New Proclamation from Governor Inslee Empowers "High-Risk" Employees and Creates New Duties for Washington Employers

Legal Alert
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Although most employers' attention has been focused on Federal laws relating to the COVID-19 crisis, Washington employers should be aware of Governor Inslee's new proclamation, Number 20-46 (the "Proclamation"), that immediately grants significant new rights to employees who have a higher risk of severe illness from COVID-19

Employer Coverage

The Proclamation states that it applies to "all public and private employers in Washington State." Other portions of the Proclamation also apply to labor unions representing employees in Washington state. It is unclear whether Governor Inslee intends to bind out-of-state employers who have employees working in Washington state, or to bind Washington-based employers with respect to workers in other states or countries.

Employee Coverage

The Proclamation protects "high-risk workers, as defined by the Centers for Disease Control and Prevention." The CDC identifies "those at high-risk for severe illness from COVID-19" as including:

- People 65 years and older
- People who live in a nursing home or long-term facility
- People with chronic lung disease or moderate to severe asthma

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- People who have serious heart conditions
- People who are immunocompromised
    - Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications
- People with severe obesity (body mass index [BMI] of 40 or higher)
- People with diabetes
- People with chronic kidney disease undergoing dialysis
- People with liver disease

Duration

The Proclamation became effective April 13, and applies until June 12, 2020. However, as with Governor Inslee's "Stay Home Order" (another proclamation), it could be extended by further order of the Governor.

UPDATE **-** On July 29, 2020, Governor Inslee announced the Proclamation would remain in effect through the duration of the state of emergency, or until otherwise rescinded or amended. Read Governor Inslee's press release announcing the extension.

Employer Obligations

The Proclamation includes several new obligations and prohibitions for Washington employers:

Accommodations

A Washington employer previously was required to consider accommodations for high-risk workers if requested, and to grant reasonable accommodations for medical disabilities that impacted the employees' ability to work, provided the accommodations did not create an undue hardship for the employer. The new proclamation states that if requested to do so, the employer is required to provide accommodation to high-risk workers "that protects them from risk of exposure to the COVID-19 disease on the job." Specifically, the employer must "utilize all available options for alternative work assignments to protect high-risk employees, if requested, from exposure to the COVID-19 disease, including but not limited to telework, alternative or remote work locations, reassignment and social distancing measures."

Although the Proclamation states that accommodations must only be provided if requested, the Americans with Disabilities Act and the Washington Law Against Discrimination require the employer to initiate discussions with an employee regarding potential accommodation if it is

apparent that the employee has a disability and may need accommodation, even if the employee does not affirmatively ask for it.

The Proclamation is silent about whether an employer can require evidence that an employee is a high-risk worker. However, in light of the fact that the Proclamation only protects high-risk workers as defined by CDC guidelines, the employer should be able to verify that the requesting employee meets the CDC definition. The employer presumably has the information to determine whether the employee is at least 65 years old. Medical facts may be more difficult to discern, leaving the employer with the decision whether to require a health care provider to verify the employee's medical condition, or to accept an alternate verification such as the employee's own certification of high-risk status. Note that under an emergency rule, employers covered by the Seattle Paid Sick and Safe Time Ordinance may not require employees to provide a verification from a health care provider of proper use of sick or safe time.

Benefits While on Leave

If alternative work arrangements that would protect high-risk employees from COVID-19 exposure are not "feasible," then the employer must allow employees to take leave, and "to use any available employer-granted accrued leave in any sequence at the discretion of the employee." Unfortunately, the Proclamation does not provide criteria for the employer to use in determining whether alternatives to leave are "feasible."

The Proclamation appears to mean that an employer must permit high-risk employees to use any available leaves (e.g., vacation, PTO, sick leave or even extended illness leave) in whatever order that they wish during this period of leave, regardless of whether the employer otherwise restricts use of these types of leaves.

Moreover, after paid time off is exhausted, the proclamation requires the employer to "fully maintain all employer-related health insurance benefits until the employee is deemed eligible to return to work." Unfortunately, the Proclamation is silent about who deems the employee eligible to return to work for purposes of this section; language elsewhere suggests that the employee solely determines when they are able to return. This can make it difficult to ensure that healthcare coverage is available. The employer should make sure inactive employees remain covered under the medical plan at least through the end of June (or later if the Proclamation is extended). If coverage is in doubt, the employer should consider whether to utilize COBRA or other strategies.

No Adverse Employment Action

Under the Proclamation, the employer may not take "adverse employment action" against an employee for exercising rights under the Proclamation "that would result in loss of the employee's current employment position by permanent replacement." At the same time, the Proclamation is clear that the employer can implement planned layoffs or furloughs that do not

target high-risk employees: if "no work reasonably exists, such as in a circumstance of a reduction in force," the employer can take "employment action," and high-risk employees are not immune. However, the employer should carefully document the criteria for furlough or position elimination, to limit the appearance of violating the Proclamation by taking action against high-risk employees because they sought relief under the Proclamation.

An employer may hire temporary replacement workers to cover high-risk workers out on leave if the temporary workers don't "negatively impact the permanent employee's right under this Proclamation to return to their employment position without any negative ramifications to their employment status by the employer." Based on this language, permanent replacements are not permitted.

The Proclamation also prohibits the employer from taking action that may adversely impact an employee's eligibility for unemployment benefits.

Return to Work

Although it is not specifically stated in the Proclamation, it appears that the employer cannot recall high-risk employees from leave. It is up to the employees to give the employer notice of intent to return to work. Under the plain language of the Proclamation, the employer can require up to five days advance notice, but no more.

Many employers require fitness for duty confirmations before an employee can return to work from leave. Although the Proclamation does not speak to this issue specifically, placing impediments or conditions on the employee's decision to return to work could be seen as adverse action prohibited by the Proclamation.

Other Agreements Interfering with Rights under Proclamation Effectively Void

Many employers have policies, contracts or collective bargaining agreements that prescribe the accommodation process, use of leave and return to work issues. The Proclamation prohibits employers and labor unions from applying or enforcing any employment contract provisions or collective bargaining agreement terms that "contradict or otherwise interfere with" the provisions described above. For example, most collective bargaining agreements limit use of extended illness leave except for specific reasons, and only after the employee has used a certain amount of regular leave. These types of provisions are unlawful under the Proclamation.

Although the Proclamation does not specifically call out policies, it is quite likely that applying policies that would contradict or interfere with the requirements and prohibitions above is also unlawful.

Employers with union-represented employees should review their collective bargaining agreements to determine their course of action regarding the Proclamation. Many collective bargaining agreements have provisions that allow for or require bargaining when a law or order contradicts with the agreement.

Penalties

The Proclamation states that violations may be subject to criminal penalties under RCW 43.06.220(5). That statute states that any person "willfully violating any provision of an order issued by the governor" is guilty of a gross misdemeanor. The word "willfully" suggests that the State would not attempt to prosecute employers who reasonably attempt to comply. The Proclamation does not specify a civil remedy or right by any government agency or employee to sue an employer or individual for violating its terms.

Next Steps

As can be seen, the Proclamation imposes many requirements on Washington employers, but fails to answer basic questions about implementation. Employers should consult with their employment and labor attorneys to plan for and respond to employee questions and requests.

If you have any questions, please contact a member of Foster Garvey's Labor, Employment & Immigration team.