Updates
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Washington State’s New Health Emergency Labor Standards Act

Governor Jay Inslee recently signed the Health Emergency Labor Standards Act (HELSA or the Act), a sweeping worker protection bill recently passed by the state legislature. The Act amends the state's worker's compensation and industrial health and safety statutes to provide automatic protections for certain workers and to impose new notification and reporting requirements on employers in the event of a "public health emergency." As defined in the Act, a "public health emergency" occurs whenever there is a statewide "declaration or order concerning any infectious or contagious diseases" issued by the governor or as part of a national or regional state-of-emergency declared by the president of the United States, including the current state-of-emergency due to the still ongoing coronavirus pandemic. The law, signed May 11, 2021, is set to take effect immediately, although some of the provisions will require the Washington State Department of Labor & Industries (L&I) to issue operative regulations and guidance before they can be fully implemented.

Presumptive Worker's Compensation Coverage

A key element of the Act is the creation of a rebuttable presumption of Worker's Compensation coverage for any "frontline" worker who contracts the specified infectious or contagious disease during a public health emergency. The presumption would be that the employee was exposed to the disease while on the job for the purpose of occupational disease coverage. The presumption can be rebutted by a preponderance of the evidence showing that the employee contracted the disease from other employment or nonemployment activities, or that the employee was working remotely or on leave for a period of time equivalent to the recommended quarantine period immediately prior to discovering they have contracted the disease. For the purposes of this new provision, "frontline" workers include:

- First responders;
- Hospital, healthcare, nursing home, and assisted living facility staff, including in-home healthcare workers;
- Food processing, distribution, meatpacking, and farm workers (including floriculture workers and farm tool/equipment maintenance staff);
- Maintenance, janitorial, and food service workers at any facility treating patients;
- Public mass transit drivers and operators;
- In-person daycare and childcare workers at licensed facilities;
- Employees of pharmacies and retail or grocery stores that remain open to the public;
- Employees of restaurants or hotels that remain open to the public;
- Correctional officers; and
- Teachers and other on-site educational employees, if in-person classes are permitted.

Worker's compensation payments made under this new provision will not affect the experience rating of an employer insured by the state fund, and self-insured employers can deduct the costs when calculating assessments.

New Employer Reporting Requirements

Another new provision requires employers with 50 or more employees at any worksite to make a report to L&I within 24 hours if 10 or more employees at the worksite test positive for the specified infectious or contagious disease. The Act instructs L&I to prescribe a form for the required reporting, which as of yet has not been issued by the department, but the statute specifically notes that required report may not include any names or other personal identifying information of the infected employees. The statute also specifies that it does not require employees to disclose any medical conditions or diagnoses to their employers, nor does it alter or replace any other employer reporting requirements under state or federal law.

The primary purpose of the reporting requirement is to help the department identify and track clusters of infections at specific workplaces or in specific industries, but the Act also indicates that the reports can be used by the department to investigate health and safety violations as well.

Protections for High Risk Workers

HELSA also includes heightened job protections for employees who are at higher risk of contracting the specified infectious or contagious disease during the public health emergency. This provision essentially codifies similar protections to those that were previously put in place by way of an emergency proclamation issued by the governor for the duration of the current state-of-emergency. So, this essentially means that, in the future, the same protections will automatically kick in again during any subsequent public health emergency.

Specifically, the Act protects high-risk workers from discharge, permanent replacement, or discrimination for (1) seeking an accommodation that protects them from the risk of exposure, or (2) utilizing all available leave options, including but not limited to leave without pay and unemployment insurance, for the duration of any public health emergency. An employee is considered high risk under the Act if their age or underlying health condition places them at higher risk of severe illness from the specified infection or contagious disease, or if a medical provider recommends the employee's removal from the workplace because of their risk of severe illness.

Potential Exposure Notification Requirements

The last significant provision of HELSA obligates employers to notify potentially affected employees, union representatives, and employers of subcontracted employees within one business day of receiving a "notice of potential exposure." A "notice of potential exposure" occurs when the employer receives:

- Notification from a public health official or licensed medical provider that an employee was exposed to a qualifying individual at the worksite;
- Notification from an employee, or their emergency contact, that the employee is a qualifying individual; or
- Notification that an employee is a qualifying individual received through an employer-implemented testing protocol.

A "qualifying individual" is anyone who has tested positive, received a positive diagnosis, been ordered into quarantine by a public health authority, or died from the specified infectious or contagious disease.

The Act requires the employer to provide the notice in writing and in a manner the employer normally uses to communicate employment-related information. The Act doesn't specify the contents of the written notice, but it does state that it may not include any names or other personal identifying information. For purposes of this provision, "worksite" is defined as the building, store, facility, agricultural field, or other location where the qualifying individual worked, but it does not include any buildings, floors, or other locations that the qualifying

individual did not enter.

Key Takeaways

Although the HELSA appears to be primarily forward looking, implementing protections and obligations that are intended to kick in automatically in the event of a future public health crisis, employers should recognize that we are currently operating under a state-of-emergency that meets the Act's definition of a "public health emergency." So, by its terms, the Act's provisions are technically effective immediately. Luckily, the high-risk worker protections mirror emergency provisions that have already been put in place under the current state-of-emergency, and the cluster reporting provision requires action by L&I before it can be fully implemented. Employers should still make sure they understand their new potential exposure notification obligations and take notice of the new rebuttable presumption they could face if any of their employees are diagnosed with coronavirus before the state-of-emergency is lifted. Employers should also seek the advice of counsel should any event occur that might implicate the new law.

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