# COVID-19 FAQs For Washington State Employers As Businesses Ordered Closed

Insights
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With Governor Inslee's announcement Sunday evening that he would be issuing an Emergency Proclamation ordering the closure of restaurants, bars, and entertainment and recreational facilities, all Washington businesses have been taking a closer look at what this means for their employees and operations. The March 16, 2020 Proclamation includes new requirements for retail establishments to remain open, and a second Proclamation further limited the size of public gatherings to 50.

Our Seattle office has put together guidance to respond to commonly asked questions and local resources for Washington employers. We also encourage you to review our nationwide Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus, put together by our firm's COVID-19 Taskforce.

**I operate a food service or restaurant, entertainment, recreational facility in Washington. Do we have to close? For how long?**
Probably, effective midnight March 16, 2020 until March 31, 2020, unless extended. The Proclamation specifically prohibits "on site consumption," yet does allow restaurants and food service to remain open for drive-through, takeout, and delivery. Specifically, the Proclamation covers:

- Restaurants;
- Food courts;
- Bars;
- Taverns;
- Coffee shops;
- Catered events;
- Clubs;
- Bowling alleys;
- All other similar venues in which people congregate for the consumption of food or beverages.

Other similar venues include, for example, social clubs, private clubs, tennis clubs, golf clubs, and faith-based organizations/facilities

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faith-based organizations/facilities.

**I operate an entertainment or recreational facility in Washington. Do we have to close? For how long?**
Probably, effective midnight March 16, 2020 until March 31, 2020, unless extended. The Proclamation specifically prohibits the operations of "public venues in which people congregate public venues in which people congregate for entertainment, social or recreational purposes, including but not limited to theaters, bowling alleys, gyms, fitness centers, non-tribal card rooms, barbershops and hair/nail salons, tattoo parlors, pool halls, and other similar venues."

**I operate a retail business. Do we have to close?**
Possibly. To remain open, a retail establishment must "designate an employee or officer who must establish and implement social distancing and sanitation measures established by the United States Centers for Disease Control and Prevention or the Washington State Department of Health guidelines." This prohibition will remain in effect until midnight on March 31, 2020, unless extended beyond that date. "Retail establishment" is not defined in the Proclamation, but it is likely to mean a wide range of retailers, from beauty salons to auto dealerships to department stores, as defined under the North American Industry Classification System ("NAICS") 441 through 453998.

**I operate a different kind of business. Do we have to close?**
If your business is not covered by the categories above, it probably does not need to close at this time unless it receives specific recommendations due to an employee or onsite outbreak. The ban does not apply to pharmacies, gas stations, convenience stores, and grocery stores, although it would apply to areas in any of those venue that allow for sit down food or beverage consumption.

**Our business is closing temporarily. Do I need to worry about WARN?**
It depends on the length of the closure and if your company is covered. Washington state does not have its own WARN act, so the federal WARN applies. See our WARN/Plant Closings section on our national FAQ.

**Our business is closing temporarily. Do I need to pay my employees paid sick and safe leave (PSSL)?**
It depends on the nature of your business and your policies.

- **Restaurants/Bars/Food Service/Entertainment.** Washington, Seattle, Tacoma, and SeaTac all have paid sick and safe leave (PSSL) laws allowing employees to use accrued PSSL if their workplace closes due to orders of public officials. Under Washington's law, employees are authorized to used available paid sick leave "when the employee's place of business has been closed by order of a public official for any health-related reason." RCW 49.46.210 (1)(a)(b)(iii). Seattle's law requires this "when the employee's place of business has been closed by the order of a public official." SMC 14.16.030. Tacoma's law requires the same "when the employee's place of business has been closed by order of a public official for any health-related reason." TMC 18.10.030(C)(3). SeaTac's law allows use of PSSL "when the Covered Worker's place of business has been closed by order of a public official to limit exposure to an infectious agent." STMC 7.45.020(F)(1). The governor's Order regarding closures related to the coronavirus outbreak

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likely qualifies as "an order of a public official." It's an employee's choice when to use their accrued PSSL.

- **All others.** Whether employees have the right to PSSL will depend on whether they need this time off for an authorized reason, which, in addition to public health closures, includes time off to care for themselves or a sick family member or if their child's school has been closed by a public official. So, an employee who needs to stay home due to COVID-19 symptoms, must be allowed to use available PSSL if they wish to do so. It's an employee's choice when to use their accrued PSSL.
- You can find more information about Washington's law, Seattle's law, or Tacoma's law through these embedded hyperlinks.

**If my business closes temporarily or places some employees on temporary layoff, will my affected employees be able to seek unemployment?**

Yes, although the first step is to analyze your obligations regarding PSSL. The next step is to provide your workers with information regarding Employment Security Department (ESD) programs. ESD has extended several programs to help both part-time and full-time employees, including SharedWork, Partial Employment and Standby. Employers must apply for the first two programs. Employers also must request Standby status in response to an employee's unemployment application.

ESD has issued emergency rules to assist affected employees during the COVID-19 pandemic, and this webpage is a good starting point for businesses needing more information about these programs. One of the emergency rules extends benefits to part-time workers.

Regardless if one of the programs apply, all employees must still serve a "waiting week," that is, the first week in which they otherwise qualify for unemployment compensation but do not receive benefits.

**What is ESD's Standby program?**

This is a category of layoff defined by ESD. Generally, it allows employers to request to place an employee on Standby for up to eight weeks and the employee can collect unemployment benefits without having to look for other work. While on standby, workers must accept any work you offer that they can do without breaking isolation or quarantine. Relief of benefit charges cannot be granted in this situation.

Standby is normally only allowed for up to eight weeks. ESD states, however, that it "may grant an extension of standby for more than eight weeks if you make your request in writing and can show extraordinary circumstances. Under the new emergency rules, temporary shutdowns related to COVID-19 infection at the place of business that cause you to close or severely reduce operations are considered extraordinary circumstances." It is not yet known whether employers will be able to request Standby status for a group of employers, rather than solely on an employee- by- employee basis.

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**Our business is closing temporarily. Can we require our employees to use their PTO or vacation before applying for unemployment?**
It depends.

- If you are shutting down due to the Proclamation, then you must allow employees to use PSSL. (See above). Again, however, using PSSL is the employee's choice, and you cannot require they use it.
- If you offer a combined, universal PTO policy that includes both vacation and meets your PSSL obligations, the answer will largely depend on your policy. Generally, if your PTO bank can be used for either vacation or PSSL, then employees have the right to use it, but you cannot require its use.
- If your vacation benefits are wholly separate from your policy that complies with PSSL requirements, then you may be able to require their use or make these available as you choose to do so, provided this is consistent with your written policy. Your policy, especially any changes, should be clearly communicated in writing.
- You cannot require employees who are ill or have a family member who is ill and qualify for Washington's Paid Family Medical Leave to use their paid time off benefits before applying for PFML.
- Employees are not allowed to collect paid benefits from their employer at the same time they are collecting unemployment. Employees who do so risk a fraud action by ESD.

**Our business is closing temporarily. Do I need to worry about Seattle Secure Scheduling (SSS) penalties?**
It depends on if you are a covered employer and the reason for closing. The SSS law covers hourly employees at qualifying retail and food services establishments with 500+ employees worldwide, and only full-service restaurants with 40+ full-service locations worldwide. Assuming you are covered, while the law generally requires that an employer must pay penalty pay if it changes employee's schedule with less than 14 days before the start of the shift, the SSS law contains an exception where "operations cannot begin or continue."

In the case of COVID-19, this exception for "operations cannot begin or continue" may apply. Specifically, the ordinance states an employer is not required to pay additional compensation for a schedule change where the employer cannot open or must close the worksite because of a recommendation of the public official. SMC 14.22.050 (B)(7). The Governor's Proclamation seems to fit this exception. Employers should continue to check the city's COVID-19 Q&As for updates.

Where businesses reduce their hours but remain open, the answer is less clear. We are aware that OLS has taken the position employees must still receive penalty pay for any reduction in hours from the posted schedule if the business remains open.

**What else can we do to ensure the health and safety of our employees and community?**

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In addition to the CDC and the WHO, our local public health agencies and government authorities have provided useful resources that address how we can all help slow the spread of the novel coronavirus:

- Washington Department of Health Coronavirus Information;
- Governor Inslee's Official Proclamations;
- King County's Department of Public Health Coronavirus Information; and
- King County's Guidance for retail businesses and service operators to protect from the spread of COVID-19.

**Conclusion**
COVID-19 and the state and federal response is likely to have a substantial impact on the operation of all businesses in Washington. Fisher Phillips will continue to monitor related developments, so you should ensure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information.

If you have questions, please contact your Fisher Phillips attorney, or any attorney in our Seattle office.

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*This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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