

When Are Workers Eligible for E-PSL Because of Government “Stay at Home” Orders? Not As Often As You Might Think.

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Under new federal legislation, employees may take Emergency Paid Sick Leave (E-PSL) when they are subject to a government issued “quarantine or isolation order.” Originally, it appeared that this provision referred only to individualized orders directed to a particular person or group. But the U.S. Department of Labor’s (USDOL) new E-PSL regulations clarify that “quarantine or isolation orders” may include general “stay at home” or “shelter in place” orders such as those currently in effect in Oregon, Washington and California.

So can all Oregon, Washington and California employees take E-PSL? Not really. In fact, the West Coast orders do not qualify most employees for E-PSL.

Oregon’s [Executive Order 20-12](#) closes some businesses, but allows most to continue. Certain businesses (such as hair salons and amusement parks) must close because they cannot operate without violating social distancing requirements. But the order simply requires most remaining businesses to implement telecommuting whenever possible, and to implement social distancing when telecommuting is not possible. Thus, in practice, most Oregon employees are not losing work due to Oregon’s “stay home” order. This is because the order affects only those employees (1) in the few categories of businesses closed by the order or (2) who cannot otherwise work with appropriate social distancing.

Washington’s [Executive Order 20-25](#) takes a different approach, closing all businesses except those deemed “essential” and those which can be conducted remotely. Workers are not prohibited from working in essential businesses or from conducting remote business. “Non-essential” businesses may maintain only “minimum basic operations” in person. This means that (1) employees in “non-essential” businesses (2) who cannot telecommute and (3) who are not part of the employer’s “minimum basic operations” are, according to the Department of Labor, subject to a “quarantine or isolation order.” Thus, they appear to be entitled to E-PSL.

California’s [Executive Order N-33-20](#) requires all individuals living in the State to stay at home except as needed to maintain continuity of operation of [essential critical infrastructure sectors](#). Only businesses that provide essential services may remain open. Thus, a California employee of a “non-essential” business would appear, at first glance, to be eligible for E-PSL.

But the E-PSL regulations regarding whether a government order triggers E-PSL have one more important eligibility requirement: employees are not eligible for E-PSL if no work is available. And obviously, if the business is closed due to a stay-at-home order, then no work is available. So how could an employee ever receive E-PSL? The regulations do not resolve this dilemma with clarity, but we can glean some several helpful principles to consider.

- The employee is not eligible for E-PSL if the business closed for economic reasons, even those indirectly related to coronavirus. For example, a business that closes because it has fewer customers due to a “stay at home” order does not have work for the employee; thus, the employee may not claim E-PSL.

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- The employee is not eligible for E-PSL because an executive order required the business to close. In that case, again, the employer does not have work for the employee.
- The employee is eligible for E-PSL if the executive order required the employee to stay home – but only if work is still available. If the employer is also closed due to the same executive order, then no work is available and the employee is still not eligible.

As the E-PSL regulations make clear, if the employee is not working because there is no work for the employee, then the employee should apply for unemployment benefits.

The bottom line in Oregon, Washington, and California? There are vanishingly few scenarios in which the executive orders would qualify an employee for E-PSL.

- Oregon’s “stay at home” order ends or limits business activity, but does not prevent any employees from going to work. Thus, the order will not generally prohibit an employee from going to work when work is available – and practically no Oregon employees will be eligible for E-PSL because of the order.
- Washington’s and California’s “stay at home” orders also close or limit even more business activities. Likewise, the order does not prevent employees from working when work is available, including if they can work from home or work for an essential business or in an essential position. The restrictions on businesses and individuals coincide. If an employee is prohibited from working in a business, that business is also closed. If an employee is allowed to work, that workplace is open. Thus, practically no Washington or California employees will be eligible for E-PSL because of the executive order.

This interpretation could change. Notably, some members of Congress have already complained to the DOL that its regulations limit E-PSL unnecessarily. We are continuing to monitor the situation and will issue additional updates if the situation changes.

In the meantime, the individual facts of each situation may vary widely, and it is worth doing an individual legal analysis if there are any doubts about a particular employee’s eligibility.

For more information about ongoing developments related to COVID-19, visit [Miller Nash Graham & Dunn’s resource library](#).

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