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How Should Washington Employers Accommodate 'High Risk' Employees Under Governor Inslee's Proclamation?

COVID-19 Resource

Washington Governor Jay Inslee's April 13 [proclamation](#) temporarily expands accommodations for employees who are at "high risk" for severe coronavirus illness. Washington employers should immediately prepare to make significant HR modifications for such employees that may include alternative work assignments, leave and unemployment benefits, and continued health care benefits, among other things.

Who are "High Risk" Employees?

The proclamation adopts the Centers for Disease Control's (CDC) [definition](#) for employees who are at "higher risk" for severe coronavirus illness as those who meet any one of the following factors:

- Over 65
- Live in a nursing home or long term care facility
- Have chronic lung disease or moderate to severe asthma
- Have serious heart conditions
- Are immunocompromised

- Have severe obesity (body mass index [BMI] of 40 or higher)
- Have diabetes
- Have chronic kidney disease undergoing dialysis
- Have liver disease

It is important to remember that employers cannot identify high-risk employees or even ask employees to self-identify. Requesting that information would be eliciting disability-related information. Rather, employees will need to identify themselves when seeking an accommodation.

What Should Washington Employers Do to Comply With the Proclamation?

The Governor's proclamation grants new legal protections to high-risk employees working in Washington state. Employers must be prepared to engage in the reasonable accommodation process, grant leave and continue health insurance benefits under the following circumstances:

1. When requested by high-risk employees, Washington employers must utilize all available options for alternative work assignments to protect such high-risk employees from exposure to the COVID-19 disease. This expressly includes: telework, alternative or remote work locations, reassignment, and social distancing measures.
2. If an alternative work arrangement is not feasible, employers must permit any high-risk employee to use any available employer-granted accrued leave or unemployment insurance in any order the employee chooses to use.
3. Even when an employee exhausts their paid time off during a period of leave, the employer must fully maintain employer-related health insurance benefits until the employee is "deemed eligible" to return to work.
4. Employers are prohibited from retaliating against employees who exercise their rights under the proclamation.

5. Employers are prohibited from permanently replacing a high-risk employee who takes COVID-related leave.
6. Employers and unions are prohibited from enforcing any contractual provision (including provisions in a collective bargaining agreement) that contradicts the proclamation's rules.
7. Violations may result in steep consequences — a willful violation of the proclamation is a gross misdemeanor.

What Can Washington Employers Do to Address Staffing Issues?

1. Washington employers are permitted to hire temporary employees so long as it does not impact a high-risk employee's right to return to their employment position without negatively impacting their employment status.
2. Washington employers may require those high-risk employees taking leave to provide up to **five days' advance notice** of when they intend to report or return to work.
3. Washington employers may still take employment action when no work reasonably exists, including reductions in force, **but no action can be taken that may adversely impact a high-risk employee's eligibility for unemployment benefits.**

What Should Washington Employers Do Now?

1. Check with your insurance company or insurance broker to understand how the proclamation's requirements about continuing health care will impact your group health insurance plan. Some plans do not allow employees who are on extended unpaid leave to remain covered under an insurance plan.

If your insurer will not continue to carry a high-risk employee who is on extended leave, you will need to consider what, if any, coverage options you can extend to the employee and whether or not the costs associated with this coverage should be covered by the employer. These are complicated issues because federal laws generally control health benefit plans.

Consult with legal counsel before denying continuing benefits to high-risk individuals to ensure that you are not inadvertently violating Governor Inslee's proclamation. Remember that accommodation remains an employee's choice.

2. Employers should not assume an employee who is in the higher risk group will need a particular type of accommodation (or any accommodation at all). Instead, employers should confirm that all employees know how to request an accommodation, should they seek one. Many employee handbook policies provide for reasonable accommodation, and that process is well-suited to address employees' requests.
3. Be creative and collaborative. The proclamation requires employers to "seek any and all options for alternative work assignments." Employers should engage in a collaborative dialogue with high-risk employees seeking accommodation to find creative solutions to these unique working circumstances.
4. Be careful when asking employees to verify their underlying condition. Under Washington and federal disability laws, employers should only ask for documentation for conditions that are not apparent and obvious and when the inquiry is job-related and related to business necessity.
5. Be flexible on what documentation you will accept while health systems are overloaded. For example, employers should consider provisionally accepting an employee's own statement that they are at a higher risk to conditionally grant an accommodation, while awaiting a health care provider's certification.
6. Employers who have collective bargaining agreements with provisions that are at odds with the proclamation may want to consult with legal counsel before making a decision not to enforce their agreements. Similar to the provisions of the proclamation regarding health care benefits, federal law may impact how employers choose to deal with provisions of the collective bargaining agreements that cannot be

harmonized with the proclamation.

7. Remind managers and supervisors that retaliation is prohibited, and that these employees' jobs are protected.

Update: On June 9, Governor Inslee issued [Proclamation 20-46.1](#), which amended Proclamation 20-46 by declaring that it would remain in effect until 11:59 PM on August 1. Proclamation 20-46 was effective through June 12. Proclamation 20-46.1 extends the prohibitions contained in it for an additional 50 days. No other amendments were made to Proclamation 20-46.

Determining how best to navigate these uncertain times can be challenging. Lane Powell's team of attorneys are here to help you develop and implement the strategy that supports your business and your employees.

For more information, consult Lane Powell's [COVID-19 Resource Center](#) or contact [Katheryn Bradley](#), [Hannah Ard](#), [Mike Kitson](#), [Priya Vivian](#) or [Craig Day](#).