



“Stay Home – Stay Healthy”: Updated COVID-19 FAQs For Washington State Employers

Insights

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Our Seattle office has continued to update our 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.

Do we have to close our business per the governor’s March 23 Proclamation?

It depends on the nature of your business. We’ve addressed some specific businesses in some of the following Q&As. Generally speaking, Governor Inslee’s March 23, 2020 Emergency Proclamation 20-25, [“Stay Home – Stay Healthy”](#) orders all non-essential businesses to close effective midnight on March 25, 2020 until midnight on April 6, 2020, unless extended. **[Ed. Note: The order has since been extended through May 4.]**

Non-essential businesses may continue operating only (1) if employees can work from home; (2) if it is a single-owner business with no in-person, on-site public interaction, (3) if the business consists exclusively of employees or contractors performing business activities at their homes or residences, and who do not engage in in-person contact with clients; or (4) to perform “basic minimum operations.” The Proclamation defines “basic minimum operations” as “the minimum activities necessary to maintain the value of the business’ inventory, preserve the condition of the business’ physical plant and equipment, ensure security, process payroll and employee benefits, facilitate employees of the business being able to continue to work remotely from their residences, and related functions.”

How do I determine whether my business or my workers are “essential” under Governor Inslee’s March 23, 2020 Emergency Proclamation 20-25 “Stay Home – Stay Healthy”?

The Proclamation includes an [Appendix](#) that lists “essential” businesses and “essential” workers. Generally, those are in the following sectors: healthcare/public health, emergency services, food and agriculture, energy, water and wastewater, transportation and logistics, communications and information technology, other community-based government operations and essential functions (such as food supply and hotel workers), critical manufacturing, hazardous materials, financial services, chemical, and defense industrial base. Essential businesses and essential workforce members are more specifically defined in the [Appendix](#) to the Governor’s March 23 Proclamation.

I operate a restaurant or other food service facility in Washington. Do we have to close? For how long?

It depends. You may remain open only for drive-through, takeout, and delivery. On March 16, 2020, Governor Inslee issued an Emergency Proclamation prohibiting “on-site consumption” of food or beverages at restaurants and food-service establishments. The March 23 Proclamation reinforces that restaurant and food service establishments may remain open only for drive-through, takeout, and delivery. This Proclamation is in effect until midnight on April 6, 2020 unless extended. **[Ed. Note: The order has since been extended through May 4.]**

I operate a recreational facility in Washington. Do we have to close? For how long?

Yes. As of midnight March 16, 2020, and in effect until April 6, 2020 unless extended, Governor Inslee issued an Emergency Proclamation requiring bars and entertainment and recreational facilities to close. The governor’s March 23 Proclamation also closed all non-essential businesses and prohibits all public gatherings, regardless of size. The Proclamations cover bars, taverns, catered events, clubs, bowling alleys, social clubs, private clubs, tennis clubs, golf courses and clubs, faith-based organizations and facilities, theaters, gyms, fitness centers, non-tribal card rooms, barbershops and hair/nail salons, tattoo parlors, pool halls, and other similar venues. **[Ed. Note: The order has since been extended through May 4.]**

I operate a retail business. Do we have to close?

Yes, unless you operate a retail business that has been designated an “essential business” under Governor Inslee’s March 23 Proclamation. Essential retail businesses include grocery stores, pharmacies, corner stores, convenience stores, liquor stores that sell food, farmers’ markets, food banks, farm and produce stands, supermarkets, big-box stores that sell groceries and essentials, and similar food retail establishments. Retail fuel centers (gas stations and truck stops), cannabis, and dietary supplement stores are also deemed “essential.”

Still, to remain open, an essential retail establishment must “establish and implement social distancing and sanitation measures established by the United States Department of Labor’s [Guidance on Preparing Workplaces for COVID-19](#) **and** the Washington State Department of Health [Workplace and Employer Resources & Recommendations](#). These limitations will remain in effect until midnight on April 6, 2020, unless extended. **[Ed. Note: The order has since been extended through May 4.]**

Non-essential retail establishments may continue to perform “basic minimum operations.” These are “the minimum activities necessary to maintain the value of the business’ inventory, preserve the condition of the business’ physical plant and equipment, ensure security, process payroll and employee benefits, facilitate employees of the business being able to continue to work remotely from their residences, and related functions.”

I believe my business is “essential,” but it’s not included in the Appendix to the Governor’s Proclamation. May I apply for an exemption from the Proclamation? If so, how?

The March 23 Proclamation is silent on this issue. Typically, companies may seek a temporary restraining order (TRO) or other emergency civil relief from government orders in court. While most courts remain open to hear emergency civil matters telephonically, it remains within the judge's discretion to decide whether any particular matter qualifies as an emergency under the relevant court's rules. Consider contacting any member of the [Fisher Phillips Essential Business Taskforce](#), a group dedicated to assisting employers with these issues.

What are the penalties for violating Governor Inslee's Emergency "Stay Home – Stay Healthy" Proclamation?

Any willful violation of the March 23 Proclamation is a gross misdemeanor, which is punishable by a fine of up to \$5,000 and up to 364 days' imprisonment.

My business is essential under Governor Inslee's Emergency "Stay Home – Stay Healthy" Proclamation – may all of my employees continue working in the workplace?

No. You must analyze if the worker is "essential." The governor's March 23 Proclamation allows only "essential employee[s] performing work for an essential business" to continue working in the workplace. Both essential businesses and essential workers are defined in this [Appendix](#) to the governor's March 23 Proclamation.

My business is essential under Governor Inslee's Emergency "Stay Home – Stay Healthy" Proclamation. How can I ensure my employees are able to commute to work without violating the Proclamation?

The governor's March 23 Proclamation allows essential workers to continue working at the worksite. The March 23 Proclamation is silent as to how law enforcement should enforce the prohibitions but allows people to leave their homes to engage in essential activities. This includes obtaining necessary supplies and services; engaging in activities essential for the health and safety of family, household members, and pets; caring for family members, friends, and pets in another household; and engaging in outdoor exercise activities, including walking, biking, running, and hiking.

Some employers choose to provide essential workers letters they can show to law enforcement if stopped and asked why they are not at home under the March 23 Proclamation. You should speak with an attorney to determine whether such a letter would be appropriate in your circumstances.

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](#). You should seek legal advice before determining your business is not subject to WARN requirements.

Our business is closing temporarily. Do I need to pay my employees paid sick and safe leave (PSSL)?

It depends on the reason for your closure, your employees' work location, the nature of your business, your policies, and your risk tolerance. Remember, it's always an employee's choice whether to use any accrued PSSL for a qualifying reason. You should seek legal advice before determining your business does **not** have to pay out PSSL.

- **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. The Governor's recent Proclamations prohibiting on-site consumption of food or beverages at restaurants and food-service establishments and prohibiting public gatherings likely qualify as an order of a public official. It is unclear, however, whether restaurants that decide to close instead of providing drive-through, takeout, or delivery, as allowed by the Proclamations, are considered to have "*closed by order of a public official*" or closed voluntarily for business reasons not falling under these laws.
 - Under Washington's law, non-exempt employees are authorized to use 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). Recall that so-called "white collar" overtime exempt employees do not have a right to paid sick or safe leave under Washington state law.
 - But **all** employees who regularly work in Seattle have the right to paid sick and safe leave. Seattle's law requires that employees may use accrued PSSL "when the employee's place of business has been closed by the order of a public official." SMC 14.16.030. Further, under an amendment made to Seattle's law, effective March 18, 2020, Seattle now permits employees of Tier 3 employers (those with 250 or more full-time equivalent employees worldwide) that are closed for any health or safety reason to use PSSL. SMC 14.16.030. The closure need not be made by a public official; it is not yet clear what qualifies as a health or safety reason.
 - Tacoma's law also covers **all** employees regardless of exempt status. Its law also gives employees to the right to use paid sick leave "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 covers only non-managerial/non-supervisory employees of qualifying "transportation" or "hospitality" employers. It 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 likely qualifies as "an order of a public official."
- **All others.** It's always an employee's choice when to use their accrued PSSL for an authorized reason. Whether employees have the right to PSSL will depend on the reason for the closure of your business and whether your employees need this time off for an authorized reason. Again, Washington, Seattle, Tacoma, and SeaTac all have PSSL laws authorizing employees to use accrued PSSL if their workplace closes because of an order of public official that is health related. Where the reason for your closure squarely falls within the statutes, it is clear that employees have the right to use PSSL because of a public health closure. Where your business

is open, employees clearly have the right to use PSSL for time off due to COVID-19 illness or symptoms, to care for themselves or a sick family member or if their child's school has been closed by a public official and the business remains open.

- 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 and places some employees on permanent or temporary layoff, must I pay those employees paid sick and safe leave (PSSL)?

It depends on the reasons for of your business's closure and nature of the layoffs. Please see above. You should consult with an attorney before proceeding.

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 under Washington or municipal law. 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 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. Effective as to claims filed on or after March 8, 2020, Governor Inslee has [waived](#) the usual seven-day "waiting week" for unemployment benefits. The job search requirement has also been waived [in many instances](#). Employees should be aware, however, that because of the high number of applications, ESD may not be as responsive as usual.

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 employees, rather than solely on an employee-by-employee basis.

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

It depends on the reason for your closure, your policies, and your usual business practices and procedures.

- If you are shutting down due to the March 23 Proclamation, then you must allow covered employees to use PSSSL. (See above for the differences between state and city laws). Again, however, using PSSSL is the employee's choice, and you cannot require they use it.
- If you offer a combined, universal PTO policy that co-mingles both vacation and sick leave to meet your PSSSL obligations, the answer will largely depend on your policy. Generally, if your PTO bank can be used for either vacation or PSSSL, then employees have the right to use all of it for covered PSSSL reasons, although you cannot require its use.
- If your vacation benefits are wholly separate from your policy that otherwise complies with PSSSL 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 and usual practices. Your policy, especially any changes, should be clearly communicated in writing.
- Employers 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 any employer-provided 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 penalties under Seattle's Secure Scheduling Ordinance (SSO)?

It depends on if you are a covered employer and the reason for closing. The SSO 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 your business is covered, while the law generally requires that an employer must pay penalty pay if it changes employees' schedules after it has given employees advance notice of the schedule, the SSO contains an exception where "operations cannot begin or continue due to threats to employees or property, or due to the recommendation of a public official that work 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 March 16, 2020 and March 23, 2020 Proclamations seem 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.

Our business is still open. What Washington or municipal leave rights do our employees have?

Washington, Seattle, Tacoma, and SeaTac have paid sick and safe leave (PSSL) laws allowing employees to use accrued PSSL if your business is still open.

Under Washington's and Seattle's law, an employee is authorized to use accrued PSSL for the following reasons when the business is open:

- For a mental or physical illness, injury, or health condition or if they need a medical diagnosis or preventative medical care.
- If their family member needs care for a mental or physical illness, injury, or health condition, or needs a medical diagnosis or preventative medical care.
- If their child's school or place of care has been closed for any health reason by order of a public health official.
- If they are absent from work for reasons that qualify for leave under the state's Domestic Violence Leave Act (DVLA).

RCW 49.46.210; SMC 14.16.030. Remember, however, that so-called "white collar" overtime exempt employees do not have a right to paid sick or safe leave under Washington state law. However, all employees who regularly work in Seattle, are covered by Seattle's Paid Sick and Safe Time Ordinance.

Further, under an amendment made to Seattle's law as explained in its accompanying Q&A, effective March 18, 2020, Seattle now requires that (1) employers with 250 or more full-time equivalent employees worldwide allow employees to use PSSL if their business has reduced operations for any health or safety reason, and (2) employees be permitted to use PSSL when a public health official recommends that an employee self-quarantine or if their *family member's* school or place of care closes. Prior to this new amendment, employees could use PSST only when their *child's* place of care or school was closed due to the order of a *public health official* for a health-related reason. A family member is a child, parent, spouse, registered domestic partner, grandparent, grandchild, or sibling.

Under Tacoma's law, an employee is authorized to use accrued PSSL leave for the same reasons as Washington's law, above, and to enable the employee to take leave for bereavement for the death a family member. TMC 18.10.030(C)(3).

SeaTac's law allows covered hospitality or transportation workers to use accrued PSSL:

- To care for themselves or a family member for an illness, injury, or health condition
- To go to the doctor to get medical and preventative care for their self or a family member

- To care for themselves, a family member, or a household member for reasons related to domestic violence, sexual assault, or stalking.
- To care for a child whose school or place of school has been closed by order of a public health official, to limit exposure to an infectious agent, biological toxin, or hazardous material.

STMC 7.45.020(F)(1).

Also recall that under Washington's Family Care Act, all employees have the right to use any available employer provided "earned," or accrued, paid leave benefits to cover time off to care for sick family members.

Our business is still open. What do we need to know about the federal emergency Families First Coronavirus Response Act?

The Families First Coronavirus Response Act includes many provisions which apply to employers, such as paid sick leave for employees impacted by COVID-19 and those serving as caregivers for individuals with COVID-19. Here is a summary of the key provisions:

- **FMLA Expansion/Emergency FMLA.** The Act significantly amends and expands FMLA on a temporary basis and for certain reasons. All employers with fewer than 500 employees are covered. Employees are eligible for this new FMLA leave after working only 30 days prior to the designated leave. Such employees, who are unable to work or telework, may take up to 12 weeks of job-protected leave to care for the employee's child (under 18 years of age) if the child's school or place of care is closed or the childcare provider is unavailable due to a public health emergency. The first 10 days of this Emergency FMLA may be unpaid, although, an employee may choose to substitute any accrued paid leave (like PTO or PSL) to cover some or all of the 10-day unpaid period. After the 10-day period, the employer generally must pay full-time employees at two-thirds the employee's regular rate for the number of hours the employee would otherwise be normally scheduled. The new Act limits this pay entitlement to \$200 per day and \$10,000 in the aggregate per employee.
- **Emergency Paid Sick Leave Act (EPSLA).** This provision requires employers with fewer than 500 employees to provide full-time employees (regardless of the employee's duration of employment prior to leave) with 80 hours of paid sick leave at the employee's regular rate (or two-thirds the employee's regular rate to care for qualifying reasons 4, 5, or 6 listed below). Part-time workers must be allowed the equivalent of two weeks' worth of their average weekly hours worked for the prior six months. The EPSLA now allows an eligible employee to take this paid sick leave related to COVID-19 and if the employee is: (1) subject to a federal, state or local quarantine or isolation order; (2) advised by a health care provider to self-quarantine; (3) experiencing symptoms and seeking medical diagnosis; (4) caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine; (5) caring for the employee's child if the child's school or place of care is closed or the child's care provider is unavailable due to public health emergency; or (6) experiencing any other

substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

For more information, please visit our longer [Alert](#) regarding this emergency legislation. **[Ed. Note: The Department of Labor has now posted [Q&As](#) and has engaged in emergency rule-making. Please visit our [April 2nd Alert](#) on these issues.]**

We already provide paid sick leave or combined paid vacation/sick leave (PTO) that meets or exceeds Washington and any municipal requirements. Does our business now need to provide more because of the new federal law?

Even if your business is open, the answer is unclear, and we are hoping for more guidance from federal, state or local agencies. For now, the safest position is to assume that any paid leave required by the Families First Coronavirus Response Act is in addition to paid leave hours required under Washington or local municipality law.

While the federal legislation does require employers to pay out the new mandated paid leaves, there are both caps on the amounts paid and tax credits available, as further explained in our longer [Alert](#) regarding this emergency legislation.

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

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](#);
- King County's [Guidance for retail businesses and service operators to protect from the spread of COVID-19](#);
- United States Department of Labor's [Guidance on Preparing Workplaces for COVID-19](#); and
- Washington State Department of Health Workplace [Employer Resources & Recommendations](#).

Conclusion

For now, we will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our [Seattle](#) office, or [any member of our COVID-19 Taskforce](#). You can also review our nationwide [Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus](#) and our [FP Resource Center For Employers](#), maintained by our Taskforce.

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

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