



Summary of Governor Inslee's Proclamation 20-46 regarding High-Risk Employees

(Dated April 14, 2020)

Governor Inslee issued a new Proclamation on Monday, April 13, 2020, mandating specific accommodations for "high-risk" employees during the COVID-19 pandemic. The following summarizes the key provisions of that Proclamation and its likely impact on employers. As described more fully below, this Proclamation prohibits employers from denying leave requests submitted by high-risk health care providers and emergency responders, requires employers to make alternative work arrangements for high-risk employees, entitles high-risk employees to access accrued leave or unemployment benefits if alternative work arrangements are not feasible, and mandates continued health care coverage for high-risk employees during such leave. This Proclamation will remain in effect until June 12, 2020, unless extended.

Covered Employers: All public and private sector employers in Washington state.

Covered Employees: "High-risk" employees – individuals deemed by the CDC as being at higher risk of suffering severe illness or death from COVID-19. Based on current CDC guidance, this definition includes:

- Individuals aged 65 years and older;
- Individuals who live in a nursing home or long-term care facility;
- Individuals of any age with an underlying medical condition, including:
 - Chronic lung disease;
 - Moderate to severe asthma;
 - Serious heart condition;
 - Diabetes;
 - Severe obesity (Body Mass Index ≥ 40);
 - Chronic kidney disease undergoing dialysis;
 - Liver disease;
 - Any condition that compromises an individual's immune system, including:
 - Cancer treatment;
 - Smoking;
 - Bone marrow transplantation;
 - Organ transplantation;
 - Immune deficiencies;
 - HIV or AIDS;
 - Prolonged use of corticosteroids (often seen in individuals with autoimmune diseases);
 - Any other immune-weakening condition.

NOTE: There is no exclusion for health care providers or emergency responders!

Employer Requirements: The Proclamation mandates that employers accommodate high-risk employees and it prohibits adverse action against an employee for exercising rights afforded by the Proclamation.

- **What is an accommodation?**

Any and all options for alternative work arrangements, including but not limited to:

- Teleworking;
- Assignment to alternative or remote work locations;
- Reassignment;
- Social distancing measures.

- **When must an accommodation be made?**

When requested by a high-risk employee as defined above and by the CDC (as revised or updated in the future).

- **When accommodation is impossible:**

Employers MUST:

- Permit the employee to use all available accrued leave options;
- Permit the employee to use unemployment insurance;
- Permit the employee to determine in which order they use any available accrued leave or unemployment insurance – this decision is in the employee’s discretion;
- Permit the employee to take unpaid leave if/when paid leave is exhausted;
- Fully maintain all employer-related health insurance benefits, ***even when an employee has exhausted paid leave and is on unpaid leave***, until such time as the employee is deemed eligible to return to work.

Employers CANNOT:

- Terminate, suspend, discipline, or take any other adverse employment action against the employee for not reporting to work (*but see exception for layoffs, below*);
- Permanently replace the employee;
 - But employers *may* hire temporary employees as long as doing so does not negatively impact the permanent employee’s right to return to their position without any negative ramifications on their employment status.

Documentation: Employers *generally* may require that employees engage in the interactive process like they would for any other accommodation request. However, *in the City of Seattle*, employers may not require a doctor's note or other health care verification prior to approving a request for sick leave. Employers outside the City of Seattle should verify that their local governments have not enacted similar prohibitions.

- Rules for Employers in the City of Seattle: Seattle's Office of Labor Standards issued an Emergency Rule on April 8, 2020, that ***prohibits employers from requiring a doctor's note or health care verification prior to approving an employee's request for sick leave***. This rule will remain in effect until June 7, 2020.
 - **For absences exceeding three days**, employers may require alternative forms of verification, including:
 - An employee's oral or written statement that their use of paid sick leave is for a covered purpose;
 - Documentation from other individuals, such as service providers, social workers, case managers, or legal advocates, stating that, to their knowledge, the employee's use of paid sick leave is for a covered purpose.
 - Any alternative form of verification may not result in an "unreasonable burden or expense on the employee."
 - In any case, employers may not ask the employee to identify the nature of the illness, only that leave is for a covered purpose.

Consequences for Non-Compliance: The Proclamation states that a violation of the order is a gross misdemeanor and that violators may be subject to ***criminal penalties***.

Layoffs/Furloughs: Employers may take adverse employment action ***when no work reasonably exists*** for the high-risk employee because of a reduction in force; however, in that case, employers may not adversely affect the employee's eligibility for unemployment benefits.

Returning to Work: Employers *may* require high-risk employees to provide 5 days' notice when returning to work after having exercised their rights under the Proclamation.

Conflicting CBAs or Other Employment Contracts: Employers and labor unions ***may not*** apply or enforce contract provisions that contradict or interfere with the Proclamation.

This Proclamation will remain in effect until June 12, 2020, unless extended beyond that date.

Important Notification

This summary is intended to provide an overview of key provisions of the new law. This summary is not intended to be, and should not be interpreted as, legal advice. Employers are encouraged to contact a Summit Law Group attorney or other legal counsel for guidance regarding particular situations.

Additional Resources:

Governor Inslee's Proclamation 20-46 can be found here:

<https://www.governor.wa.gov/sites/default/files/proclamations/20-46%20-%20COVID-19%20High%20Risk%20Employees.pdf>

Governor Inslee frequently issues new proclamations clarifying or modifying prior proclamations. Keep an eye out for new developments here:

<https://www.governor.wa.gov/office-governor/official-actions/proclamations>

The CDC Guidelines regarding High Risk Individuals can be found here:

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fspecific-groups%2Fpeople-at-higher-risk.html

Seattle's Office of Labor Standards' Emergency Rule SHRR70-080 can be found here:

https://www.seattle.gov/Documents/Departments/LaborStandards/PSST%20Verification%20ER_04-08-2020_for%20Web.pdf