Importance of Complying with Governor Proclamations During the COVID-19 Public Health Emergency

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On February 29, 2020, Governor Jay Inslee declared a state of emergency in response to the spread of COVID-19, directing state agencies to use all resources necessary to prepare for and respond to the outbreak. Significant measures have been put in place to limit human interaction to slow the spread of the virus in our state. This is a rapidly evolving situation with no recent precedent in our state history. Below are some additional considerations for managing the risk of possible claims during this state of emergency.

1. Failure to comply with Proclamations by the Governor. Members are facing growing distress from their communities due to the orders of the Governor to shut down non-essential businesses and stay at home. However, there is a risk of future claims against any agency that advocates ignoring or violating these orders. The Governor’s general counsel has issued cease and desist letters to several public officials and agencies in response to actions they have taken to encourage businesses or construction to resume operation in violation of the existing Proclamations. The first step to gain compliance will be through education and agreement. If this does not work, the next step may be criminal citation and penalties. Further, if individuals become infected with COVID-19, lives could be lost and civil suits may result.

2. Potential legal liability for members who encourage violation of the Governor’s Proclamations. There are some circumstances under which a city or public agency could be subject to a civil lawsuit for negligence. One such circumstance exists under common law which provides an actor can be liable for its affirmative acts if they create a recognizable high degree of risk of harm to others. The foreseeability and magnitude of risk can impose legal liability even where there was no special relationship between the actor and the person who is harmed. Washington courts have applied this theory of recovery against cities and their employees. One example where this type of claim was applied was an incident where a bus driver abandoned his bus with the keys in the ignition and a visibly agitated male on the bus. The male subsequently drove off in the bus causing property damage and injuries to others. The court stated it was foreseeable the agitated man would drive the bus away and hurt someone if he was left on the bus alone while it was still running.

In the current public health crisis, public officials and medical professionals have consistently reported there is a high risk of infection if the Governor’s orders are not followed. If a city or public official encouraged others to violate the Governor’s orders, and a claimant could prove this action led to infection or death, there is a risk a claim could be brought against the agency.
3. Conflicting orders could put law enforcement employees at risk. Pursuant to RCW 38.52.110, the Governor has the authority to utilize political subdivisions and municipal corporations and their personnel to carry out emergency management of a public health crisis. Those agencies are directed by state statute to cooperate with the Governor and extend to him their services and facilities. This includes the use of local law enforcement to enforce the Governor’s orders. If an agency or its public officials encouraged individuals or businesses to ignore or violate the Proclamations, it could place its own law enforcement personnel in a difficult position of violating state law if they do not enforce the Governor’s orders. It could also place the member at risk for a mandamus action to the court seeking judicial enforcement of the law.

Recommended Actions

Members should act consistently with the Proclamations issued by the Governor. Concerns about the necessity or application of the orders should be raised with the Governor’s office, not through encouraging others to ignore or violate the orders. Members should document decisions and actions that occur in relation to COVID-19 and the steps leading up to these. In conjunction with this, members should keep a record of the recommendations and advisories being issued by the state and federal government that inform member actions. This will provide a good framework for addressing any potential claims that might be made at a later date, and documentation that the Governor’s orders were followed. WCIA continues to maintain full operations during the state of emergency, and staff are available to assist members with risk management and consults as needed.