

Background

On May 11, 2021, Governor Inslee signed Engrossed Substitute Senate Bill (ESSB) 5115 into law, effective immediately. This new law, known as the Health Emergency Labor Standards Act (HELSEA), applies to workplaces only during a declared public health emergency involving an infectious or contagious disease.

The following questions and answers can help you understand HELSEA's requirements to protect high-risk employees from discrimination. For further details, refer to ESSB 5115.

How does HELSEA protect workers from discrimination?

HELSEA protects high-risk employees from being discharged, permanently replaced, or discriminated against in the workplace for seeking accommodation from exposure to an infectious or contagious disease during a public health emergency. HELSEA is administered by the Department of Labor & Industries (L&I) and currently applies to accommodations related to COVID-19.

HELSEA works in conjunction with existing disability protections found in the Americans with Disabilities Act (ADA) and the Washington Law Against Discrimination.

Under HELSEA, discrimination can include a variety of adverse employment actions. L&I can help workers determine if they have been discriminated against for exercising workplace safety and health rights included under HELSEA by calling 1-800-423-7233.

Is HELSEA in effect now?

Yes. The law has been in effect since May 11, 2021. The protections against discrimination under HELSEA are triggered when any public health emergency

(e.g., a pandemic) is declared by the President of the United States or by the Washington State Governor.

On Feb. 29, 2020, Governor Jay Inslee issued Proclamation 20-05 in which he declared a state of emergency in response to COVID-19. As of June 18, 2021, the state of emergency remains in place.

Who is considered a high-risk employee?

An employee who is at an age or has an underlying health condition that puts them at high risk of contracting a severe illness (as defined by Centers for Disease Control) from an infectious or contagious disease that is the subject of the public health emergency;

AND

Has obtained a recommendation from a medical provider for removal from the workforce due to their high risk of contracting a severe illness.

Can an employer require a high-risk employee to provide proof of their medical provider's recommendation?

Yes. In order to be protected under HELSEA, the employee must obtain a recommendation from their medical provider affirming they are high risk and must be removed from the workforce. For these purposes, removal from the workforce means the employee cannot be present in the workplace. An employer may follow its normal accommodation process for obtaining medical verification, however HELSEA clarifies that an employee is not required to disclose any medical condition or diagnosis to their employer for the purposes of this law.

An employee's protection under HELSEA does not affect other protections under federal or state laws concerning reasonable accommodation or discrimination.



Is a high-risk employee who asks for accommodation protected from discharge, permanent replacement, or discrimination?

Yes. If no accommodation is reasonable, the high-risk employee is also protected if they decide to use available leave options, including leave without pay and unemployment insurance, if eligible, until the public health emergency ends or an accommodation has been provided.

What if an employee asks for an accommodation under HELSA, but the employer has not made a decision yet; or what if the employee disagrees with their employer’s determination?

The employee may take any available leave, including leave without pay and unemployment insurance, if eligible, while awaiting a decision from the employer. The same protected option for taking leave also applies if the employee disagrees with the employer and has:

- Filed a reasonable accommodation complaint with the Human Rights Commission and is awaiting a decision; **AND**
- Provided the employer notice that a decision is pending.

If an employer refuses to allow leave in these cases, L&I would consider this an adverse action that may be deemed discriminatory.

When a high-risk employee takes available leave under HELSA, does the employer’s policy for order of leave taken apply? Does the employee have a choice for the order of leave?

High-risk employees must have access to all available leave, including leave without pay, and may not be discharged, permanently replaced, or discriminated against for the use of this leave. High-risk employees may choose to take leave in accordance with specific leave laws, employer policies and collective bargaining agreements. However, employers may not prescribe the type of leave an employee chooses or the order in which available leave is taken as the statute allows high-risk employees to use “all available leave options.”



May an employer discontinue a worker’s existing employment benefits?

There is no requirement that an employer maintain benefits, including health insurance, life insurance, long-term disability insurance, seniority, or employee discounts, under HELSA. Employers should follow their normal policies related to these benefits.

Can an employer ask an employee for reverification from a medical provider?

HELSA went into effect on May 11, 2021. Any recommendation from a medical provider indicating the employee is at high risk, provided to the employer on or after May 11, 2021, satisfies the employee’s obligation. Any subsequent request or demand from the employer for reverification of high-risk status must be reasonable and will be assessed on a case-by-case basis.

What can a high-risk employee do if they experience discrimination?

Call L&I at 1-800-423-7233.

Complete and file a discrimination complaint form:

- www.Lni.wa.gov/go/F416-011-000 (English)
- www.Lni.wa.gov/go/F416-011-999 (Spanish)

L&I will not accept anonymous discrimination complaints.

The employee can also visit www.Lni.wa.gov/WorkplaceDiscrimination to find the Safety and Health Discrimination in the Workplace brochure (in English and Spanish).

For More Information

Reasonable accommodation

The Washington State Human Rights Commission is the state agency tasked with providing assistance and resolving disputes relating to reasonable accommodations. Employers who have questions should contact policy@hum.wa.gov. Employees who have questions should contact 360-753-6770 or frontdesk@hum.wa.gov. Employees who wish to file a complaint should fill out the intake form here: www.hum.wa.gov/file-complaint.

Unemployment insurance

The Washington Employment Security Department handles Washington's unemployment insurance program, and can be reached at www.esd.wa.gov/unemployment.

Termination while seeking the protections of the high-risk worker proclamation

The Washington Department of Labor & Industries, Division of Occupational Safety and Health, helps with safety and health discrimination, and can be reached at 1-800-423-7233.

Health coverage alternatives

The Washington Health Benefit Exchange provides assistance with obtaining health coverage, and the locator tool is found here: www.wahealthplanfinder.org

- For free help exploring your options and signing up for coverage through Washington Healthplanfinder, call the Customer Support Center. Language assistance is provided in over 200 languages. 1-855-923-4633 TTY: 1-855-627-9604
- COBRA Premium Assistance? COBRA recipients may be eligible for premium assistance through the American Rescue Plan Act applying to periods of health coverage on or after April 1, 2021, through Sept. 30, 2021: www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy.