Attention Employers: Washington Governor Mandates New Protections for High-Risk Employees During COVID-19 Pandemic

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This proclamation has been extended until revoked, or until the State of Emergency is no longer in effect. Also, additional guidance was issued clarifying that, as of July 29, 2020 this proclamation applies *only* to the following:

- **Employees who are 65 years or older;**
- **Employees whose conditions are listed by the CDC under the "at increased risk" category; and**
- **Employees whose conditions are listed by the CDC under the "might be at increased risk" category, but only if, based on the employee's medical circumstances and workplace conditions, the employee is, in fact, at increased risk for suffering severe illness from COVID-19.**

The new guidance also clarifies that no verification from a medical provider may be required for the first two categories listed above (i.e. those who are over 65 or "at increased risk"), but employers may require verification for the third (i.e. those who "might be at increased risk"). Employers may also require verification for other state or federal leaves where verification is permitted or required, such as use of state mandated paid sick leave, paid leave under the Families First Coronavirus Response Act, or leave under the federal Family and Medical Leave Act or state equivalents.

On Monday, April 13, 2020, Washington Governor Jay Inslee issued Proclamation 20-46, which warrants careful and immediate attention from employers with Washington employees.

In particular, the proclamation makes it clear that employers in Washington are now expected to make special arrangements for certain high-risk employees (HREs), as defined by the federal Centers for Disease Control (CDC). According to the CDC guidance as of April 14, 2020, this includes:

- People 65 and older
- People with underlying medical conditions, particularly if not well controlled, including:
  - chronic lung disease
  - moderate to severe asthma
  - serious heart conditions
  - immunocompromised conditions, such as cancer treatment, bone marrow or organ transplantation, immune deficiency disorders, and HIV or AIDS
  - severe obesity

- diabetes
- chronic kidney disease being treated with dialysis
- liver disease

Washington employers are now required to:

1. Utilize "all available options" for alternative work assignments to protect HREs in the categories above, 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;
2. Permit HREs to use accrued paid leave or pursue unemployment insurance benefits "in any sequence at the discretion of the employee" when alternative work assignments are not feasible;
3. Maintain health insurance benefits for any HREs until they are able to return to work;[1] and
4. Not retaliate against any HREs who exercise their right to request a special work arrangement (including a leave of absence) in accordance with the Governor's proclamation, including not permanently replacing them. Fortunately, this does not prohibit employers from temporarily replacing any HREs who are absent, so long as the HREs are able to return without any negative repercussions. It also does not exempt HREs from furloughs or reductions in force that may be necessitated by a lack of work or production stoppage/ slowdown generally.

Proclamation 20-46 is in effect until June 12, 2020, unless extended by the Governor. It also carries misdemeanor penalties for individuals failing to comply.

This mandate is somewhat consistent with the EEOC's recent guidance on COVID-related accommodations and considerations under the Americans With Disabilities Act, as discussed in our recent article, "EEOC Offers Updated Guidance on Employer ADA Responsibilities During the Pandemic," but appears to take the concept of accommodation further than the standard "reasonableness" threshold by suggesting that "all available options" for special alternative work arrangements must be provided for this special category of employees. HREs also appear to have discretion to determine whether alternative work is feasible or whether they prefer to be absent and use paid leave and/or unemployment benefits.

While it is as yet unclear whether and to what extent any reasonableness or business-hardship components may factor in, we strongly suggest that employers in Washington State ensure that they are appropriately engaging in (and documenting!) these dialogues around potential alternative work options, just as they would for the interactive process that occurs when an employee with a potential disability requests reasonable accommodation. As they do so, employer representatives should take special care not to utilize language that could fuel perceptions of age or disability bias, or make unnecessary assumptions about who may be at high risk and who is not. Instead, employers should consider a general employee-wide communication that invites any employee who thinks they are at high risk and should not be working or wants to explore alternative work arrangements to request it, and then respond accordingly.

[1] Employers may need to consult their applicable group health plan documents and/or contact their insurers to ensure that employee eligibility can be maintained during any leave/standby period because most policies have contractual limits on how long employees can be in less than full time status before eligibility for coverage is automatically lost. If so, it will be important to determine whether coverage can be extended or employers may need to be prepared to pay via COBRA, if applicable. Employers should be sure also to consider the taxability of any COBRA premium contributions if and when they may be triggered. See the IRS publication *Employer's Guide to Taxability of Fringe Benefits*, available here.

Finally, given the anti-retaliation protections incorporated within this proclamation employers would be wise to consult with qualified counsel before taking any adverse actions (terminations, failure to return from leave, etc.) with respect to HREs—both now and in the near future.

As always, if we can assist with preparing temporary policies or other employee communications regarding this new requirement, or if you need guidance about individual employee requests or other situations that may arise with regard to this or any other employment-related matter, please reach out to us.

For more information about ongoing developments related to COVID-19, visit Miller Nash Graham & Dunn's resource library.

Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps business must take under applicable laws.

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