



STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
Aging and Long-Term Support Administration

PO Box 45600, Olympia, WA 98504-5600

May 28, 2020

Senator Andy Billig, Senate Majority Leader
Representative Laurie Jinkins, Speaker of the House,
Senator Mark Schoesler, Senate Minority Leader
Representative J.T. Wilcox, House Minority Leader

Subject: Request to Extend Emergency Proclamations 20-6, 20-10, 20-16, 20-18, 20-37, 20-38, 20-44, 20-52

Dear Senator Billig, Senator Schoesler, Representative Jinkins, Representative Wilcox

Governor Proclamations 20-6, 20-10, 20-16, 20-18, 20-37, 20-38, and 20-44 waived and suspended specific statutes and rules to protect vulnerable individuals who reside in long-term care facilities from potential exposure to COVID-19 during the outbreak. Governor Proclamation 20-52 combined 20-06, 20-10, 20-16, and 20-18, further extending the statutory waivers and suspensions in these Proclamations. Each of these waivers and suspensions were then extended by the leadership of the Washington State Senate and House of Representatives and are set to expire on May 31, 2020. As the outbreak has not yet abated and the need for continued protections provided by the waivers and suspensions continues, the Department of Social and Health Services (DSHS) requests the leadership of the Senate and House of Representatives extend the Governor Proclamations until the legislature considers formal action during the a special legislative session to address the health safety concerns outlined below.

The requested extension will also allow the legislature to consider statutory amendments to identify the waived or suspended time periods, and to provide additional time for a gradual transition back to full implementation of the statutory requirements. This requested action will protect the health and safety of residents, and support and protect long-term care facilities and staff who worked consistent with the proclamations during the outbreak. Should the proclamations expire without adopting these types of allowances, state agencies, including DSHS, will be obligated to implement and enforce the existing statutory requirements creating additional challenges into the future for long-term care facilities and staff as described below.

We have worked closely with long-term care associations to develop this request in order to work together to maintain the capacity of our state to care for the residents and clients served by Washington's long-term care facilities.

Health and Safety Concerns

The proclamations listed above are necessary for long-term care residents to have the best possible outcomes during this crisis, and it is essential the protections provided under the proclamations be lifted in a phased approach consistent with state and federal recommendations to prevent a resurgence of the disease in Washington State. At this time, our state is beginning to gradually allow for increased activities for Washingtonians based on county level risk, and is closely monitoring for any increase in COVID-19 activity in each county as they move cautiously forward with re-opening under the “Safe Start Washington” plan.

Proclamations 20-6 and 20-16 (extended through Proclamation 20-52) are key to reducing exposures to vulnerable long-term care residents by restricting visitation with some exceptions, such as end of life situations and visits by attorneys, administrative law judges, advocates, and similar others. Without the suspension of statutes and rules identified in these proclamations, these restrictions will be lifted statewide regardless of individual county or facility risk, and exposures in our most challenged facilities may increase dramatically. It is critical those who are known to be most vulnerable to this disease be protected from exposure as much as possible in these first phases of re-opening.

Proclamation 20-10 (extended through Proclamation 20-52) suspends training requirements for long-term care workers as required trainings are not being offered under the current phase of re-opening, and the certification testing centers are also closed as there is not a way to complete skills demonstrations in a way that is consistent with social distancing during this time where critical PPE must be prioritized for health care workers. Should the proclamation be allowed to expire, long-term care workers who have not completed the training due to the COVID-19 outbreak, would be dismissed immediately in all long term care settings impacting clients receiving services through Medicaid and private pay, creating a staffing shortage crisis across the state and exacerbating an already challenging situation.

Proclamation 20-18 (extended through Proclamation 20-52) suspends annual inspections for Adult Family Homes, Assisted Living Facilities, Nursing Homes, and Enhanced Services Facilities and fingerprint background check requirements for Adult Family Homes, Assisted Living Facilities, and Enhanced Services Facilities, and in-home providers. During the outbreak, DSHS efforts are necessarily focused on inspecting facilities to identify and improve infection control measures, and investigate complaints that place residents in imminent jeopardy including complaints related to neglect, abuse, and exploitation. Continuing annual inspections would be a hindrance to these activities both for DSHS and the facilities being inspected.

Should the proclamation be lifted now, facilities and DSHS would be faced with routine inspections while also trying to meet the necessary inspections for COVID-19. DSHS would not be able to meet that demand and keep residents and staff safe from acquiring or transmitting the disease.

Fingerprint background check requirements are waived for Adult Family Homes, Assisted Living Facilities, Enhanced Services Facilities, and in-home providers out of necessity as many fingerprint check agencies that provide these services are not operating during the outbreak. If the exemptions are not extended, staff who are unable to obtain fingerprint background checks as

a result of the outbreak will be dismissed immediately, contributing to a staffing shortage crisis and leaving thousands of individuals without essential services.

Proclamation 20-37 suspends nursing assistant requirements for nursing homes in order to be consistent with requirements waived by the Center for Medicare and Medicaid Services (CMS). These requirements were waived by CMS in order to address the staffing shortages in Washington State and across the country, and will be in place until the end of the national declaration of the public health emergency. Should proclamation 20-37 expire, Nursing Homes will be subject to conflicting requirements between state and federal regulations, and the measures taken by CMS to address national staffing shortages will be undone in Washington State by our more stringent state requirements.

Classroom instruction must re-open in order to provide training and testing to those registered nursing assistants hired during the COVID-19 crisis. Certification testing centers must also be opened. Recent communications with testing centers indicate suspension of testing may remain in place until July 13, 2020. Should the proclamation be allowed to expire, registered nursing assistants who have not completed the training due to the COVID-19 outbreak, and are currently unable to receive training and testing, would be dismissed immediately, creating a staffing shortage crisis across the state and exacerbating an already challenging situation.

Proclamation 20-38 suspended certain construction review requirements for Assisted Living Facilities and Nursing Homes, as well as Certificate of Need requirements for Nursing Homes to increase bed capacity and assist in meeting the demand being placed on the health care system. These additional facilities and beds are often specifically allocated for COVID-19 positive residents who would otherwise be cared for in hospitals. Without these suspensions, the approval process for new facilities and increased bed capacity takes weeks longer, leaving health care facilities with insufficient resources to meet the care demands of this outbreak.

Proclamation 20-44 also addresses coordination between Washington State nursing home laws and those waived by CMS until the end of the first full quarter after the national declaration of the public health emergency concludes. Specifically, the proclamation coordinates transfer and discharge requirements to cohort residents and provide more flexibility in addressing the capacity of nursing homes to care for all their residents without increasing risk of COVID-19 transmission. Like proclamation 20-37, should this proclamation expire without a corresponding grace period, Nursing Homes will be subject to conflicting requirements between state and federal regulations, and the measures taken by CMS to address the unique impacts of the COVID-19 outbreak on Nursing Homes will be undone in Washington State by our more stringent state requirements.

Proclamation 20-52 combined 20-06, 20-10, 20-16, and 20-18, further extending the statutory waivers and suspensions in these Proclamations. The health and safety concerns outlined above for 20-06, 20-10, 20-16, and 20-18 remain under 20-52.

Extended Implementation, Enforcement Challenges, and Statutory Amendments

The transition back to full implementation of the waived and suspended statutes and rules must be gradual, and in some cases may require statutory amendments, in order to avoid extending the effects of the COVID-19 outbreak by potentially exposing vulnerable residents to COVID-19, triggering staffing shortages, and triggering untimely expiration of COVID-specific facility licensing standards.

Proclamation 20-10, Training (extended through Proclamation 20-52): Without a statutory amendment to identify the outbreak and provide a transition period for training and testing of long-term care staff, the long-term care facility staffing shortages are expected to persist for months following expiration of the proclamations. Clients who receive care in their own home will also be without critically needed staff. DSHS estimates more than 4,000 long-term care workers will be dismissed for not meeting training requirements within the statutorily mandated timeframe. It will take several months for training and testing facilities to be able to provide services to the many who will be seeking training and testing in order to meet licensing and certification requirements and resume their positions with long-term care facilities, or as individual providers to clients in the community. In the meantime, long-term care programs will be short of staff while the risk of COVID-19 resurgence is still present.

In addition, staff records and credentials are reviewed during every annual survey to ensure staff hiring requirements are met. Without a statutory remedy, DSHS and Department of Health (DOH) would be obligated to enforce the statute as currently written for staff who worked in long-term care facilities during the outbreak as they will not have met the long-term care worker training requirements. There is also significant audit risk of federal disallowances if individuals are allowed to continue working without the statutory suspensions.

To avoid these consequences, DSHS recommends the applicable statutes be amended to allow a six month grace period for long-term care workers who were unable to complete required training and testing due to the COVID-19 outbreak. This will allow long-term care workers time to complete the training and testing requirements, and allow training and testing centers time to address the increased demand they will face as they reopen. The grace period would begin the day after the public emergency ends.

Proclamation 20-18, Inspections (extended through Proclamation 20-52): As described above, should the proclamation be lifted without a statutory amendment, DSHS would not be able to complete all the delayed inspections within the statutorily established timeframes. While a descriptive entry could be made explaining the inability to meet statutory requirements due to the COVID-19 outbreak, without a standardized process for reimplementation of a survey and inspection schedule, DSHS could be subject to legal action. There is also significant risk of a federal disallowance as the State Auditor reviews state survey and inspection timeframes as a part of the Medicaid audit.

To avoid these consequences, DSHS recommends amending the statutes to permanently suspend the standard survey requirements for the period of the outbreak, and to reset the timeframe for all required surveys and inspections with a reset date of October 1, 2020, allowing DSHS time to

complete other essential functions such as critical complaint investigations and continued infection control investigations.

Proclamation 20-18, Fingerprint Background Checks (extended through Proclamation 20-52): The need for a statutory allowance for long-term care workers to obtain fingerprint background checks is similar to that of staff obtaining required training and testing. During the outbreak, many fingerprint check agencies that provide these services are closed. Should the proclamation expire without a statutory remedy, the long-term care facilities, home care agencies and DSHS would be required to terminate direct care workers who have not met the statutory fingerprint check requirement. Independent providers who work with clients in their own home would also be required to stop working until a fingerprint check could be completed. With the backlog of long-term care staff waiting for fingerprint based background checks, staffing shortages could be expected to persist for many weeks while background check facilities process requests. This will leave long-term care facilities and clients in their own homes short of staff while the risk of COVID-19 resurgence is still present.

In addition, staff records are reviewed during every annual survey to ensure staff hiring requirements are met. Without a statutory remedy, DSHS and DOH would be obligated to enforce the statute as currently written for staff who worked in long-term care facilities during the outbreak as they will not have met the fingerprint background check requirements prior to being hired. There is also significant risk of a federal disallowance as the State Auditor reviews background checks in its annual Medicaid audit.

To avoid these consequences, DSHS recommends the applicable statutes be amended to allow a six month grace period for long-term care workers who were hired during the COVID-19 outbreak to meet the background check requirements. The grace period would begin the day following the end of the public health emergency.

Proclamation 20-37, Nursing Assistant Requirements for Nursing Homes: In addition to the complications described above regarding staff training requirements, Nursing Homes are uniquely impacted by the potential of immediate implementation of state statutes that have been waived and suspended under the proclamations. Approximately 1,000 nursing assistants have been registered during the COVID-19 outbreak. The majority of these staff work Nursing Homes, the long-term care facilities most impacted by the COVID-19 outbreak. Most are awaiting the reopening of the training and testing facilities in order to complete the criteria to become a Certified Nursing Assistant. Without a statutory amendment to identify the outbreak and provide a transition period for training and testing of the Nursing Assistant Registered staff, many of these staff will be dismissed for not meeting training requirements within the statutorily mandated timeframe. It will take several months for training and testing facilities to address the backlog and provide services to those who will be seeking training and testing in order to meet licensing and certification requirements and resume their positions with the nursing homes.

Additionally, careful coordination with federal requirements is necessary to prevent conflict between state and federal regulations. The transition to operating under the full effect of the statute must be coordinated with CMS so that implementation of both state and federal requirements is consistent.

Proclamation 38, Construction Review and Certificate of Need: For facilities that received approval to increase bed capacity, ending that approval at the expiration of the proclamation would potentially have severe consequences for those residence who are living in the approved spaces. The facility would need to immediately find alternative placement for the residents regardless of the health status of the resident. Not only would this create an additional burden for the facilities, it could endanger the health and safety of the residents, particularly those being treated for COVID-19. A transition period after expiration of the proclamation to allow placement of these residents is essential to honoring the commitment made to care for them and to reducing the likelihood of spreading COVID-19 and the potential of preventable death.

To avoid these consequences, DSHS recommends amending the statutes to allow a four month grace period for facilities to use these temporarily approved facilities for residents placed during the period of the outbreak, and to continue care for these residents until they either recover or are placed in another fully approved facility. The grace period would begin the month following the end of the public health emergency.

Proclamation 20-44, Discharge and Transfer Requirements: As described above, this proclamation enables Nursing Homes to operate effectively under the waived CMS transfer and discharge requirements for the purpose of grouping COVID-19 positive residents to avoid increasing the risk of COVID-19 transmission among non-positive residents. Under RCW 74.42.450, a resident has the right to appeal such a transfer or discharge. Under the proclamation, the right to appeal is maintained and only the process is modified so that the discharge or transfer can proceed while the appeal is being considered. This procedural change to the appeal process is critical to prevent reintroduction of COVID-19 into facilities caring for our most vulnerable populations during this public health emergency. DSHS recommends amending the statute to specifically direct DSHS to coordinate transition back to full implementation with CMS and to ensure federal and state requirements are consistent.

Please consider an extension of these critical waivers and statutory amendments. We appreciate your assistance during this critical time in our state. Please let me know if you need any further information. You can reach me by phone at (360) 725-2311 or by email at bill.moss@dshs.wa.gov.

Thank you for all of your work, your time, and your support.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Moss", with a long horizontal flourish extending to the right.

Bill Moss, Assistant Secretary
Aging and Long Term Support Administration
DSHS: Transforming Lives

Cc: Kathryn Leathers, General Counsel, Office of Governor Jay Inslee
Amber Leaders, Health Policy Advisor, Office of Governor Jay Inslee
Cheryl Strange, Secretary, Department of Social and Health Services
Dana Phelps, Deputy Chief of Staff, Department of Social and Health Services
Mark Eliason, Director, Government and Community Relations
Candace Goehring, Director, Residential Care Services
Bea Rector, Director, Home and Community Services