



# CORONAVIRUS COVID-19

## New Proclamation from Washington Governor Establishes Employer Obligations to COVID-19 At-Risk Employees

The below is issued as a general guide only, and does not constitute legal advice. Laws, regulations, and guidance are changing rapidly. Specific questions should be addressed to an employment attorney

On April 13, 2020, Governor Inslee issued Proclamation 20-46 High Risk Employees-Workers' Rights amending his previous February 29, 2020 Proclamation 20-05 which declared the outbreak of COVID-19 a public disaster.

According to the new Proclamation, the threat of severe illness or death caused by COVID-19 to Washington State's public and private sector workers who are in Centers for Disease Control and Prevention (CDC) -recognized high risk groups is recognized and action must be taken to protect people in these high risk groups from working conditions that require them to be placed in situations where they may be exposed to the infection that causes the COVID-19 disease. People at high risk according to the Center for Disease Control and covered by this Proclamation include:

- People 65 and older
- People who live in a nursing home or long-term care facility
- People of all ages with underlying medical conditions, particularly if not well controlled including:
  - People with chronic lung disease or moderate to severe asthma;
  - People with serious heart conditions;
  - People who are immunocompromised (including as a result of cancer treatment, smoking, bone marrow or organ transplants, immune deficiencies, poorly controlled HIV or AIDS and prolonged use of corticosteroids and other immune weakening medications);
  - People with severe obesity (BMI of 40 or higher);
  - People with diabetes;
  - People with chronic kidney disease undergoing dialysis; and
  - People with liver disease.

The Proclamation prohibits all public and private employers in Washington State from taking any of the prohibited actions below with regard to these high risk employees and provides that these prohibitions shall remain in effect until June 12, 2020 at 11:59 p.m., unless extended beyond that date.

The prohibitions are:

- Employers are prohibited from failing to utilize all available options for alternative work assignments to protect high risk employees, if requested, from exposure to the COVID-19 disease, included but not limited to telework, alternative or remote work locations, reassignment, and social distancing measures.
- Where an alternative work arrangement is not feasible, employers are prohibited from failing to permit any high-risk employee to use any available employer-granted accrued leave or unemployment insurance in any sequence of employee's choice; and
- If the employee's paid time off is exhausted while the employee is on leave, the employer must maintain all employer-related health insurance benefits until the employee is deemed eligible to return to work; and
- The employer is prohibited from taking any adverse employment action against the at-risk employee that would result in the loss of their employment, including by permanent replacement.
- Further, no employer or union can enforce any employment contract provision contrary to the above prohibitions or that interferes with them.

To summarize, the Proclamation provides that to the greatest extent possible it should be construed to protect the at-risk employee from loss of their position, loss of employment benefits, and retaliation for decisions made regarding whether and how to work for their employer pursuant to the Proclamation. It makes clear that this Proclamation does not prohibit employers from hiring temporary employees to cover work that needs to be done as long as it does not negatively impact the "permanent" employee's rights under the Proclamation to return to their position without any negative ramifications to their employment status, except that they may require five days' notice of the at-risk Employee's intention to return to work.

The bottom line is that an at-risk employee must be accommodated, if requested, but if no accommodation is feasible then they must be allowed to use any accrued leave they choose or unemployment compensation, and if the employee exhausts their paid leave, their health insurance must be maintained, they may not be terminated and they must be reinstated to their position when they are able to return to work. They may, however, be included in a reduction in force when no work reasonably exists.

This Proclamation at this point expires as of June 12, 2020; therefore, if that date is unchanged, the employee protections and employer obligations required by the Proclamation would cease at that time. We cannot predict at this time whether the coverage of the Proclamation will be extended beyond June 12, 2020, but there is probably a good chance that it will be unless everything is back to normal at that time, which appears unlikely, especially for this high risk group.

We do not expect any guidance from the State on the application of this Proclamation any time soon – if at all, so we cannot be sure how it will be interpreted; we can only use our best judgment. Here are a few hypotheticals you might encounter and reasonable application of the Proclamation:

- An employee tells you he has diabetes and needs accommodation under the Proclamation. Can you ask for any proof of his condition or need for a specific accommodation? If you don't already have knowledge of his condition, you should be able to ask for confirmation that he has the condition from a medical provider or from his medical records, but you cannot insist on medical certification of his need for accommodation or a specific accommodation under this Proclamation.
- If the employee is established as high risk, and it is determined that no accommodation is possible in the workplace, but that it is possible for the employee to work from home, may the employee choose not to work from home but to go on paid or unpaid sick leave? That is not allowed under this Proclamation, but may be available under other authority.
- If it is determined that the employee is high risk, no accommodation is possible in the workplace, the employee's job cannot be performed from home, and the employee has no paid leave available, or has exhausted said leave, may you terminate the employee? No, not while the Proclamation is in force. The Proclamation requires that you keep the employee on unpaid leave status and that you continue their health insurance until the employee is able to return to work, or presumably the end date of the Proclamation if sooner. At the end of the Proclamation you would have to determine whether any other law like the ADA would impact your ability to terminate the employee, or require you take any actions before doing so.

Please contact us if you need legal advice about this Proclamation or other employment issues.



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