

Washington Reopening: Returning to the Workplace

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May 7, 2020

Our Plan Today



Identify issues for
re-entry of the
workforce



- Updates from Governor Inslee: Turning the Dial
- Health Screenings
- High-Risk Employees
- Rehiring Issues
- Leave Laws and Unemployment
- Employee Benefits Considerations

Update from Governor Inslee: Turning the Dial

Kate Tylee Herz

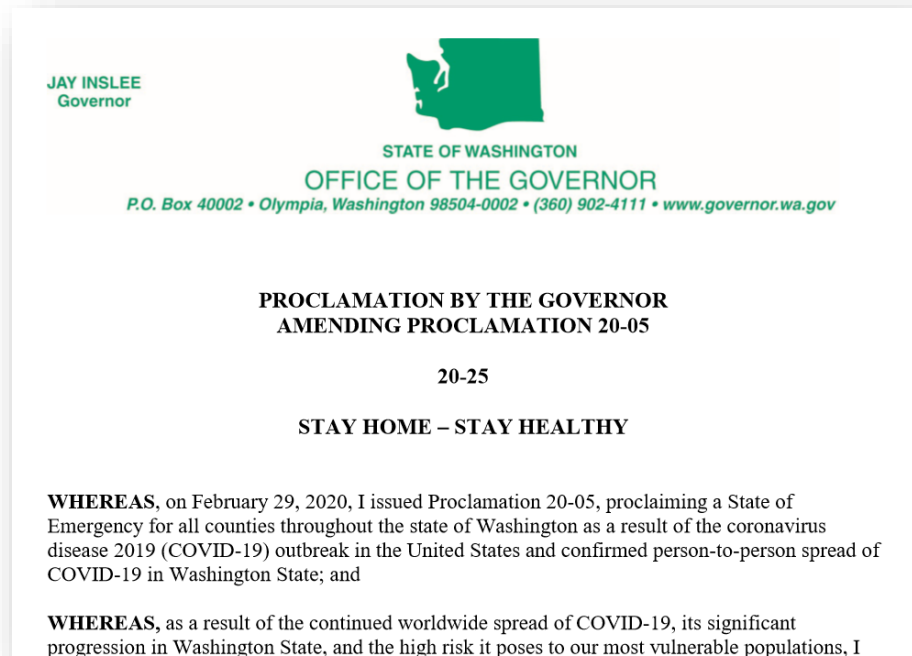
Guidance and Updates from Governor Inslee

- Update on “Stay Home, Stay Safe” Order
- Starting to “Turn the Dial”
 - Four-Phase Approach to Reopening WA
 - Phase One: Underway
 - In-Progress Construction
 - Certain Recreational Activities
 - Limited Businesses
 - Elective Medical Procedures







Re-Opening of “Non-Essential” Businesses

- Proclamation 20-05 (Stay Home—Stay Healthy Order)
 - Will re-open in “phases” or like “turning a dial”
 - Until a vaccine, “workplaces will look different” – physical distancing, teleworking, and other measures will continue to be necessary



WASHINGTON'S PHASED APPROACH

Modifying Physical Distancing Measures as we Reopen the State

	 Phase 1	 Phase 2	 Phase 3	 Phase 4
High-Risk Populations*	Continue to Stay Home, Stay Healthy	Continue to Stay Home, Stay Healthy	Continue to Stay Home, Stay Healthy	Resume public interactions, with physical distancing
Recreation	Some outdoor recreation (hunting, fishing, golf, boating, hiking)	Outdoor recreation involving 5 or fewer people outside your household (camping, beaches, etc.)	<ul style="list-style-type: none"> - Outdoor group rec. sports activities (50 or fewer people) - Recreational facilities at <50% capacity (gyms, public pools, etc.) - Professional sports without audience participation (horseracing, baseball, etc.) 	Resume all recreational activity
Gatherings (social, spiritual)	<ul style="list-style-type: none"> - None - Drive-in spiritual service with one household per vehicle 	Gather with no more than 5 people outside your household per week	Allow gatherings with no more than 50 people	Allow gatherings with >50 people
Travel	Essential travel and limited non-essential travel for Phase I permissible activities	Essential travel and limited non-essential travel for Phase I & II permissible activities	Resume non-essential travel	Continue non-essential travel
Business/Employers	<ul style="list-style-type: none"> - Essential businesses open - Existing construction that meets agreed upon criteria - Landscaping - Auto/RV/boat/ORV sales - Retail (curb-side pick-up orders only) - Car washes - Pet walkers 	<ul style="list-style-type: none"> - Remaining manufacturing - Additional construction phases - In-home/domestic services (nannies, housecleaning, etc.) - Retail (in-store purchases allowed with restrictions) - Real estate - Professional services/office-based businesses (telework remains strongly encouraged) - Hair and nail salons/barbers - Pet grooming - Restaurants/taverns <50% capacity table size no larger than 5 (no bar-area seating) 	<ul style="list-style-type: none"> - Restaurants/taverns <75% capacity/ table size no larger than 10 - Bar areas in restaurant/taverns at <25% capacity - Movie theaters at <50% capacity - Customer-facing government services (telework remains strongly encouraged) - Libraries - Museums - All other business activities not yet listed except for nightclubs and events with greater than 50 people 	<ul style="list-style-type: none"> - Nightclubs - Concert venues - Large sporting events - Resume unrestricted staffing of worksites, but continue to practice physical distancing and good hygiene

How Will the Phased Approach Work?

Minimum of three weeks per phase (one complete disease incubation period plus an additional week to compile complete data and confirm trends).

Every phase will still require social distancing and appropriate health precautions, including the use of personal protective equipment in a number of workplaces.

Industry-specific guidance and safety criteria are being developed to ensure workplace safety and public health are maintained. Workplace guidance will be available at the [state Department of Labor & Industries](#).

Certain counties may request a variance to move to next phase earlier.

Readiness Dashboard

- Dashboard assesses readiness on a scale from “low risk” to “high risk” for the prevalence of the virus, the risk to vulnerable populations, testing capacity and availability, case and contact investigations, and healthcare readiness.
- While Washington is approaching “low risk” for health care readiness and virus prevalence, it remains in the “high risk” category for testing and contact tracing.



May 6 Update: COVID-19 Risk-Assessment Dashboard



Best Practices for Health Screening and Sanitation Procedures

Kate Tylee Herz

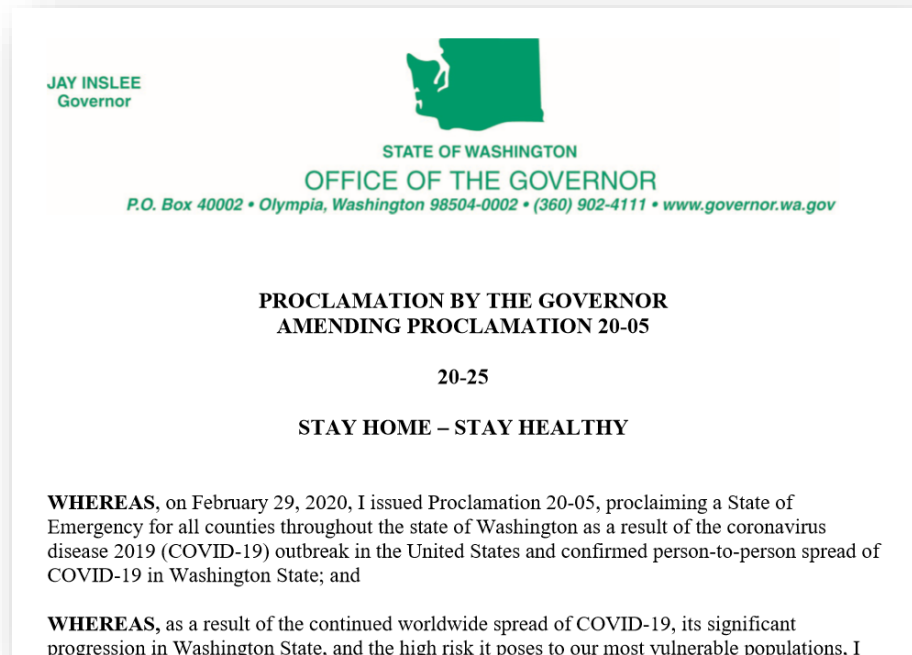
Employee and Customer Safety



- This is a moving target!
- Creating a safe—and compliant—work environment
 - Changes to physical layouts and structures (“engineering controls”)
 - Changes to policies and practices (“administrative controls”)
 - Personal protective equipment (“PPE”)
- “At the front door”—inquiries and testing
 - Options
 - Privacy
 - Procedures
- When something goes wrong—notifications

Social Distancing and Sanitation Measures

- Industry-specific guidance to be released gradually
- Proclamation 20-25: “must establish and implement social distancing and sanitation measures established by the United States Department of Labor or the Washington State Department of Health Guidelines.”



Social Distancing and Sanitation Measures

Must follow:

- L&I Workplace Safety and Health Guidance
 - Specific guidelines for certain industries: agriculture, childcare, construction, food processing, janitorial/environmental services, truck drivers, long-term care workers, grocery and retail workers
- US DOL Guidance on Preparing Workplaces for COVID-19
- Washington DOH Workplace and Employer Resources & Recommendations

Social Distancing

- Place staff members at least 6 feet away from each other
- Do not have in-person meetings
- If you must have an in-person meeting, meet in a large room and remain at least 6 feet from one another. Meet for as short as you can.
- Close lunch rooms and limit access to areas where people gather
- Limit visitors

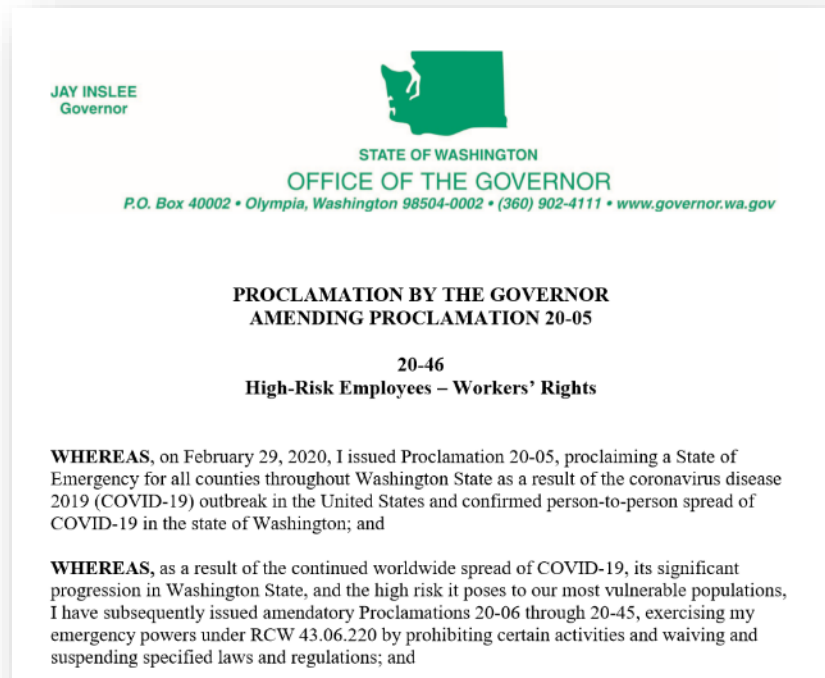
Sanitation Measures

- Clean all high touch areas (stair handrails, elevator buttons, fitness equipment, door handles)
- Provide cleaning wipes so that “high touch” objects can be wiped after use

High-Risk Employee Proclamation

Jordann Hallstrom

Proclamation for High-Risk Employees



- On April 13, 2020, Governor Inslee issued Proclamation 20-46 “High-Risk Employees – Workers’ Rights” (the Proclamation), which amends Proclamation 20-05 (Stay Home—Stay Healthy Order).
- Extends benefits and protections for “high-risk” employees.
- Remains in effect through at least June 12, 2020
 - “Safe Start Washington” – indicates employers must follow Proclamation through all Phases

WASHINGTON'S PHASED APPROACH

Modifying Physical Distancing Measures as we Reopen the State

1

Phase 1

2

Phase 2

3

Phase 3

4

Phase 4

High-Risk Populations*

Continue to Stay Home, Stay Healthy

Continue to Stay Home, Stay Healthy

Continue to Stay Home, Stay Healthy

Resume public interactions, with physical distancing

Recreation

Some outdoor recreation (hunting, fishing, golf, boating, hiking)

Outdoor recreation involving 5 or fewer people outside your household (camping, beaches, etc.)

- Outdoor group rec. sports activities (50 or fewer people)
- Recreational facilities at <50% capacity (gyms, public pools, etc.)
- Professional sports without audience participation (horseracing, baseball, etc.)

Resume all recreational activity

Gatherings (social, spiritual)

- None
- Drive-in spiritual service with one household per vehicle

Gather with no more than 5 people outside your household per week

Allow gatherings with no more than 50 people

Allow gatherings with >50 people

Travel

Essential travel and limited non-essential travel for Phase I permissible activities

Essential travel and limited non-essential travel for Phase I & II permissible activities

Resume non-essential travel

Continue non-essential travel

Business/Employers

- Essential businesses open
- Existing construction that meets agreed upon criteria
- Landscaping
- Auto/RV/boat/ORV sales
- Retail (curb-side pick-up orders only)
- Car washes
- Pet walkers

- Remaining manufacturing
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- In-home/domestic services (nannies, housecleaning, etc.)
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- Nightclubs
- Concert venues
- Large sporting events
- Resume unrestricted staffing of worksites, but continue to practice physical distancing and good hygiene

Who is a “high-risk” employee?

- A high-risk worker is defined by the Centers for Disease Control and Prevention (CDC) and includes persons who are:

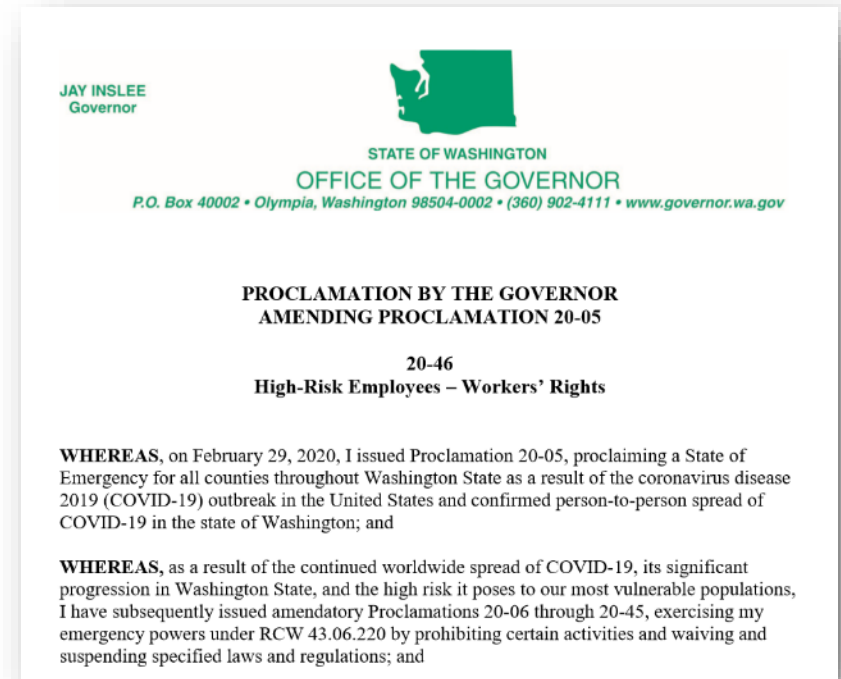
Of all ages with underlying medical conditions, particularly if not well controlled; and/or

65 years of age or older.

- Proclamation does not apply to or cover employees who have family members or household members deemed “high-risk”

Must Employers Notify High-Risk Employees?

- There is **no requirement** that employers proactively notify employees of High-Risk Proclamation
 - Designed so that employees may approach employer
- What if employer wants to notify employees?
 - Do so cautiously, and to *all employees*
 - Be prepared to accommodate higher number of requests
 - Do not attempt to identify “high-risk” employees to single out for notification
 - Discrimination claims
- Cannot unilaterally bar “high-risk” workers
 - EEOC guidance: ADA requires interactive process
 - “Direct Threat” - must show “the employee poses a significant risk of substantial harm to himself that cannot be reduced or eliminated by reasonable accommodation”



Requirements for Employers

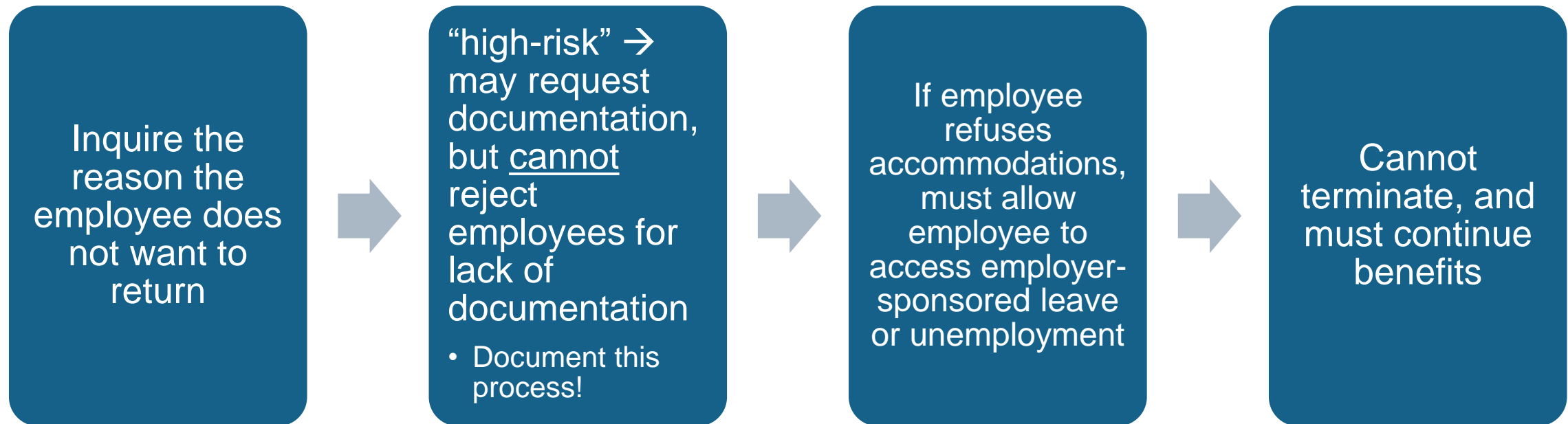
Accommodations: All employers (public or private) **must offer accommodations** to high-risk workers in order to protect them from exposure to COVID-19. This includes, but is not limited to, telework, alternative or remote locations, reassignment, and social distancing measures.

Usage of Leave and Access to Unemployment: If alternative work arrangements are not feasible, the high-risk workers **must be permitted to use any available employer-granted accrued leave or unemployment insurance** (in any sequence at the employee's discretion) without risk of adverse employment actions. An employer cannot require that a high-risk worker use accrued leave prior to the worker applying for unemployment.

Job Protection: Employers are **prohibited from retaliating or taking an adverse action** against high-risk workers under this Proclamation, including terminating or replacing employees.

Union Employers: Employers and labor unions representing employees in Washington State are prohibited from applying or enforcing any employment contract provisions that contradict or otherwise interfere with the above prohibitions and the intent of this Proclamation.

High-Risk Employees that Do Not Want to Return to Work



Requirements for Employers

- **Benefits Continuation.** “In the event the employee’s paid time off exhausts during the period of leave, employers are prohibited from failing to fully maintain all employer-related health insurance benefits until the employee is deemed eligible to return to work.”
- Employers must maintain health insurance for high-risk employees for duration of leave period
- Not limited to medical insurance
- ERISA preemption



Benefit Premiums

- **Benefits Continuation - Who Pays for the Premiums?**
 - Can still require employees to pay for his/her share of premiums
 - However, if employee indicates he/she *cannot* pay, employer must cover the premiums
 - Can establish a reasonable repayment plan for employee





Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

Gillian Murphy

Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

Anything other than
an immediate return
to *status quo ante* ...



Potential for legal claims

Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

Option 1: Allow employees to self-select

- Depending upon industry, demand may not be what it once was
- Resumption of operations may be gradual
- Personnel demands may operate at less than capacity
- Employees choose to return or stay home
- Be flexible within reason

Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

Option 2: Use clear, legitimate criteria

- Focus on key positions/functions and staffing needs rather than specific individuals
- Selection based on **non-discriminatory** factors
 - Seniority
 - Particular skill set
 - Best performers
 - Team that works well together

Determining Recall & Reinstatement Best Practices, Available Options, and Legal Issues

- Under either option, be aware of the potential for disparate treatment
- **DON'T** assume
 - Woman with school-aged children would prefer to stay home
 - Older worker would prefer to stay home
 - Employee who complained about working conditions would prefer to stay home
- **DO** assume that you will have to explain/defend every reinstatement decision

Employees Who Are Reluctant to Return

Different approaches depending on status of employee and reason(s) for not returning:

Furloughed Employees – In most cases, approach like any other request for leave

- Obtain enough info to determine whether request must be approved (e.g. FFCRA, FMLA, high-risk, ADA, PFML)
- If leave is not “protected,” may separate employment
- Qualifying for unemployment benefits does not necessarily mean “protected” leave

Laid-off Former Employees – In most cases, approach like new applicant

- Generally no obligation to offer FFCRA, FMLA, or any other protected leave or benefit
- May be required to consider accommodations

Still Won't Return?

- Share info about safety efforts
- Share understanding of UI benefits
- Share that position may not be available in future

Leave Laws and Unemployment

Angela Vogel

Sick Time and Leave Overview



- **Washington Sick and Safe Time**

- Covers non-exempt employees
- Medical issues for employee or family member
- Includes quarantine and isolation, and care for family member
- School/place of care for children closed by public official
- Workplace closures by public official
- If PTO includes sick time, PTO balance available

- **Reinstatement**

- If rehired within 12 months, balance must be reinstated
- If rehire occurs in subsequent calendar year, must only reinstate 40 hours (required carryover)

Sick Time, PTO and Leave Overview

■ Seattle Sick and Safe Time

- Covers exempt and non-exempt employees
- Same uses as Washington Sick Time – but amended in March 2020
- School/place of care closures for *family members* - no public order required
- Employers with 250 FTE's - Workplace slow downs or closures *for any health or safety reason* - no public order required

■ Reinstatement:

- If rehired within 12 months, balance must be reinstated
- If rehire occurs in subsequent calendar year, must reinstate required carryover amount (varies based on Tier size)



Sick Time, PTO and Leave Overview



- **Seattle Sick and Safe Time Emergency Rule:**
 - Employers may not require a doctor's note because it is an unreasonable burden during the COVID-19 pandemic. Employers must identify and provide alternatives to meet the verification requirement.
 - Employee's own statement, or documentation from service providers, such as social workers, case managers, or legal advocates.
 - In effect until June 7, 2020
 - <https://www.seattle.gov/laborstandards/ordinances/paid-sick-and-safe-time>

Sick Time, PTO and Leave Overview

■ Vacation and PTO Considerations

- Balance reinstatement—Furlough vs. Layoff
- Policy-specific considerations
 - Waiting Period/ Eligibility for use—clock restart?
 - Accrual rates/length of employment—based on prior period of employment?
- If the PTO is meant to satisfy paid sick leave laws, there may be reinstatement requirements



Sick Time, PTO and Leave Overview

■ Paid Family Medical Leave

- Partial wage replacement, available for *serious health condition* of employee or family member
- Leave could also be necessary to underlying condition (vs. COVID-19)
- *Not available for school closures*
- Portable benefit from employer to employer
- Must work 820 hours for Washington employers in qualifying period to be eligible
- Must provide employees with required written notice
- Long delays for approval



Sick Time, PTO and Leave Overview

- **Paid Family Medical Leave**

- **Job Restoration/ Benefits Continuation:**

- Must be employed by the same employer for at least 1250 hours in the last 12 months to be eligible for the job restoration and benefits continuation protections.
 - Employees with job restoration rights must receive written notice if they will not be restored to their position. (WAC 192-700-010).
 - Notice must be provided in person or via certified mail.



Sick Time and Leave Overview



- **Family Medical Leave Act**

- Unpaid, available *for serious health condition* of employee or family member
- Employee eligibility:
 - Works at site with 50 or more employees within 75 miles;
 - Employed by same employer for at least 12 months;
 - Worked at least 1250 hours during prior 12 months for employer;
 - *12 months of employment do NOT need to be consecutive months.*


- **FFCRA** – in effect until December 31, 2020

- Paid Sick Time
- Paid leave for school/place of care closures




Benefits Overview

<https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWAGOV/newsroom/COVID-19/covid-19-scenarios-and-benefits.pdf>

COVID-19 Scenarios & Benefits Available <small>The information shared on this flyer does not necessarily reflect the official policy or position of any other agency or company. It is the reader's responsibility to verify the facts of coverage.</small>					
COVID-19 SCENARIOS	Paid Sick Leave (employer paid)	Unemployment Insurance		Paid Family & Medical Leave	Industrial Insurance (L&I)
	Current Law	Current Law	Emergency Rule	Current Law	Current Law
1 Worker is mildly ill with COVID-19.	✓	✗	✓	?	?
2 Worker is severely ill with COVID-19.	✓	✗	✗	✓	?
3 Worker was exposed and quarantined. Business remains open.	✓	✗	✓	✗	?
4 Worker is caring for sick family member.	✓	✗	?	✓	✗
5 Schools are closed by a public official because of COVID-19 and worker has no childcare.	✓	✗	?	✗	✗
6 Worker is immune-compromised and advised to self-quarantine.	?	✗	✓	?	✗
7 Worker is following the advice of public health and government officials to self-quarantine and chooses not to go to work.	✗	✗	✓	✗	✗
8 Employer must shut down due to a quarantine by a public official.	✓	✓	✓	✗	?
9 Employer shuts down due to a business slowdown or lack of demand.	✗	✓	✓	✗	?
10 Employer reduces available hours due to business slowdown or lack of demand.	✗	✓	✓	✗	?
11 Employer stays open in defiance of public health urging to close.	✗	?	?	✗	?
12 Health care workers and first responder are under quarantine.	✓	✗	✗	✗	✓


Employment Security Department
WASHINGTON STATE

The Employment Security Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance services for limited English proficient individuals are available free of charge. Washington Relay Service: 711

 **YES**
 **NO**
 **MAYBE**
(case by case)

ESD.WA.GOV

Unemployment Emergency Rules

- An individual is considered to have been “laid off due to lack of work” when:
- The individual is subject to a “Stay-Home Order” and does not have the ability to telework; OR
- The individual works for an “essential service” but does not have the ability to telework with pay, and the individual is:
 - A person identified by the CDC as high risk for severe illness from COVID-19;
 - In the same household as a person identified by CDC as high risk;
 - Providing direct care to a person identified by the CDC as high risk; OR
 - Working at a worksite that does not follow the rules or guidelines published state agencies for protecting workers from COVID-19 exposure.
- **CDC High Risk:** 65 or older or has certain underlying medical conditions:

<https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>

Unemployment Overview – CARES Act

- **Pandemic Unemployment Assistance (“PUA”)** - Extends benefits to those who would not otherwise qualify, such as the self-employed, underemployed, and those who have exhausted unemployment benefits. Must self-certify one of eleven COVID-19-related reasons applies.
- **Emergency Increase in Unemployment Compensation (“EIUC”)** - *Adds \$600 to all weekly benefit payments through July 31, 2020*, so long as the claimant would otherwise receive at least \$1.00 per week in benefits payments. Applies to PUA and PEUC programs.
- **Pandemic Emergency Unemployment Compensation (“PEUC”)** - *Extends regular unemployment claims by an extra 13 weeks through December 2020.*

Unemployment Overview – Eligibility Checker

ELIGIBILITY CHECKER		
Do I qualify for regular unemployment benefits?	YES	NO
1. Did you work at least 680 hours in your "base year?" Your base year is the first four of the last five completed calendar quarters before the week you apply for benefits.	<input type="checkbox"/>	<input type="checkbox"/>
2. Did you work in Washington state sometime in the last 18 months?	<input type="checkbox"/>	<input type="checkbox"/>
3. Are you able to work? Able to work means you are mentally and physically able to work.	<input type="checkbox"/>	<input type="checkbox"/>
4. Are you available for work? Available to work means you are able to work without restrictions that would prevent you from accepting work (for example: transportation issues, illness, vacations, or lack of family/childcare).	<input type="checkbox"/>	<input type="checkbox"/>
5. Were you laid off? Find out more about being laid off.	<input type="checkbox"/>	<input type="checkbox"/>
6. Did you quit your job? Find out more about quitting.	<input type="checkbox"/>	<input type="checkbox"/>
7. Were you discharged from the military in the last 18 months? Find out more.	<input type="checkbox"/>	<input type="checkbox"/>
8. None of these statements apply to me. If none apply, select Yes. <ul style="list-style-type: none">I was fired and it was my fault. Find out more about being at fault.I am on strike from my employer.I am on a leave of absence from my job.I am still working.	<input type="checkbox"/>	<input type="checkbox"/>

If you answered **Yes** to MOST of these questions: You will likely qualify for regular unemployment benefits. Apply for benefits as soon as possible and we will review your application and decide if you qualify. **To avoid mistakes and get paid faster, please be sure to download the application checklist and read the information at esd.wa.gov/unemployment before applying.**

If you answered **No** to MOST of these questions: You might not qualify for regular benefits but could qualify for expanded benefits under the federal CARES Act during the COVID-19 pandemic. Complete the checklist on the next page to see if you could be eligible.

UPDATED: 04.21.20

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ELIGIBILITY CHECKER		
Do I qualify for expanded unemployment benefits related to the COVID-19 pandemic?	YES	NO
1. Are you out of work or working less than normal because of COVID-19?	<input type="checkbox"/>	<input type="checkbox"/>
2. Were you recently denied for unemployment because you hadn't worked 680 hours?	<input type="checkbox"/>	<input type="checkbox"/>
3. Did you work, but worked fewer than 680 hours in Washington in the past 18 months?	<input type="checkbox"/>	<input type="checkbox"/>
4. Were you diagnosed with COVID-19, severely ill and unable to work?	<input type="checkbox"/>	<input type="checkbox"/>
5. Are you showing symptoms of COVID-19 and are either waiting for results of a test or seeking medical attention?	<input type="checkbox"/>	<input type="checkbox"/>
6. Are you at high risk AND a medical provider has told you to stay home?	<input type="checkbox"/>	<input type="checkbox"/>
7. Are you caring for a family member or dependent who has COVID-19?	<input type="checkbox"/>	<input type="checkbox"/>
8. Do you have a family member or dependent who is showing symptoms of COVID-19 and is seeking medical attention?	<input type="checkbox"/>	<input type="checkbox"/>
9. Do you have a family member or dependent who is high risk, lives with you and is staying home for their protection?	<input type="checkbox"/>	<input type="checkbox"/>
10. Are you caring for a high-risk person who has been advised to stay home for their protection?	<input type="checkbox"/>	<input type="checkbox"/>
11. Has your child's school been closed and you are unable to find child care?	<input type="checkbox"/>	<input type="checkbox"/>
12. Is your workplace closed because of an official order or a case of COVID-19, and you are unable to work from home?	<input type="checkbox"/>	<input type="checkbox"/>
13. Are you self-employed?	<input type="checkbox"/>	<input type="checkbox"/>
14. None of these statements apply to me. If none apply, select Yes. <ul style="list-style-type: none">I quit my job for reasons unrelated to COVID-19.I quit my job just to collect unemployment benefits.I am currently receiving vacation leave, sick leave or paid time off.I can work from home but am choosing not to.I am an essential worker, not high risk and my workplace has met requirements for my safety, but I'm too afraid to work.	<input type="checkbox"/>	<input type="checkbox"/>

If you answered **Yes** to ANY questions 1-13 AND question 14, you are likely eligible for unemployment benefits during the COVID-19 pandemic. If you answered **No** to ALL of these questions, you might not be eligible. If you think you are eligible under the expanded benefits, please visit esd.wa.gov to learn more, get ready and apply.

UPDATED: 04.22.20


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Available at:

<https://esdorchardstorage.blob.core.windows.net/esdwa/Default/ESDWAGOV/Unemployment/UIEligibilityChecker.pdf>

EMPLOYMENTLAW.DWT.COM



Employee Benefits Considerations

Christine Hawkins

Employee Benefits Considerations

- Remember to consider how returning employees will be treated under retirement and welfare plans
- Immediate participation in 401(k) plan
 - New elections
- If health coverage was not maintained, employers may waive waiting period
- Recent guidance gives employees extended period to elect COBRA for any gap in coverage
- Join our employee benefits webinar on May 18th



Q&A



Thank You!



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