Municipal Research News

LOCAL GOVERNMENT SUCCESS

Washington Local Governments Tackle Reopening Plans  page 3

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For more than 80 years, local governments in Washington State have turned to MRSC for assistance. Our trusted staff attorneys, policy consultants, and finance experts have decades of experience and provide personalized guidance through Ask MRSC and our extensive online resources. Every year we help thousands of staff and elected officials research policies, comply with state and federal laws, and improve day-to-day operations through best practices.

Municipal Research News is published quarterly to inform, engage, and educate readers about ongoing and emerging issues. In print and online at the MRSC Insight blog, we cover such major topics as the Public Records Act, to name a few. When the legal landscape changes, we are here to clarify the issues and help local government leaders make the right decisions for their communities.

**MRSC Rosters Helps Agencies Contract Faster, More Efficiently**

MRSC Rosters is a membership service that hosts small public works, consultant rosters, and vendor rosters for Washington State public agencies using a single, online database. MRSC Rosters offers public agencies access to large groups of vendors with experience serving local government clients, more than what is normally available in an agency-specific vendor roster. It also provides all the legal and customer service maintenance public agencies need when using the roster contracting process.

MRSC has been offering this service since 2007, when the City of Lynnwood discontinued their 45-member Puget Sound-based shared roster program. Today, MRSC Rosters serves over 600 Washington cities, counties, and special purpose districts.

**PROGRAM BENEFITS**

For a modest annual membership fee, MRSC Rosters takes care of posting the required legal notice on your behalf, covers customer support for business registration and application renewal, and maintains all electronic business applications in a user-friendly, searchable database.

MRSC Rosters is good for businesses too. Rather than filing multiple times with individual agencies, MRSC Rosters business members need just one central location where their firm can be listed on multiple agency rosters within their service area. This lowers the barrier for businesses to participate in the roster contracting process, making the process more accessible and equitable. Membership in MRSC Rosters allows your public agency to host your individual small works, consultant, and vendor rosters in the shared database, and offers you access to additional businesses that have an interest in contracting with your public agency.

**ANNOUNCING BIG CHANGES**

MRSC Rosters is now open for enrollment for public agencies on a rolling basis. This means as soon as a public agency completes their online application process, they will be able to access and start using the program.

We have been hard at work updating the rosters website to make applications and renewals a more user-friendly process for our public agencies and businesses. This means no more paper applications—new and renewing public agencies can now complete the whole application process online. Additionally, we’ve made it much easier for businesses and public agencies to reset their login information, meaning you will no longer be required to contact us to update your login information. These updates will take effect sometime this summer.

We would also like to introduce Maggie Dalzell as our new Rosters Program Coordinator. Maggie joined MRSC in April 2021 and brings a decade of program coordination and customer service experience. If you have any questions or would like to reach out, you can reach Maggie at mdalzell@mrsc.org or 206-652-1300 ext. 120. Of course, you can continue to email mrscrosters@mrsc.org or call 206-436-3798.
The COVID-19 pandemic has pushed local governments to innovate at a pace that is rarely possible under normal circumstances. Cities, counties, and special districts drafted telecommute options overnight and created online tools and portals to keep business operations functioning. Now that office work is returning to more normal conditions, local governments are taking the same creativity, technology, and information-sharing that helped us get through the past year and are applying it to the challenges of operating under more settled but still uncertain conditions.

Local governments are reopening their public buildings to staff and the public at a time when public health and safety guidance and requirements are still somewhat fluid. So, let’s take a look how local governments in Washington are adapting to changing conditions as they reopen their public spaces.

**TIMING OF REOPENING**

Local governments are taking a variety of approaches to the timing and phasing of office reopening. A recent poll of the 222 local government staff who attended our Policies and Practices for the Post-COVID Office webinar yielded the following results to the question, “When is your agency planning to have non-essential workers return to the office on a regular schedule?”

- **23%** – We have no established timeframe
- **28%** – We are opening in June or July
- **21%** – We are already opened
- **17%** – We are opening in August or September
- **2%** – We are opening by the end of the year

Several local governments are planning a phased return to the office. The City of Redmond’s Stay Safe Reopening Plan includes a five-stage strategy for reopening city facilities, services, and programs. Under this plan, the city’s workforce returns gradually and facilities initially reopen for limited hours. Transitions to the next stage are based on guidelines and data analysis offered by the State of Washington.

Some local governments are taking a two-phased approach to returning to the office. Phase 1 includes a reopening of public buildings for walk-in customer service, which adheres to Governor Inslee’s June 30 statewide reopening goal. In this phase, a city hall or county courthouse would be open for limited walk-in services, with commensurate office staffing. Walk-in services would be available during restricted hours or by appointment only. In Phase 2, all remaining local government staff would return to the office, typically planned for September or October.

Note that the statewide reopening goal of June 30 does not automatically compel cities and counties to open up city hall or the county courthouse to the public on that specific date. Local government elected officials have the authority to establish the days and hours that offices are open for the transaction of business under RCW 35A.21.070 (code cities), RCW 35.21.175 (non-code cities and towns), and RCW 36.16.100 (counties).

**VACCINATION AND FACE MASK POLICIES**

As with office reopening, local governments are taking a range of approaches to vaccination and mask-wearing. One common approach is to establish clear face mask rules for fully vaccinated and non-vaccinated employees.

The City of Walla Walla has clear rules for either group: Fully vaccinated employees are not required to wear masks but have the option to do so. Non-vaccinated employees are required to wear masks except under limited circumstances. Publicly accessible lobby areas have posted signs that state: “Wearing a mask remains required for non-vaccinated patrons and is encouraged but not required for fully vaccinated patrons.” Libraries and recreation facilities that serve children under 12 who are not currently eligible for vaccination require masks for all patrons.

Another common approach is to continue to require employees to wear face masks in all indoor settings. This approach may be preferred in cases where it is in alignment with county public health officer guidance or requirements, which can be stricter than state guidance. Some local governments are choosing this approach to avoid staff divisions based on vaccine status or because of concerns about creating public records related to vaccination.

Guidance from the Washington State Labor and Industries states that, before ending masking and social distancing requirements, employers must confirm whether workers are fully vaccinated by having the worker sign a document attesting to their status or provide proof of vaccination.

**UPDATED TELECOMMUTE POLICIES**

When establishing criteria for telework eligibility, consider whether the criteria treat lower wage employees equitably. Of the local governments updating their policies, several started with a staff survey to gain insight into the benefits and challenges of working remotely. The City of Shoreline’s survey has specific questions about improving communications and information flow in a remote work environment. The City of Kent’s survey includes feedback on the kinds of technology support that staff has requested assistance with over a standard work week.

Updated telework policies generally offer more flexibility than pre-COVID practices (which often discouraged working from home on a regular basis). These new policies may or may not specify a minimum number of days that employees must be present in the office. In either case, the key to a successful remote working relationship is for managers to stay in touch with employees, remote or otherwise. In today’s workplace, checking in on a coworker remotely can be as easy as walking down the hall to speak to them, and managers should be comfortable using digital communication tools.

When establishing criteria for telework eligibility, consider whether the criteria treat lower wage employees equitably. Often, these employees staff the front counter and may not have been able to telecommute in the past. However, the past year has shown that local governments can provide outstanding customer service online or from a remote location. Think creatively about how to provide convenient service and be curious as to why some customers prefer to travel to your offices to conduct business. You may find opportunities that allow the flexibility for your valued customer service staff to work from home, even if on a more limited basis.

New policies, checklists, and telecommuting agreements adopted by Whatcom County and the City of Kent show approaches to addressing typical provisions, including:

- established criteria for the types of positions that qualify for telecommuting options;
- work schedules and work coverage expectations, including standard work hours and breaks;
- respective responsibilities of the agency and the employee related to at-home technology and equipment;
- workplace safety provisions;
- records security and management standards;
- telecommute-agreement signed by the employee and appropriate agency representatives.

MRSC will continue to gather information on how area agencies are handling operations, personnel, and facilities decisions as the end of the COVID-19 pandemic approaches. If you are interested in sharing your agency’s reopening plan, please send it to tburrows@mrsc.org.
Federal and state agencies have published several documents related to wearing facial coverings. Some are “guidance” and may not be mandatory, and some are “orders” and are mandatory. You should review each one carefully with your attorney and risk carrier to determine your agency’s specific policies. Based on the guidance we’ve reviewed, here are a few broad takeaways to consider:

- All persons in healthcare settings, correctional facilities, homeless shelters, schools, and public transportation must wear masks, regardless of their vaccination status.
- For all other local government employees, the face mask guidance for unvaccinated employees and visitors has not changed. However, fully vaccinated people (those who are two weeks past the date of their final vaccination) are no longer required to wear a mask if they provide proof of vaccination.
- If your county public health officer or other local health authority has imposed a stricter mask requirement than the state, you should adhere to the local requirements.
- Any employee may impose their own stricter mask requirements, regardless of the state or local mandates, and no local authority may prevent an employer from doing so or checking vaccination status.
- Local agencies can enforce masking requirements for visitors, and public transportation passengers are still required to wear masks. Local agencies must continue to comply with the Americans with Disabilities Act and provide reasonable accommodations to employees or visitors who say they are unable to wear a facial covering, and the individual is not required to explain their condition. If the visitor declines to provide information or says that they refuse to wear a face covering (not exempt under the face covering order and proclamation but unwilling to wear a face covering), the agency must deny the customer entry/service (unless there are worker safety concerns).

Based on the guidance we’ve reviewed, here are a few broad takeaways to consider:

- All persons in healthcare settings, correctional facilities, homeless shelters, schools, and public transportation must wear masks, regardless of their vaccination status.
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Finally, local agencies can verify vaccination status. For employees, agencies can ask to see a copy of a vaccination record, have a person sign a form saying they are vaccinated, or record their employees’ vaccination status in a logbook (including employee name and method of confirming their vaccination status). Employers are not required to maintain records demonstrating the underlying proof of the employees’ vaccination status but must provide the Washington State Department of Labor and Industries (L&I) access to the logbook if requested during an investigation. For employees, make sure your process complies with the requirements on pages 13-14 of L&I’s DOSH Directive 1.70.

For visitors to your customer service areas, agencies should follow the Professional Services COVID-19 Requirements guidance from Governor Inslee’s office. That guidance allows agencies to implement an honor system, engage with visitors to ask about vaccination status, require proof of vaccination status, or continue mandating the use of face coverings. This verification process only applies to your customer service areas. For public meetings, agencies are required to comply with the governor’s Miscellaneous Venues COVID-19 Requirements guidance, which requires vaccination record be verified by a medical professional. If the customer says they are fully vaccinated and therefore exempt under the proclamation, the agency may allow the customer to enter without further inquiry. If the customer states they are not fully vaccinated but are otherwise exempt under the proclamation, the agency may offer a reasonable accommodation (an alternative way to receive service, if possible). If the customer refuses the reasonable accommodation, the agency must deny the person entry. If the customer declines to provide information or says that they refuse to wear a face covering (not exempt under the face covering order and proclamation but unwilling to wear a face covering), the agency must deny the customer entry/service (unless there are worker safety concerns). However, be aware of medical privacy laws; only ask for the minimum information you need (vaccinated or not – or have an exemption) to decide whether to provide services in person or by some other method. Don’t keep a copy of a medical record if you don’t have a good business reason to do so – just have staff ask to see the document and then note that it has been seen.

Also, SSB 5254, which took effect on April 26, says that during a declared public health emergency, employers must allow employees to wear a mask or other protective equipment if the employee chooses to (with limited exceptions related to workplace safety and operations). In other words, if a fully vaccinated employee wants to continue voluntarily wearing a face mask for the duration of the declared emergency, even if it is no longer required by the state or the employer, the employer generally must let them.

**CURRENT GUIDANCE**

This article will provide just an overview of new guidance from the Centers for Disease Control and Prevention (CDC), Governor Inslee’s Proclamation 20-25.13, Washington State Secretary of Health’s Order 20-25.2, and L&I’s Key COVID-19 Updates for Fully Vaccinated Workers.

Remember that your local health department or board still has the authority to issue requirements that are more restrictive than those of the state unless state guidance specifically prohibits supplemental regulation. (For example, King County and Jefferson County still require or strongly recommend that fully vaccinated people continue to wear masks indoors).

**NEW CDC GUIDANCE**

The CDC’s new guidance for fully vaccinated people (updated May 6, 2021) and its public transportation order (issued January 29, 2021) underpin the latest state requirements. If you are fully vaccinated (it has been at least two weeks since you received your final vaccine shot), the CDC says that you do not need to wear a facial covering. However, there are several exceptions. The CDC still recommends that fully vaccinated people wear a facial covering if: required by local law or a local business; traveling on planes, buses, trains, and other forms of public transportation into, within, or out of the United States, and in U.S. transportation hubs such as airports and stations; and/or required to do so, such as in a healthcare setting.

**GOVERNOR’S PROCLAMATION 20-25.13**

Under the proclamation, fully vaccinated workers do not have to wear face masks on the jobsite (except for “CDC exempted locations”) if the employee provides proof of vaccination or a signed attestation form to their employer. However, the proclamation allows businesses or local authorities to impose their own stricter face mask requirements, and local authorities may not prohibit businesses or other local authorities from imposing their own face mask requirements or requiring proof of vaccination.

**SECRETARY OF HEALTH’S ORDER NO. 20-03.2**

Effective May 15, 2021, the order requires people to wear a face covering “when they are in a place where people from outside their household are present or in a place that is generally accessible to people from outside their household.” However, the exceptions have been updated so that people are not required to wear a face covering outdoors, if they can maintain six-foot separation from people outside their household; at small, private gatherings where anyone attending is either fully vaccinated or is unvaccinated but living in a single household (where no one is at increased risk for severe illness from COVID-19); and while eating or drinking, subject to specific limits in the state’s Healthy Washington – Roadmap to Recovery plan.

The order also provides for blanket exemptions from wearing a face covering for people fully vaccinated – except when they are in healthcare settings, correctional facilities, homeless shelters, or schools – children younger than five years old, and people with a condition — medical or otherwise — that prevents wearing a face covering.

**L&I’S UPDATES FOR FULLY VACCINATED WORKERS**

The Key COVID-19 Updates for Fully Vaccinated Workers fact sheet was published May 25, 2021.

Before ending masking and social distancing requirements, L&I requires employers confirm whether workers are fully vaccinated by having the worker sign a document attesting to their status or provide proof of vaccination. L&I provides several options for employers to verify vaccination status, including (but not necessarily limited to): creating a log of workers who have verified they’ve been vaccinated and the date of the verification (not the date of vaccination), checking vaccination status each day as workers enter the jobsite; or marking a worker’s badge or credential to show that they are vaccinated. DOSH Directive 1.70 also provides more
ASK MRSC

Questions about what constitutes a public record under the Public Records Act (PRA)

Every month, Ask MRSC receives hundreds of inquiries from Washington cities, towns, counties, and certain special purpose districts. The following is a sample of these inquiries and the answers provided by our skilled legal and policy consultants.

If a staff member installs and uses a cloud-based communications tool like Microsoft Teams on their personal cell phone, is it possible that their phone would be subject to a search for information in response to a public records request?

Agencies are required to conduct a reasonable search of the likely locations for responsive records. If you are confident that nothing is stored on the personal device, then it would be an unlikely location to find responsive records. The Public Records Officer will still need to coordinate with the staffer and potentially have the staffer search their phone for responsive records.

Also, you would want to confirm that the phone was set up so that it is in fact fully synced with the remote server. For example, the Outlook app for iPhone can be configured so that changes made in the local view are not necessarily the same as the desktop view (like “mark as unread”, etc.).

It is possible that some sort of transitory/temporary file is stored on the personal device, but this data is of a temporary nature and usually overwrites very quickly and is not generally accessible by reasonable means (but you will want to confirm this with Microsoft.) Keep in mind that metadata only needs to be produced if specifically requested, and only if technically feasible and financially reasonable for the agency to do so.

Are preliminary site plans that are pending approval subject to public records disclosure? Does a site plan pending approval qualify as a deliberative process and draft under RCW 42.56.280?

MRSC has consistently advised that for the exemption in RCW 42.56.280 to apply, the draft documents must discuss opinions or the formulation of policy. This exemption does not generally apply to documents submitted as part of the permitting process. To rely on this exemption, an agency must show:

• that the records contain pre-decisional opinions or recommendations expressed as part of a deliberative process;
• that disclosure would be injurious to the deliberative or consultative function of the process;
• that disclosure would inhibit the flow of recommendations, observations, and opinions; and
• that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based.


This exemption is focused on the deliberative and policy-making process within an agency and the exemption disappears once the agency takes final action on the issue.

Yes, a resignation letter is a public record that is subject to disclosure under the PRA. There is no general exemption that would allow an agency to withhold the letter. It’s possible there would be personal information exempt based on RCW 42.56.250(4) or potentially a privacy exemption under RCW 42.56.230 if there are unsubstantiated allegations included in the letter. You will want to review the content of any requested letter to see if there is any information that might fall within such an exemption.

The city could also provide third party notice to the former employee who wrote the letter and/or anyone mentioned within the letter pursuant to RCW 42.56.540, if it felt such individuals would potentially want to seek an injunction preventing the letter’s release.

You will want to fully document your decision-making process, evidence that all records are actually stored on the remote server, such that comprehensive searching of a personal devices by the staff member is probably not necessary, as well as any configuration requirements. Make sure the public records officer has a copy of that documentation.

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Details on acceptable verification of vaccination status.

UPDATING YOUR AGENCY’S REOPENING PLAN

As agencies continue to update their return-to-work policies, the governor’s Healthy Washington - Roadmap to Recovery provides some helpful guidance on when employees should wear masks and other personal protective equipment. However, this document is typically updated only once per month (latest update was May 17) and it had not yet been updated to address the new requirements for vaccinated versus unvaccinated people.

COMPLIANCE & ENFORCEMENT

MRSC believes that local agencies may require employees to comply with directives to wear a facial covering. As for customers and other public visitors to your agency’s facilities, we believe that you have the statutory authority to require them to wear a face covering if they want to conduct business in person.

Local agencies must continue to comply with the Americans with Disabilities Act and make reasonable accommodations if necessary. As always, local agencies are encouraged to work with the Americans with Disabilities Act (ADA) compliance officer and other local agencies to be sure the public records officer has a copy of that documentation.

Steve Gross, Legal Consultant, writes about a variety of topics impacting local governments. He has worked in municipal law and government for over 20 years. sgross@mrsc.org

Have a Question? Ask MRSC. Call us at (206) 625-1300 or (800) 933-6772 or submit your question online at mrsc.org
The small works roster process provides the opportunity for public agencies to waive retainage and payment and performance bonds on applicable projects. A question to consider is, “What is the benefit of doing so?” This blog focuses on why an agency might waive retainage and bonds for a project.

**APPLICABLE STATUTES**

RCW 39.04.155 provides procedures when using the small works roster. Section 2(f) outlines the authorization to waive retainage (required in RCW 60.28) when using the roster process. Additionally, Section 3(b) outlines procedures for limited public works projects under the small works roster. This process allows waiver of both retainage (required in RCW 60.28) and the payment and performance bond (required in RCW 39.08).

RCW 39.08.030 also authorizes the waiver of the performance bond. This authority is for any project under $150,000, but in exercising this option, an agency would be required to hold 10% retainage.

**CONSIDERATIONS: THE BENEFITS**

Public agencies tend to look at the waiver opportunities as a way to manage a public works process more expeditiously, saving time, paperwork, and the oversight involved in otherwise requiring retainage and a performance bond.

This can be a great advantage for a busy agency; it keeps their focus on the actual projects that are necessary rather than tending to all the same requirements of larger projects. It can also be an advantage for an agency that does not conduct many public works projects and might find it challenging to manage the processes of retainage and bonds.

There has been some speculation that these waivers also afford contractors who are newer to public works, or possibly small and/or minority/women owned businesses, a better chance to gain experience with public works projects when there are fewer hoops to jump through. As they become more familiar with the public works process in general, these contractors can become more acclimated to the additional requirements of public works contracting in preparation of seeking larger projects. In the process, they can build relationships and a reputation for compliance.

**CONSIDERATIONS: THE DOWNSIDE**

To look at potential negative impacts, it is helpful to review the intent behind requiring retainage and performance bonds.

Retainage, required in RCW 60.28, acts as a trust fund for the protection and payment of: 1) the claims of any person arising under the contract; and 2) the state, with respect to unemploy-ment compensation premiums, industrial insurance, and taxes, increases, and penalties imposed pursuant to Titles 50, 51, and 82 RCW, respectively, which may be due from the contractor.

Subsequently, liens on retainage may be made for unpaid labor or material suppliers as well as for unpaid state taxes and premiums.

When a public agency waives the contract bond and the contract retainage, the agency assumes liability for any claims that would otherwise be made against these protections. This might unexpectedly lead to a significant claim against the public agency.

In general, if a debt is owed to one of the state agencies that is collectible against retainage, the state agency would attempt to collect otherwise be made against these protections. This might unexpectedly lead to a significant claim against the public agency.

SUMMARY

In recent years, legislation has been passed that allows for increased opportunities for waiver of retainage and bonds. The full impact of these allowances, therefore, is not yet known. However, if there are fiscal impacts to the state agencies, accountability could come back to the public agency. As more data becomes available on the impact of these actions, other legislative actions could possibly arise. In the meantime, public agencies may want to affirm how the decision to waive retainage and bonds on certain projects aligns with their perceptions of the impacts, beneficial or otherwise.

Judy Isaac, Public Works Consultant, has experience in public works and public procurement, including purchasing positions with the City of Redmond and the City of Shoreline, and most recently as Purchasing Manager for KCDA Purchasing Cooperative. Working in areas of procurement and project management has provided Judy significant experience in both the public and private sectors.

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MRSC offers convenient, online and in-person training across a variety of broad topics including finance and budgeting, government performance, management, public works and contracting, public records act compliance, and land use case law.

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