

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

Age discrimination:

Data about COVID-19 does seem to show that it impacts older persons more severely, putting older workers at a higher risk. You should give your older employees the option to telecommute or take time off work due to the risk, until the Washington State Department of Health or the CDC concludes that the risk has been minimized. However, you cannot force your older workers to go home or cease working if they choose not to, unless you are making these decisions about all of your employees regardless of their age. If you give these directives to only older workers, this would be age discrimination. When deciding on which workers to lay-off, you cannot choose or target older workers because of their age or because their health is at a higher risk.

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

Disability discrimination:

It will not be considered to be disability discrimination if you send someone home because they are sick, or have a cough or a fever. 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, you can send that person home. This is **not** considered to be disability discrimination.

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. The employer must maintain all information about employee illness as a confidential medical record. At this time, it is recommended that employers refrain from asking sick employees to provide a doctor's excuse for their absence; medical resources and personnel are overextended right now and providing such a note would be too much of an extra burden.

An employer can require a fitness for duty certification before an employee returns to work. 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.

An employer cannot ask if an employee has a compromised immune system. If an employer already has information that an employee has an underlying condition that makes them more vulnerable to COVID-19, an employer cannot send them home or lay them off simply due to that underlying condition (see age discrimination above). If an employer does so, that could 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

An employer must reasonably accommodate an employee with a disability. In the COVID-19 situation, this means if an employer is aware that an employee falls into a high risk category (compromised immune system, underlying condition, pregnant, etc.) the employer should allow that employee to telecommute when possible, to do a job that allows for distancing at least six feet from others, or to take leave as a reasonable accommodation.

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 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 can be taken into account during an investigation into the employer's actions if there is a discrimination claim.

In addition, employees should be flexible with their requests. If they are telecommuting and need equipment as a reasonable accommodation to work at home, they need to recognize that an employer may have a limited capacity to do a workplace assessment or obtain equipment quickly.

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. Employers are prohibited from failing 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 are prohibited from failing to permit any high-risk employee in a situation

where an alternative work arrangement is not feasible 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 prohibited from failing 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: [Proclamation 20-46](#)

Race and national origin discrimination:

An employer, business owner, or housing provider 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, or refuse them housing due to their race or national origin is illegal discrimination. It is also illegal discrimination to allow harassment of someone in the work place due to that person's race or national origin. Unfortunately and unfairly, many Asians and persons of Chinese descent are becoming targets of race discrimination due to the pandemic and the inaccurate and racist term "Chinese flu". 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 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.

If your workforce is facing layoffs:

1. An employer should be able to justify and show a legitimate business need for the layoffs. Generally, an economic downturn or temporary shutdown of your business (such from restrictions due to COVID-19) will justify that business need.
2. Consider alternatives, such as telecommuting.
3. Make a plan
 - Determine numbers of affected employees
 - Determine which divisions, positions, jobs, or functions will be eliminated or downsized (at the beginning stage, never make decisions about which individual employees will be laid off).
4. Inform employees about the impending layoffs:
 - Give a general notice to the workforce and the Union – explain if the layoff is temporary or permanent, when it will take place, and generally what the company expects to happen.
 - Abide by the Collective Bargaining Agreement if one is in place.

- Abide by the provisions of the Worker Adjustment and Retraining Notification Act (WARN) if applicable (Contact the US Department of Labor for more information on the WARN Act).
6. Evaluate employees, using objective, job-related guidelines and criteria:
- Talent and experience that is consistent with business necessity
 - Past performance
 - Special skills that are consistent with business necessity
 - Seniority or longevity
 - Rank individuals if you have reliable and objective performance related data
 - Rank employees within groups of employees who do similar work; be sure to include all employees who do the similar types of work within the same group (in other words, do not try to shelter a favorite employee from the layoffs by not including them in the group that will be laid off)
 - apply the same procedures and criteria to everyone
 - avoid the temptation to protect an employee or certain employees from the layoff by not evaluating them, by not including them in the group of potential layoffs, or by transferring them out of a job just before a layoff; this is a red flag that you are treating some people differently.
 - Be fair and use good faith; make decisions free from any bias
 - Ensure that all of the data used in making the decision is free from bias

Resources

CDC Guidance for Employers and Workplaces on COVID-19: [Resources for Businesses and Employers](#)

Washington State information on COVID-19: [Washington State Coronavirus Response \(COVID-19\)](#)

EEOC guidance on pandemics: [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#)

U.S. Department of Labor: [Preparing Workplaces for COVID-19](#)

COVID-19 or Other Public Health Emergencies and the Family and Medical Leave: [COVID-19 and the Family and Medical Leave Act Questions and Answers](#)

Information for health facilities from WA State DOH
[Healthcare Facility Frequently Asked Questions](#)

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 can 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.