

To: Jim

From: Mark

Date: June 7, 2021

Re: **COVID issues (updated memo)**

Introduction

On May 21, 2021, L&I issued an update stating that "fully vaccinated employees do not have to wear a mask or socially distance at work, unless their employer or local public health agency still requires it." The L&I update also states mandates, however, that "before ending mask and social distance requirements, employers must confirm workers are fully vaccinated -- by having the worker either sign a document attesting to their status or provide proof of vaccination."

After L&I issued this update, Cline and Associates received a large number of emails from union leadership expressing concerns about the legality of L&I's guidance, questions about the legality of what their agencies' respective HR Departments plan to do in response to L&I's guidance, questions about the legality of the mask mandate itself, and questions about the legality of Governor Jay Inslee's proclamation of an ongoing emergency. This newsletter addresses these questions.

No case law answers the question as to whether L&I's update or the Governor's proclamation of an ongoing emergency are lawful.

As the L&I update is literally only days old, there are obviously no published Washington cases challenging the enforceability or legality of L&I's mandate. It is important to note that L&I's guidance is based upon, and motivated by, changes to masking requirements specified by the federal Centers for Disease Control (CDC). L&I's update is not the result of any statutory change. Nor is it the result of a lawful rulemaking process. It is not statute. It is not a WAC. L & I admits in the first paragraph of its update that its guidance is offered to help employers meet new CDC guidelines "adopted by Governor Jay Inslee." The adoption referenced here is the Governor's proclamation of an ongoing emergency. Without the governor's emergency proclamation, L&I's actions are baseless.

The federal government derives its authority to impose restrictions from the Commerce Clause of the U.S. Constitution. Under Section 361 of the Public Health Service Act (42 U.S.C. Section 264), the U.S. Secretary of Health and Human Services is authorized to take measures to prevent the entry and spread of communicable diseases from foreign countries into the United States and between states. The authority for carrying out these functions on a daily basis has been delegated to the CDC.

Following new guidance from the CDC, Washington Governor Jay Inslee announced that this state will follow the CDC's guidance that fully vaccinated individuals no longer need to wear masks in most settings. The governor's proclamation, known as Proclamation 20-25.13, was issued by Governor Inslee on May 21, 2021 and amended earlier proclamations 20-05 and 20-25. In his most recent proclamation, Governor Inslee asserted that a state of emergency continues to exist in *all counties* of Washington state. He directed:

1. The face covering requirements for workers, employers, businesses, customers, the general public, and any other entities or individuals in prior versions of Proclamation 20-25 are hereby rescinded and replaced with the face covering requirements imposed in and pursuant to this version of Proclamation 20-25.
2. Order of the Secretary of Health 20-03.2, issued on May 15, 2021, is incorporated by reference, and may be amended as is necessary; and, all such amendments are also incorporated by reference.
3. **Employers must comply with all conditions for operation required by the Washington State Department of Labor & Industries, including interpretive guidance**, regulations and rules and Department of Labor & Industries-administered statutes. (emphasis added).
4. Everyone is required to cooperate with public health authorities in the investigation of cases, suspected cases, outbreaks, and suspected outbreaks of COVID-19 and with the implementation of infection control measures pursuant to State Board of Health rule in WAC 246-101-425.
5. All mandatory guidelines for businesses and activities, which remain in effect except as modified by this Proclamation, may be found at the Governor's Office website, COVID-19 Resources and Information, and at COVID-19 Reopening Guidance for Businesses and Workers. Existing guidelines that require proof of vaccination for certain settings and activities remain in effect until such time as those guidelines are expressly modified.

The Governor asserted in his Proclamation that he has authority to take these actions based on grant of authority by the legislature in three separate statutes, Chapters 38.08, 38.52 and 43.06 RCW. He specifically asserts on page 3 of his Proclamation that an ongoing emergency exists and that he has authority to act under these statutory chapters, stating "as a result of the above noted situation, and under Chapters 38.08, 38.52 and 43.06 RCW, do hereby proclaim and order that a state of Emergency continues to exist in all counties of Washington State...."

Analysis of whether Governor Inslee's proclamation of an ongoing emergency is supported by Washington statutory law

In this memo, I will analyze each of the three chapters cited by Governor Inslee as ostensible authority for his declaration of an ongoing emergency.

Chapter 38.08: Title 38 RCW is entitled "Militia and Military Affairs." Within this title, chapter 38.08 describes the powers and duties of the governor as commander in chief over the militia of the state. Section 38.08.030 authorizes the governor to issue a proclamation of martial law so that "the reestablishment or maintenance of law and order may be promoted." The governor has the options of proclaiming "complete martial law," which is the subordination of all civil authority to the military, or "limited martial law," which is a partial subordination of civil authority by the setting up of an additional police power vested in the military force which shall have the right to try all persons

apprehended by it in such area by a military tribunal or turn such offender over to civil authorities within five days for further action, during which time the writ of habeas corpus shall be suspended in behalf of such person.

Here, the governor has never declared a state of martial law. Moreover, even if the governor had declared a state of martial law, any such declaration would have been baseless because COVID has never caused a breakdown in law and order within this state that would otherwise justify a proclamation of martial law. Thus, our opinion is that, despite the governor's assertion to the contrary, the legislative grant of authority in Chapter 38.08 does not legitimize the governor's recent proclamation of an ongoing emergency in all Washington counties. In our opinion, the Governor engaged in overreach when he cited to a statute authorizing the declaration of martial law.

Chapter 38.52 RCW: As with Chapter 38.08, Chapter 38.52 is also part of Title 38, Militia and Military Affairs. Chapter 38.52 is entitled "Emergency Management." This chapter authorizes the state military department to administer the emergency management program of the state when faced with "disasters of unprecedented size and destructiveness. RCW 38.52.010-020. These disasters or emergencies are defined as an event of set of circumstances which "(i) demands immediate action to preserve public health, protect life, protect public property, or to provide relief to any stricken community overtaken by such occurrences; or (ii) reaches such a dimension or degree of destructiveness as to warrant the governor proclaiming a state of emergency pursuant to RCW 43.06010." RCW 38.52.010(9)(a). In the event of such an emergency, RCW 38.52.050 sets forth the Governor's general powers and duties. The governor's authority is limited by the statute to those actions "*within the limits of the authority conferred upon him [or her] herein*, with due consideration of the plans of the federal government. (emphasis added). RCW 38.52.050(3). Importantly, in addition to having control of the emergency management functions of the state, subsection 3 grants the governor the power to make, amend, and rescind necessary orders, rules, and regulations to carry out the provisions of the chapter. *Id.*

While we think this chapter of the RCW provides what is probably the strongest legal argument in support of the governor's declaration that a state of emergency persists in all Washington counties, we also think that his argument is an overreach. Even if COVID did at some time in the past present a true emergency, data from the governor's own Department of Health undermines any argument that an ongoing state of emergency still exists. As of June 9th, 58% of Washington's population has received at least one dose of the COVID vaccines. Consequently, the number of new COVID cases has plummeted over the last six months. Statistics provided by the Washington Department of Health show that COVID case counts peaked between November 2020 and January 2021. <https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard>. DOH's data also shows that, as of May 9th, the 7-day death rate per 110K population in all Washington counties cumulatively was at 0.50 and the 7 day death count totaled 38. *Id.* Over the last month, the trend in both case cases and death rates has been decidedly downward. *Id.* As a practical matter, therefore, the Governor's assertion that an ongoing state of emergency exists in every county within the state is just not supported by the facts. Therefore, it is highly debatable whether the governor's recent proclamation of an ongoing state of emergency is truly necessary to preserve public health.

Chapter 43.06 RCW: Chapter 43.06 RCW ("Governor") is found within Title 43 ("State Government – Executive"). This chapter describes the general powers and duties of the governor and

specifically includes the power to issue a proclamation of a state of emergency. RCW 43.06.210. The definition of “emergency” as set forth in this chapter is circular, defining a state of emergency as "an emergency proclaimed as such by the governor....." RCW 43.06.200. Under this definition, a state of emergency exists whenever the governor says there is a state of emergency. Importantly, nevertheless, the governor “must” terminate the state of emergency proclamation *when order has been restored in the area affected.*” RCW 43.06.210 (emphasis added). This implies that an emergency proclamation is only appropriate when order has been lost.

While the grant of authority by the legislature to declare a state of emergency is exceptionally broad, we also note that the legislature has required that the state of emergency must cease when order has been restored to the area affected. This causes us to ponder whether order was ever lost in any county within the state after the onset of COVID. We don’t think so. Certainly, if order was ever lost, it has been long since restored. And, we certainly do not think that order has been lost in every county of the state and remains unrestored in every county of the state. Thus, as stated earlier, our view is that the governor’s recent proclamation of an ongoing state of emergency in every county in this state is overreach. To state it bluntly, Chapter 43.06 RCW does not provide lawful support for the governor’s declaration of an ongoing state of emergency. The citizens of Washington state have witnessed an unlawful power grab by the state’s executive branch.

Summary

L&I's proclamations are not law at all. They are suggestions offered by a group of bureaucrats. No rule making process was followed. No statute was passed. No citizen of this State has any obligation to follow L&I's suggestions, which are not law.

As for Governor Inslee, by prolonging the declared state of emergency which no longer exists, he has usurped authority not granted to him under law. A case can be made that the governor's actions are outside the scope of legislatively granted authority. If Governor Inslee’s proclamation of a state of emergency is illegitimate, it necessarily and logically follows that L&I’s policy guidance is also without the force of law and is illegitimate.

Would a legal challenge have any chance of success?

We are not optimistic that a legal challenge would have a chance of success. Here’s why:

First, given the fact that we just came through a worldwide pandemic, courts generally are going to be unlikely to interject themselves into the middle of a controversy about the governor's policy determinations on how to protect the health and wellbeing of the people of this state. This raises a separation of powers issue. The legislature has seen fit to grant the governor special powers in the event of an emergency. The judicial branch is unlikely to interject itself.

Second, the definition of what constitutes an "emergency" was intentionally drafted by the legislature to be amorphous. Given that the exact nature of an "emergency" could never be known before such an emergency happens, the legislature entrusted the governor with special powers in the event of such a situation. A court, even in a conservative county, may very well hold that (a) an ongoing emergency still exists, and (b) the governor's actions were, and are, consistent with the special powers granted by the legislature in the event of an emergency.

Third, while a member Guild located in one of the more conservative counties in this state would likely have the best chance of success at getting a superior court judge to rule that the governor's actions were beyond the scope of his authority, the issue would certainly end up before the state Supreme Court on appeal. Given the Court's liberal bent and its past precedent, the long term chance of having any favorable superior court decision granting injunctive relief being upheld are almost nil.

The Washington Supreme Court has shown deference to the governor's discretion to declare a state of emergency in several past decisions. In a case decided by the Supreme Court shortly after the eruption of Mount Saint Helens, business owners from the town of Cougar claimed that Governor Ray's declaration of a state of emergency in April 1980 due to the volcanic activity of Mt. St. Helens was grounds for a lawsuit seeking damages. *Cougar Business Owners Assn. v. State*, 97 Wn.2d 466 (1982). The owners claimed that the governor lacked the constitutional and statutory authority to act as she did. The Court disagreed. *Id.* at 472. In its decision, the Court analyzed Chapter 43.06 RCW, Chapter 38.52 RCW, and Chapter 38.08 RCW – the same statutory sections cited by Governor Inslee in his recent proclamation. The Court showed deference to the Governor's executive power both as to when a declaration of emergency would be appropriate and when the declaration of emergency should end. "The Governor's discretion is the same in determining both the start and end of such an occurrence. This is particularly true when the disaster is an active but not currently erupting volcano." *Id.* at 476. Here, in a metaphorical sense, while the volcano is no longer "erupting" it is still "active." The Court will not likely overrule the governor's determination that the COVID emergency is still ongoing.

Just last year, the Supreme Court was called upon to address a demand by inmates in Washington state correctional facilities that the Governor be forced to reduce the prison population and release about 13,000 inmates due to COVID. *Colvin v. Inslee*, 195 Wn.2d 879 (2020). The case involved a request for a writ of mandamus, a rare and extraordinary remedy in which a court commands another branch of government to take a specific action, something the separation of powers typically forbids. *Id.* at 890-891. While the focus of the Court's decision was on its reluctance to issue a writ of mandamus, it is important to note the Court's statements regarding the historical role of the executive branch in declaring emergencies:

The executive branch has historically led Washington's response to emergencies. "The proclamation of an emergency and the Governor's issuance of executive orders" to address that emergency "are by statute committed to the sole discretion of the Governor." *Cougar Bus. Owners Ass'n v. State*, 97 Wn.2d 466, 476, 647 P.2d 481 (1982), *overruled in part by Chong Yim v. City of Seattle*, 194 Wn.2d 682, 451 P.3d 694 (2019). The law empowers the governor to "proclaim a state of emergency" in response to a disaster that threatens "life, health, property, or the public peace." RCW 43.06.010(12). An emergency proclamation unlocks "the powers granted the governor during a state of emergency." *Id.* Those emergency powers are broad and include the authority to prohibit "[a]ny number of persons ... from assembling," RCW 43.06.220(1)(b), "to waive or suspend" "any statute, order, rule, or regulation [that] would in any way prevent, hinder, or delay necessary action in coping with the emergency," RCW 43.06.220(2)(g), to "order the state militia ... to assist local officials to restore order," RCW 43.06.270, and more. "These statutory powers evidence a clear intent by the Legislature to delegate requisite police power to the Governor in times of emergency." *Cougar Bus. Owners Ass'n*, 97 Wn.2d at 474.

¶23 The governor’s response to an emergency “is clearly one of those discretionary acts that are ‘in their nature political, or which are, by the constitution and laws, submitted to the executive,’ and inappropriate for mandamus.” *SEIU Healthcare 775NW*, 168 Wn.2d at 600 (quoting *Marbury*, 5 U.S. at 170); see RCW 43.06.010(12) (“The governor *may* ... proclaim a state of emergency.” (emphasis added)), .220(1)(b) (“The governor ... *may* ... issue an order prohibiting [a]ny number of persons, *as designated by the governor*, from assembling.” (emphasis added)), .220(2) (“The governor ... *may* ... issue an order or orders concerning waiver or suspension of statutory obligations.” (emphasis added)), .270 (“The governor *may in his or her discretion* order the state militia ... to assist local officials to restore order.” (emphasis added)). 7

Colvin, 195 Wn.2d at 895-896. These statements, made by the Court only last year, evidence a clear reluctance to wade into decisions that it views as inherently political. Indeed, the Court’s earlier citation to *Congar Business Owners Association* and its blanket statement that declarations of emergency are at the “sole discretion” of the Governor are essentially a death knell for any challenge to Governor Inslee’s authority in the current situation.

Other than a possible lawsuit, are there practical considerations for labor union leadership to keep in mind?

The following are considerations that labor union leadership should keep in mind when employers begin to ask union members about their vaccination status:

EEOC Guidance: First, keep in mind that the EEOC has issued guidance that merely asking for or requiring an employee to show proof of receipt of a COVID-19 vaccination is not in itself a disability-related inquiry. Thus, if an employer asks an employee if he/she has been vaccinated, the employer may ask only for a yes or no response. In other words, it is out of bounds for an employer to ask “why not?” if a staff member didn’t get vaccinated. Doing so would constitute an impermissible medical inquiry prohibited under the Americans with Disabilities Act (ADA). While the EEOC has issued guidance that asking for or requiring an employee to show proof of receipt of a COVID-19 vaccination is not in itself a disability-related inquiry, the EEOC guidance also states that subsequent employer questions, such as asking *why* an individual did not receive a vaccination, may elicit information about a disability and would therefore be impermissible. Consequently, union leadership should warn their members to not provide the employer with medical information or explanations beyond a simple yes or no when asked whether they have been vaccinated. Employer inquiries asking the “why” question constitute an impermissible medical inquiry under the ADA.

Accommodations for disabilities or religious objections: Second, two exceptions to any vaccine requirements are available for workers with disabilities or religious objections. Both federal law and Washington state law require employers to provide reasonable accommodations for those with disabilities or sincerely held religious beliefs. The existence of these long-recognized rights raises the question as to what should happen when an employer makes the L&I required inquiry and the employee answers that they are not vaccinated *and* that their reason for not being vaccinated is because of a disability or religious belief. In that situation, it will be important for union leadership to remember that the employer (1) has a duty to accommodate, and (2) if the employer takes any form of adverse action against the employee it risks a discrimination grievance or lawsuit.

HIPAA violations? Third, many people believe that asking about vaccination status violates HIPAA. This is not correct. HIPAA applies to health care providers and health plans/insurers, not employers. That is, most employers are not a “covered entity” for purposes of the HIPAA statute. Note however, that if the employer is self-insured, as many government bodies are, then HIPAA may apply.

Generally, when lay people talk about alleged HIPAA violations, what they are usually referring to is a violation of the right to confidentiality of their medical information, which is a different issue. HR is normally required to maintain confidential medical information in an employee file separate and apart from the personnel file. The medical file is not to be accessed by supervisors or managers. We believe, therefore, that it would be improper for an employer to disseminate information about employee vaccination status to supervisors or managers. We believe that doing so would constitute an abdication of HR’s responsibility to protect the confidentiality of employees’ medical information.

Disclosure of vaccine status to third parties: A related question is whether the employer may lawfully provide information on employee vaccination status to third parties or the public, in response to a PRA request or some other request. Our guidance, again, is that employers should control access to employee vaccination status and limit its disclosure as this information should be considered confidential medical information.

The right to negotiate changes to mandatory subjects: Labor union leadership should always remain mindful that the union has a right to negotiate any changes to mandatory subjects of bargaining. Mandatory subjects are those related to wages, hours, and working conditions. Our position, certainly, is that safety of the workforce due to COVID is a mandatory subject. If the employer implements a unilateral change without extending an opportunity to bargain, it commits an unfair labor practice. Unions have a right to demand that both the decision, and its impacts, be bargained. The mere threat of a ULP gives the union a voice.