Extended Rights for "High-Risk" Employees in Washington State

Legal Alert
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As the COVID-19 pandemic continues, Washington State Governor Jay Inslee has extended and clarified a proclamation granting high-risk employees the right to decline to return to the workplace.

In April, the Governor issued a proclamation empowering "high-risk" employees in Washington State to decline to come to work due to increased hazards from COVID-19.

Under the proclamation, employers 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." 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. The proclamation does not specify how an employer can determine whether alternative work arrangements are "feasible."

The proclamation was set to expire on June 12, but was extended until August 1. Then, on July 29, the Governor extended the proclamation indefinitely.

In light of the extension, employers must continue to comply with the terms of the proclamation. Of particular note is the requirement that employers with high risk employees on leave "fully maintain all employer-related health insurance benefits until the employee is deemed eligible to return to work." If an employee's coverage under the employer-provided medical plan is in doubt due to the employee's leave status, the employer should consider whether to utilize COBRA or other strategies to maintain health benefits.

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On July 29, the Governor also issued a separate memo to clarify which employees are protected by the proclamation and the medical information that these employees may be required to supply.

The July 29 memo distinguishes among three potentially protected groups of employees, as defined by the Centers for Disease Control and Prevention ("CDC"):

1. Any employee 65 or older (the age group that has experienced eight in 10 COVID-19 deaths);

2. Any employee with an underlying medical condition that puts him or her "at increased risk" as defined by the CDC, currently:

- Cancer
- Chronic kidney disease
- COPD (chronic obstructive pulmonary disease)
- Immunocompromised state (weakened immune system) from solid organ transplant
- Obesity (body mass index [BMI] of 30 or higher)
- Serious heart conditions, such as heart failure, coronary artery disease or cardiomyopathies
- Sickle cell disease
- Type 2 diabetes mellitus

3. Any employee who "might be at increased risk" due to a condition so designated by the CDC; this employee is protected "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." Current conditions in this category are:

- Asthma (moderate-to-severe)
- Cerebrovascular disease (affects blood vessels and blood supply to the brain)
- Cystic fibrosis
- Hypertension or high blood pressure
- Immunocompromised state (weakened immune system) from blood or bone marrow transplant, immune deficiencies, HIV, use of corticosteroids or use of other immune weakening medicines
- Neurologic conditions, such as dementia
- Liver disease

- Pregnancy
- Pulmonary fibrosis (having damaged or scarred lung tissues)
- Smoking
- Thalassemia (a type of blood disorder)
- Type 1 diabetes mellitus

According to the July 29 memo, employers generally may not require verification from a medical provider if the employee is 65 years or older or falls within the "at increased risk" category, but may require verification from a medical provider when the employee falls within the "might be at increased risk" category.

The verification requirements will create challenges for employers. How is the employer supposed to know whether an employee actually has an "at increased risk" condition if it cannot require verification? And who is supposed to evaluate whether, "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," and how?

Employers may—and in some cases must—obtain verification if a state or federal law, collective bargaining agreement or contractual obligation separately requires verification. For instance, an employer may require verification from a high-risk employee if the employee seeks paid leave under the Families First Coronavirus Response Act, the Washington Paid Sick Leave law or an employer-administered paid leave policy.

Many employees have participated in these or other paid leave programs or are taking unpaid leave under the proclamation. These employees may remain on leave indefinitely with the right to return to their job.

As the application of and interplay among these laws and programs can be complex, 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.