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September 23, 2021

New Reporting, Notification, and Accommodation Requirements Issued for Washington Employers During the Pandemic

Washington Governor Jay Inslee signed the Health Emergency Labor Standards Act (HELSEA) on May 11, 2021. HELSEA went into effect immediately and applies to workplaces only during a declared public health emergency involving an infectious or contagious disease.

On August 10, 2021, Washington State Department of Labor & Industries (L&I) filed emergency rules, also effective immediately, in response to this law. The new rules, which incorporate the legislation signed into law by Governor Inslee, address:

- Employer reporting and notification requirements of COVID-19 outbreaks or exposures, and
- Requirements for employers to accommodate voluntary use of face masks and other personal protective equipment (PPE).

Not only do the emergency rules apply to the COVID-19 pandemic, but they will also apply during any future pandemic or other public health emergency involving an infectious or contagious disease as declared or ordered by the president of the United States or by the Washington state governor.

Reporting COVID-19 Outbreaks to L&I

Under the new rules, employers with 50 or more "covered employees" at a workplace or work site are required, within 24 hours, to report COVID-19 "outbreaks" of 10 or more employees to L&I.

"Covered employees" are hourly, salaried, labor, management, part-time, and seasonal employees, and any employee hired from a temporary help service, employee leasing service, or personnel supply service if the employer supervises the employee on a day-to-day basis.

An "outbreak" is generally considered to be a cluster of infections occurring at a specific workplace or work site in a particular timeframe. The new regulation applies to COVID-19 outbreaks of 10 or more test-confirmed employee infections with test-collection dates that occur during:

- A period of time that starts when any two (or more) cases have occurred within 14 consecutive calendar days of each other and ends when 28 consecutive calendar days have passed without a new infection, or
- Any period of time the Washington State Department of Health or a local health jurisdiction communicates to the employer that there is a COVID-19 outbreak at their workplace or work site.

According to the rule, after an employer discovers that 10 or more infections have occurred in a workplace or work site, the employer has 24 hours to report the outbreak by calling L&I's Division of Occupational Safety and Health (DOSH) at 1.800.4BE.SAFE (or 1.800.423.7233) and following the option for "reporting fatalities, hospitalizations, amputations or loss of an eye." Employers should *not* include employee names or personal identifying information when making this report.

No further reporting is required for the outbreak once it has been reported by the employer, even if additional cases occur. However, it is possible that a workplace may have a new outbreak after passing 28 days without a new case, in which case the employer would need to report the new outbreak.

Notice to Employees of Potential COVID-19 Exposure

Regardless of workforce size, employers must notify employees of potential exposure to COVID-19 during the pandemic. The notification requirement is triggered each time an employer receives notice of potential exposure through any of the following mechanisms:

- Through the employer's testing protocol that an employee is a qualifying individual, or
- From an employee (or their emergency contact) that the employee is a qualifying individual, or
- From a medical provider or public health official that an employee was exposed to a qualifying individual at the work site.

If triggered, the employer must notify all covered employees who were on the premises at the same work site *on the same day* as a qualifying individual who may have been infectious or contagious. For COVID-19 in particular, a qualifying individual could be infectious or contagious:

- At least two days before feeling sick; or, if asymptomatic, at least two days before being tested, *and*
- Until they are isolated and/or leave the work site.

Written notice must be provided in a manner typically used to communicate employment-related information to employees, including, as applicable, personal service, email, or text message—assuming the notification can reasonably be anticipated to be received within one business day by the employee.

Employers must not include any employee name(s) or personal information in the written notice. The written notification should be in English and the language understood by a majority of the employees.

Exempt from this notification requirement are healthcare facilities that provide healthcare services directly to patients, including, but not limited to, a hospital, clinic, healthcare provider's office, health maintenance organization, diagnostic or treatment center, neuropsychiatric or mental health facility, hospice, or nursing. Notification requirements for healthcare facilities are being addressed through separate rulemaking.

Voluntary PPE Use

Finally, the new rules require that employers allow any employee or contractor (regardless of vaccination status) to voluntarily use PPE—but only after the employer has decided that use will not:

- Create a safety or health hazard, or
- Interfere with the employer's security requirements, or
- Conflict with PPE requirements specified by other applicable health and safety rules.

"Voluntary use" means the optional use of a face mask or other PPE by an employee or contractor in the workplace when it is not required by the Washington Industrial Safety and Health Act or the employer during a public health emergency involving an infectious or contagious disease. Voluntary use can also occur when an employee or contractor required to use PPE wants to upgrade their level of protection—e.g., an employee required to use a cloth face covering wants to voluntarily use a more protective mask such as an N95. Employers are not required to pay for voluntary PPE, but are still required to pay for required PPE.

Key Takeaways for Employers

Upon learning that an employee has tested positive for COVID-19, employers should ensure that all directives for notifying employees and reporting an outbreak to L&I are followed, as applicable, including maintaining employee confidentiality. In addition, if an employee asks to use PPE voluntarily in the workplace, that request must be accommodated absent one of the rule's outlined exceptions. It should be kept in mind that not only do these emergency rules apply to the current COVID-19 pandemic, but they will also apply to any future pandemic or other public health emergency involving an infectious or contagious disease.

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