

WASHINGTON STATE HUMAN RIGHTS COMMISSION

COVID-19 and Compliance with Non-Discrimination Laws



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The Washington State Human Rights Commission enforces the Washington Law Against Discrimination (WLAD). The WLAD continues to apply to employers, businesses and housing providers. The WLAD does not prevent employers from following the guidelines and suggestions made by the Centers for Disease Control or the Washington State Department of Health regarding actions entities should take regarding COVID-19. **Employers should remember that guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.**

Go to www.coronavirus.wa.gov

This is a rapidly evolving area. This document is intended as guidance and not legal advice. Contact your attorney with legal questions relating to these issues. The EEOC states that employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

Age discrimination:

Data about COVID-19 seems to show that it impacts persons over 65 years old more severely, putting older workers at a higher risk of having serious complications or death if COVID-19 is contracted. In accordance with the Governor's Proclamation 20-46, regarding High-Risk Employees - Workers' Rights (see below), employers are to allow older employees the option to telecommute, take leave, or apply for unemployment benefits, due to the risk, until the Washington State Department of Health or the CDC concludes that the risk has been minimized. Proclamation 20-46 is effective through June 12, unless extended.

However, you cannot force your older workers to go home or cease working if they choose not to, unless you are doing so for all of your employees, regardless of their age. If you give these directives to only older workers, this may be age discrimination. If your organization or company is contemplating layoffs due to the outbreak, you cannot choose or target workers because of their age or because their health is at a higher risk. If you have a layoff policy or procedure, it is best to follow it if layoffs are needed.

Likewise, when it comes time to call your employees back to work, you must give older workers the same return to work options as you do all other employees, and use objective, neutral criteria when deciding which standby/laid off employees to call back to work.

Disability discrimination:

Employers may send someone home because they are sick, have a cough, have a fever, or fail other screening questions related to COVID-19. In fact, the Washington State Department of Health recommends that all persons who are sick or exhibit symptoms of

COVID-19 stay home. If an employee shows up to work sick, or with possible symptoms of an illness, employers may send that person home. According to the EEOC, this is **not** considered to be disability discrimination. https://www.eeoc.gov/facts/pandemic_flu.html

During a pandemic, employers may ask employees if they are experiencing symptoms of the pandemic virus. For COVID-19, these include symptoms such as fever, chills, cough, shortness of breath, or sore throat. Employers are allowed, in the situation of a pandemic, to take and record employee temperatures (however, not all persons who have contracted COVID-19 have a fever). Employers can ask why an employee has called out of work when an employee stays home. During the COVID-19 pandemic, employers may take steps to determine if [employees entering the workplace have COVID-19](#) because [an individual with the virus will pose a direct threat](#) to the health of others, if the testing is “job related and consistent with business necessity.” If the employer maintains records of temperatures or other screening questions/answers, or of whether the employee has, or has been exposed to, COVID-19, all such records must be kept in a separate confidential medical file for each employee. At this time, both the CDC and EEOC recommend that employers refrain from asking sick employees to provide a doctor’s note for validating their illness, to qualify to use sick leave (cannot be required until after 3 consecutive days), or in order to return to work; medical resources and personnel are overextended right now and documentation may not be provided in a timely manner. Employers may need to consider alternatives to requiring a doctor’s note, such as an email, a form, or a stamp from a clinic.

An employer can require a fitness for duty certification before an employee returns to work, as long as it is reasonable, and the requirement is the same for all employees experiencing COVID-19 related symptoms. However, the employer should keep in mind that medical resources and personnel are limited, and that such a certification may be difficult to obtain during the pandemic or in the aftermath. Consider accepting alternatives, such as a form letter or an email from a healthcare provider, or a declaration from the employee that the medical provider has cleared them to return to work.

An employer cannot ask if an employee has a compromised immune system or other underlying condition that may make them more vulnerable to serious complications or death related to COVID-19. If an employer already has information that an employee has an underlying condition that makes them more vulnerable to complications from COVID-19, an employer cannot send the employee home to work or lay them off simply due to that underlying condition. Instead, an employer should offer the same alternatives as offered to all employees. If an employer takes a negative action based solely on a known or suspected disability (i.e., compromised immune system), it may constitute disability discrimination. If it comes time for a layoff, you would apply the same objective and neutral criteria to the person with the disability as you would to all of your other employees.

Reasonable Accommodation

Washington State Law requires employers reasonable accommodate workers with disabilities and pregnant workers in certain circumstances. An employer must engage in the interactive process to assess how an employee with a disability or an employee who is pregnant may be reasonably accommodated.. . The CDC states that it is unclear what the risks are related to pregnant people; however, the CDC notes that pregnant people have had a higher risk of severe illness when infected with viruses from the same family as COVID-19 and other viral respiratory infections, such as influenza. _____.

The reasonable accommodation process is an interactive process, involving the employee and employer, with the goal of determining a way that the employee can do the essential functions of their job. The employer can usually require information from a medical professional about limitations and possible reasonable accommodations. If that information is necessary to evaluate the request but is unclear, incomplete, or dated, the employer normally can ask for additional medical information. *However*, in the current emergency situation, and the need for some employees to immediately have a reasonable accommodation for their safety, employers should be quick and flexible; quick to recognize the need for reasonable accommodation and to grant that accommodation, and flexible enough to not demand immediate or additional medical information from an already overworked medical professional. If an employer makes an unreasonable demand for medical information during a COVID-19 related reasonable accommodation situation, these emergency circumstances may be taken into account during an investigation into the employer's actions if there is a discrimination claim.

The rapid spread of COVID-19 has disrupted normal work routines and may have resulted in unexpected or increased requests for reasonable accommodation. Although employers and employees should address these requests as soon as possible, the extraordinary circumstances of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where warranted. Employers and employees are encouraged to use interim solutions to enable employees to keep working as much as possible.

Governor's Proclamation on High-Risk Employees

Proclamation 20-46, regarding High-Risk Employees - Workers' Rights, was issued by Governor Inslee on April 13, 2020. It is effective through June 12, 2020 unless extended. Employers are required to 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. Employers must permit any high-risk employee to use any available employer granted accrued leave or unemployment insurance in any sequence at the discretion of the employee. In the event the employee's paid time off exhausts during the period of leave, employers are required to fully maintain all employer-related health insurance benefits until the employee is deemed eligible to return

to work. Employers are prohibited from taking adverse employment action against an employee for exercising their rights under this Proclamation that would result in loss of the employee's current employment position by permanent replacement.

View the Proclamation here: https://www.governor.wa.gov/sites/default/files/20-46%20-%20COVID-19%20High%20Risk%20Employees.pdf?utm_medium=email&utm_source=govdelivery

State employers may want to review guidance from State Human Resources.

Race and national origin discrimination:

An employer, business owner or employee, housing provider, or government agency cannot treat anyone differently based on their race or their national origin. To fire someone from a job, refuse to hire them, refuse them service at a business, refuse them housing, or deny access to government services due to their race or national origin is illegal discrimination. It is also illegal discrimination to allow harassment in a covered setting due to that person's race or national origin. Such discrimination may be actionable under RCW 49.60 and federal law.

Anyone, of any race or national origin, can become sick from COVID-19 or can carry the disease. Be professional and rely on expert sources for information, such as the CDC and Washington State Department of Health. Practice kindness at this time, and do not let yourself or your employees take discriminatory actions due to baseless fears. We are all in this together.

Resources

CDC Guidance for Employers and Workplaces on COVID-19:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

Washington State information on COVID-19:

www.coronavirus.wa.gov

EEOC guidance on pandemics:

https://www.eeoc.gov/facts/pandemic_flu.html?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

U.S. Department of Labor:

"Preparing Workplaces for COVID-19"

<https://www.osha.gov/Publications/OSHA3990.pdf>

"COVID-19 or Other Public Health Emergencies and the Family and Medical Leave Act"

<https://www.dol.gov/agencies/whd/fmla/pandemic>

Information for health facilities from WA State DOH

<https://www.doh.wa.gov/Emergencies/NovelCoronavirusOutbreak2020COVID19/HealthcareProviders/HealthcareFacilities>

State Employers may want to review information and guidance from State Human Resources (HR) through the HR Portal.

If you need additional information regarding non-health issues, please contact the WSHRC at 360-753-6770 or 800-233-3247 (TTY 800-300-7525). Additional information on discrimination and other civil rights issues may be found on our website at www.hum.wa.gov. This document does not constitute legal advice; if you have a particular situation about which you need legal advice, you should contact your attorney.