup>22</sup> reinforces Title I to state and local government by making it illegal for all state and local governmental

agencies to discriminate against individuals based on disability in state and local government programs and activities, including employment.<sup>23</sup> ADA also protects people from discrimination based on their relationship with a person with a disability even if they do not themselves have a disability.<sup>24</sup> For example, it is illegal to discriminate against an employee because his or her spouse has a disability. ADA's nondiscrimination standards apply to federal sector employees under section 501 of the Rehabilitation Act, as amended, and its implementing rules.<sup>25</sup> The U.S. Equal Opportunity Commission (EEOC) enforces Title I of ADA<sup>26</sup> while the U.S. Department of Justice (DOJ) enforces Title II.<sup>27</sup> Because ADA establishes overlapping responsibilities in both EEOC and DOJ for state and local government employment, the federal enforcement effort is coordinated by EEOC and DOJ to avoid duplication in investigative and enforcement activities.<sup>28</sup>

Title I of ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees, regardless of whether those individuals have disabilities. Employers may not ask about the existence, nature, or severity of a disability,<sup>29</sup> except under limited circumstances:

- Before a conditional offer of employment, ADA prohibits disability-related inquiries and medical examination. The employer is permitted to make inquiries into the ability of an applicant to perform job-related functions, or may ask an applicant to describe or demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.<sup>30</sup>
- After a conditional offer of employment, but before an individual begins working, ADA permits disability-related inquiries and medical examinations if all entering employees in the same job category are subject to the same inquiries and examinations regardless of disability.<sup>31</sup> However, if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation.<sup>32</sup>
- During employment, ADA prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.<sup>33</sup> For this purpose, the employer must have a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition or an employee will pose a direct threat due to a medical condition.

An inquiry is "disability-related" if it is likely to elicit information about a disability. "Disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities of the individual" and may be actual or perceived.<sup>34</sup> The determination of whether any particular condition is considered a disability is made on a case-by-case basis; generally, a disability does not include an impairment that is transitory and minor, such as a cold or seasonal influenza.<sup>35</sup> ADA provides that the definition of disability shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the act's terms.<sup>36</sup> As an example, EEOC advises: "[A]sking an individual if his immune system is compromised is a disability-related inquiry because a weak or compromised immune system can be closely associated with conditions such as cancer or HIV/AIDS. By contrast, an inquiry is not disability-related if it is not likely to elicit information about a disability. For example, asking an individual about symptoms of a cold or the seasonal flu is not likely to elicit information about a disability."<sup>37</sup>

Generally, ADA permits medical surveillance and screening programs for current public health workers who are at risk for exposure to disease or other hazards. For a medical surveillance program to be lawful, it cannot be arbitrary and must include all potentially affected employees. ADA recognizes that medical surveillance may be required by occupational safety and health laws, such as standards established by OSHA under the OSH Act.<sup>38</sup> If a standard is required by another federal law, an employer must comply with it and does not have to show that the standard is job-related and consistent with business necessity. An employer still has

the obligation under ADA to consider whether there is a reasonable accommodation consistent with federal standards that will prevent exclusion of qualified individuals with disabilities who can perform jobs consistent with these standards.<sup>39</sup>

ADA does not negate state or local safety and health laws, except where such laws conflict with ADA requirements. Before excluding individuals with disabilities from the workplace or a particular job for health or safety reasons, the employer must assess whether the individual poses a “direct threat.” A direct threat is a significant risk of substantial harm to both the individual and other employees even with reasonable accommodation. EEOC regulations set forth four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.<sup>40</sup> Whether pandemic influenza rises to the level of a direct threat may depend on the severity of the illness. Assessment by CDC or public health agencies regarding the illness’s severity may provide the objective evidence needed for a disability-related inquiry or medical examination protect the employee and others.<sup>41</sup>

ADA does not prevent employers from collecting and appropriately using information necessary for a comprehensive emergency evacuation plan.<sup>42</sup> An employer may ask employees whether they will require assistance in the event of an evacuation and, if so, what type of assistance they would need. Some employees may need assistance because of medical conditions that are not visually apparent whereas others may have obvious disabilities or medical conditions but may not need assistance.

ADA requires that employers reasonably accommodate an otherwise qualified applicant or employee’s known physical or mental limitations unless doing so would impose an undue hardship on the operation of the employer’s business. With regard to disability caused by pandemic influenza, reasonable accommodation may include, but is not limited to, telework, altered work schedules, and infection control strategies.<sup>43</sup>

EEOC has addressed matters related to pandemic influenza in its technical assistance document titled *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*,<sup>44</sup> which provides guidance and reminders for employers regarding health-related inquiries and medical examinations before, during, and after a pandemic. The document also provides a sample ADA-compliant survey employers may use with employees before a pandemic to evaluate potential absenteeism (see Figure 1). EEOC takes the position that an employer may survey its workforce to gather personal information to determine potential absences from work during a pandemic, provided that the employer asks broad questions that are not limited to disability-related inquiries. For example, in addition to medical reasons, an employer may ask employees to identify potential nonmedical reasons for absence during a pandemic, such as curtailed public transportation or the need to care for a child if schools or day care centers were closed. The employer must be careful to structure its survey so that employees identify potential medical and nonmedical reasons that would prevent them from coming to work in the event of a pandemic without specifying the factor that applies to them. This way, the employer is able to gather information to plan for absenteeism without asking the employee to disclose information about a disability. Prior to implementing such a survey, employers should consult legal counsel to evaluate when and how such a survey may be used.

During a pandemic, an employer may send employees home if they display influenza-like symptoms. Employers may also ask employees who call in sick if they are experiencing influenza-like symptoms. An employer may require employees who have been away from the workplace during a pandemic to provide a doctor's note certifying fitness to return to work. If the illness is akin to seasonal influenza or the 2009 H1N1 virus, such actions or inquiries are not disability-related. Such actions or inquiries would also be permitted under ADA if the illness were serious enough to pose a direct threat.<sup>45</sup>

ADA requires protection of information obtained from disability-related inquiries and medical examinations. Information regarding any employee's medical condition or history shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record.<sup>46</sup>

ADA also limits sharing such information.<sup>47</sup> Supervisors and managers may be informed of necessary restrictions on an employee's work or duties and necessary accommodations. Additionally, first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment or affect the employee's ability to evacuate the workplace during an emergency. Finally, government officials investigating ADA compliance shall be provided with relevant information on request.

## Conclusion

Certain personal and health information about employees helps public health agencies and other employers prepare and respond to public health emergencies. Employee surveys may help public health agencies determine potential absences from work that impact vital public health functions and emergency response efforts. Monitoring employees' health helps employers provide safe workplaces, preventing the spread of disease among employees and to the public and ensuring that employees obtain treatment. However, ADA—which protects people against discrimination because of disability—restricts public health agencies' ability to ask employees about their health or to require medical examinations. A public health agency must understand these limitations' nature and scope so that it may effectively carry out its responsibilities to all employees and the public, whether or not an emergency exists.

## Sources:

<sup>1</sup> U.S. Department of Labor Occupational Health and Safety Administration. "Safety and Health Topics, Pandemic Influenza, Publications and Other Resources." Available at <http://www.osha.gov/dsg/topics/pandemicflu/index.html>. Accessed 11-16-2012. HHS. "Business Planning and

## ADA-COMPLIANT PRE-PANDEMIC EMPLOYEE SURVEY

**Directions:** Answer "yes" to the whole question *without specifying the factor that applies to you*. Simply check "yes" or "no" at the **bottom of the page**.

**In the event of a pandemic, would you be unable to come to work because of any one of the following reasons:**

- If schools or day-care centers were closed, you would need to care for a child.
- If other services were unavailable, you would need to care for other dependents.
- If public transport were sporadic or unavailable, you would be unable to travel to work.
- If you or a member of your household fall into one of the categories identified by the CDC as being at high risk for serious complications from the pandemic influenza virus, you would be advised by public health authorities not to come to work (e.g., pregnant women; persons with compromised immune systems due to cancer, HIV, history of organ transplant or other medical conditions; persons less than 65 years of age with underlying chronic conditions; or persons over 65).

**Answer:** YES \_\_\_\_\_ , NO \_\_\_\_\_

Figure 1, Source: U.S. Equal Employment Opportunity

- Preparedness Resources.” Available at <http://www.flu.gov/planning-preparedness/business/index.html>. Accessed 11-16-2012. CDC. “Guidance for Businesses and Employers To Plan and Respond to the 2009 – 2010 Influenza Season.” Available at <http://www.flu.gov/planning-preparedness/business/guidance.pdf>. Accessed 11-16-2012.
- <sup>2</sup> U.S. Department of Labor Office of Disability Employment Policy. “Disability Employment Policy Resources by Topic, Emergency Preparedness.” Available at <http://www.dol.gov/odep/topics/EmergencyPreparedness.htm>. Accessed 11-16-2012.
- <sup>3</sup> 29 U.S.C. § 2601 *et seq.*
- <sup>4</sup> 29 U.S.C. § 651 *et seq.*
- <sup>5</sup> 42 U.S.C. § 12101 *et seq.*
- <sup>6</sup> 45 C.F.R. Parts 160 and 164.
- <sup>7</sup> 42 U.S.C. § 300gg *et seq.*
- <sup>8</sup> 45 C.F.R. § 160.103, definition of *protected health information*.
- <sup>9</sup> 29 U.S.C. § 651 *et seq.*
- <sup>10</sup> U.S. Department of Labor Occupational Safety & Health Administration. “Information about OSHA for Workers.” Available at <http://www.osha.gov/workers.html>. Accessed 11-16-2012.
- <sup>11</sup> 29 U.S.C. § 652.
- <sup>12</sup> U.S. Department of Labor Occupational Health and Safety Administration. “OSHA Coverage of State and Local Government Workers.” Available at [http://www.osha.gov/dcsp/osp/public\\_sector.html](http://www.osha.gov/dcsp/osp/public_sector.html). Accessed 11-16-2012.
- <sup>13</sup> *Ibid.*
- <sup>14</sup> 29 C.F.R. § 1910.120.
- <sup>15</sup> U.S. Department of Labor Occupational Health and Safety Administration. “OSHA Coverage of State and Local Government Workers.” Available at [http://www.osha.gov/dcsp/osp/public\\_sector.html](http://www.osha.gov/dcsp/osp/public_sector.html). Accessed 11-16-2012.
- <sup>16</sup> *Ibid.*
- <sup>17</sup> 29 U.S.C. § 654.
- <sup>18</sup> OSHA Publication No. 3327. “Guidance on Preparing Workplaces for an Influenza Pandemic.” Available at [http://www.osha.gov/Publications/influenza\\_pandemic.html](http://www.osha.gov/Publications/influenza_pandemic.html). Accessed 11-16-2012.
- <sup>19</sup> 29 C.F.R. Part 1910.
- <sup>20</sup> 42 U.S.C. §§ 12111-12117.
- <sup>21</sup> 42 U.S.C. § 12112; 29 C.F.R. § 1630.4.
- <sup>22</sup> 42 U.S.C. §§ 12131-12165.
- <sup>23</sup> 42 U.S.C. § 12132. U.S. Department of Justice. “Americans with Disabilities Act Questions and Answers.” Available at <http://www.ada.gov/q%26aeng02.htm>. Accessed 11-16-2012.
- <sup>24</sup> 42 U.S.C. § 12112(b)(4).
- <sup>25</sup> U.S. Equal Employment Opportunity Commission. “The Rehabilitation Act of 1973.” Available at <http://www.eeoc.gov/laws/statutes/rehab.cfm>. Accessed 11-16-2012.
- <sup>26</sup> U.S. Equal Employment Opportunity Commission. “Overview EEOC.” Available at <http://www.eeoc.gov/eeoc/index.cfm>. Accessed 11-16-2012.
- <sup>27</sup> U.S. Department of Justice. “ADA Best Practices Tool Kit for State and Local Governments.” Available at <http://www.ada.gov/pcatoolkit/chap1toolkit.htm>. Accessed 11-16-2012.
- <sup>28</sup> U.S. Equal Employment Commission. “The ADA: Your Employment Rights as an Individual With a Disability.” Available at <http://www.eeoc.gov/facts/ada18.html>. Accessed 11-16-2012.
- <sup>29</sup> 29 C.F.R. § 1630.13; 29 C.F.R. § 1630.14.
- <sup>30</sup> 42 U.S.C. § 12112(d)(2); 29 C.F.R. § 1630.14(a).
- <sup>31</sup> 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b).
- <sup>32</sup> *Ibid.*
- <sup>33</sup> 42 U.S.C. § 12112(d)(4); 29 C.F.R. § 1630.14(c).
- <sup>34</sup> 42 U.S.C. § 12102; 29 C.F.R. § 1630.2(g).
- <sup>35</sup> 29 C.F.R. § 1630.15(f).
- <sup>36</sup> 42 U.S.C. § 12102(4).

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<sup>37</sup> U.S. Equal Employment Opportunity Commission. "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act." Available at [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html). Accessed 11-16-2012.

<sup>38</sup> 29 C.F.R. Part 1630, Appendix to Part 1630, "Interpretive Guidance on Title I of the Americans With Disabilities Act," p 42; U.S. Equal Opportunity Commission and U.S. Department of Justice. "Americans with Disabilities Act, Questions and Answers." Available at <http://www.ada.gov/q&aeng02.htm>. Accessed 11-16-2012.

<sup>39</sup> U.S. Equal Opportunity Commission and U.S. Department of Justice. Americans with Disabilities Act, Questions and Answers. Available at <http://www.ada.gov/q&aeng02.htm>. Accessed 11-16-2012.

<sup>40</sup> 29 C.F.R. § 1630.2(r)

<sup>41</sup> U.S. Equal Employment Opportunity Commission. "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act." Available at [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html). Accessed 11-16-2012.

<sup>42</sup> U.S. Equal Employment Opportunity Commission. "Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures." Available at [http://eeoc.gov/facts/evacuation.html#N\\_2](http://eeoc.gov/facts/evacuation.html#N_2). Accessed 11-16-2012.

<sup>43</sup> U.S. Equal Employment Opportunity Commission. "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act." Available at [http://www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html). Accessed 11-16-2012.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> 42 U.S.C. § 12112; 29 C.F.R. § 1630.14(c), (d).

<sup>47</sup> 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(c), (d).

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<p>This document was compiled from April–November 2012 and reflects the laws and programs current then. It reflects only portions of the laws relevant to public health emergencies and is not intended to be exhaustive of all relevant legal authority. This resource is for informational purposes only and is not intended as a substitute for professional legal or other advice. The document was funded by CDC Award No. 1U38HM000454 to the Association of State and Territorial Health Officials; Subcontractor Subcontractor University of Michigan School of Public Health, Network for Public Health Law – Mid-States Region.</p>
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