

CITY OF BURIEN, WASHINGTON

ORDINANCE NO. 757

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BURIEN, WASHINGTON
PROTECTING THE HEALTH, SAFETY, AND PROSPERITY OF GROCERY WORKERS
AND THE GENERAL PUBLIC DURING THE EXISTING STATE OF EMERGENCY.**

WHEREAS, as of January 29, 2021, COVID-19 has resulted in the following:

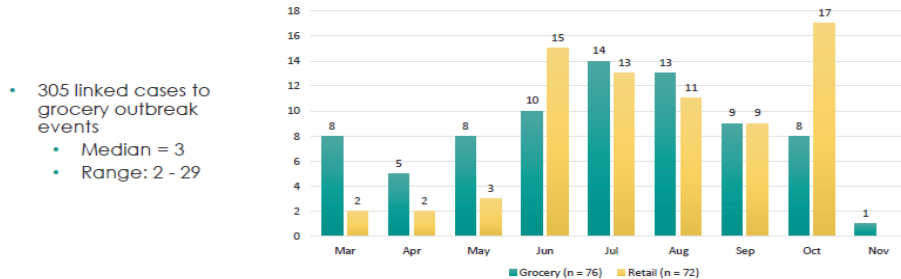
<u>Location</u>	<u>Confirmed cases</u>	<u>Confirmed deaths</u>
Worldwide	101,636,470	2,194,790
United States	26,027,106	437,743
Washington	312,042	4,328
King County, WA	75,682	1,242
Burien, WA	2,536	37

WHEREAS, as of November 7, 2020, there were approximately 1446 non-healthcare setting outbreaks of COVID-19 reported to the Washington State Department of Health. Of those outbreaks

<u>Type of Industry</u>	<u>Number of Outbreaks</u>	<u>Percentage of Total Outbreaks</u>
Service -providing, other	754	52%
Goods-producing	415	29%
Community, other	101	7%
Government	100	7%
Service-providing, grocery	76	5%

WHEREAS, for illustrative purposes, see the following:

COVID-19 Outbreaks in Grocery & Retail Settings*



*Data reflect outbreaks reported to DOH since the beginning of the pandemic.
Data may be incomplete

WHEREAS, in response to COVID-19, on February 29, 2020, Governor Inslee declared a state of emergency; on March 9, 2020, the Burien City Manager declared a State of Emergency; and on March 11, 2020, the World Health Organization declared that COVID-19 was a global pandemic;

WHEREAS, in response to COVID-19, the federal and state governments have imposed eviction moratoria, provided financial support, and imposed public health orders to protect people and businesses;

WHEREAS, municipalities in Alabama, Connecticut, Georgia, Indiana, Kansas, Maine, Maryland, Michigan, Mississippi, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Texas, and Washington, D.C., have approved hazard pay for municipal frontline workers;

WHEREAS, the commonwealth of Massachusetts and state of Ohio have adopted hazard pay for municipal frontline workers;

WHEREAS, during this pandemic, in addition to governmental workers (including public transit workers, postal workers, corrections officers, firefighters/EMTs, and police officers), and healthcare workers, other workers have provided “essential” services, including grocery and general merchandise store workers (especially cashiers), janitors, maintenance workers, agricultural workers, truck drivers, gasoline attendants, food processing workers, and manufacturing workers;

WHEREAS, none of these essential workers can work remotely or by video;

WHEREAS, considering the new racial justice emphasis, we must note that Black, Indigenous, and People of Color (“BIPOC”) employees are overrepresented among, but are not the only members of, the “essential” services workforce;

WHEREAS, while all essential workers are at risk, BIPOC workers are disproportionately impacted by COVID-19 as data shows that COVID-19 disproportionately hospitalizes and kills people of color;

WHEREAS, a March 15, 2020, New York Times article, based on the CDC’s *As Coronavirus Deepens Inequality, Inequality Worsens Its Spread*, noted that 1 in 5 foodservice employees went to work while sick with vomiting or diarrhea for fear of losing their jobs if they stayed home, turning restaurants into vectors for virus outbreaks;

WHEREAS, there is no reason to think that other essential workers don’t have the same fear or continue to work while ill;

WHEREAS, in Burien, concerns about safety are real as a local grocery store had at least 10 employees test positive for COVID-19 in December 2020;

WHEREAS, according to the Brookings Metropolitan Policy Program, the United States' top retail companies, including grocery businesses, have generated record-breaking profits during the pandemic, with the top retail companies accumulating on average an additional \$16.7 billion in profits over the previous year amounting to a 40% increase in profits;

WHEREAS, these profits are at least in part due to the efforts of grocery employees and other essential workers working despite a lethal pandemic and an above-average susceptibility and risk of exposure to COVID-19 in their workplace;

WHEREAS, in exchange for their brave efforts, grocery employees have received limited or inconsistent additional pay despite grocery businesses earning record-breaking profits;

WHEREAS, some grocers and grocer associations argue that they have already provided grocery workers with (temporary) extra pay, paid leave, unemployment insurance, enhanced safety protocols (professional deep cleaning sanitation sessions, social distancing, provided face masks, shielding, and limited store access), and they allege that they are paying increased taxes;

WHEREAS, some grocery workers complain that stores are not thoroughly cleaned, mask requirements for the public are not enforced, and limited store access is not enforced;

WHEREAS, in a study conducted by researchers including Dr. Justin Yang, an assistant professor at Boston University School of Medicine and researcher at Harvard TH Chan School of Public Health, found that the positive rate of infection among grocery employees was five times as likely for those who interacted with customers than for those who did not;

WHEREAS, Seattle, WA, Berkeley, Long Beach, Los Angeles, Oakland, and Santa Clara, CA, have considered, are considering, or have adopted ordinances requiring grocery worker hazard pay;

WHEREAS, Los Angeles' ordinance is based at least in part on an increasing number of outbreaks in grocery stores;

WHEREAS, Washington State Constitution Article XI, Section 11, empowers a city to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws;"

WHEREAS, the Washington Supreme Court has explained that municipal police power “not only extends to enactments designed to protect and promote public peace, health, morals and safety, but also to those intended to promote the general public welfare and prosperity;” and “what is termed the police power of the state, which, in its broadest acceptation, means the general power of the state to preserve and promote the public welfare, even at the expense of private rights.” Tacoma v. Fox, 158 Wash. 325, 330-331 (1930), citing Karasek v. Peier, 22 Wash. 419 (1900);

WHEREAS, the Court added that a state of facts that can reasonably be presumed to exist that would justify the legislation requires the court to presume that the facts did exist and that the law was passed for that reason. Tacoma v. Fox, 158 Wash. at 331;

WHEREAS, in addition to the Washington State Article XI, Section 11, RCW 35A.11.050, provides in pertinent part that “The general grant of municipal power conferred by this chapter and this title on legislative bodies of noncharter code cities and charter code cities is intended to confer the greatest power of local self-government consistent with the Constitution of this state and shall be construed liberally in favor of such cities;”

WHEREAS, RCW 35A.11.020 states that city councils in noncharter and charter code cities “may adopt and enforce ordinances of all kinds relating to and regulating its local or municipal affairs and appropriate to the good government of the city;”

WHEREAS, the Supreme Court has found that the National Labor Relations Act (“NLRA”) does not pre-empt the establishment of a minimum wage and other employee protections since the establishment of a minimum labor standard does not impermissibly intrude upon the collective-bargaining process. Filo Foods, LLC v. City of SeaTac, 183 Wn.2d 770, 797-798 (2015);

WHEREAS, the United States Supreme Court has explained that “the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety as long as the regulations do not violate the United States Constitution.” Jacobson v. Massachusetts, 197 U.S. 11, 24 (1905);

WHEREAS, the United States Supreme Court has opined that “in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.” Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905);

WHEREAS, in Washington, the courts have long admitted that “Courts cannot interfere with legislative discretion, and are slow to declare ordinances invalid because unreasonable, when the power to legislate upon the subject has been conferred upon the common council. The council’s discretion, and not the court’s, must control. In such matters the city authorities are usually better judges than the courts. An ordinance to be void for unreasonableness must be plainly and clearly unreasonable. There must be evidence of weight that it took inception either in a mistake, or in a spirit of fraud or wantonness on the part of the enacting body.” Walla Walla v. Ferdon, 21 Wash. 308, 311 (1899), citation omitted;

WHEREAS, additionally, “Parties cannot complain of an impairment of their contract rights when this impairment comes about through the State acting within its police power for the health, welfare and good of the general public. It is presumed that parties contract with knowledge that reservation of essential attributes of sovereign power is written into all contracts as a postulate of the legal order.” Federated Am. Ins. Co. v. Marquardt, 108 Wn.2d 651, 659 (1987);

WHEREAS, Burien seeks to improve grocery worker safety, compensation for risk by requiring compliance with the federal, state, and county health standards, and to pay employees a wage that reflects the risk to the employees, the employees’ families, acquaintances, and the increased costs to be safe, to obtain and manage personal protective equipment and other expenses;

WHEREAS, the City of Burien recognizes that it will not be able to please everyone or to treat each grocer the same way, and since Burien does not have the resources to adopt an ordinance that requires all stores to make hazard payments and then manage a waiver process for stores to opt-out of a hazard pay ordinance, Burien is considering the impact on smaller and/or independent grocers in Burien since these grocers may not have the financial reserves, purchasing or borrowing power, or access to compete during the pandemic while paying hazard pay since some of them are already working at a loss (perhaps because more people are purchasing their groceries online);

WHEREAS, to protect the general public by allowing frontline or essential workers to earn enough to be able to afford to take sick leave, to ensure that grocery workers continue to work and provide the public with food, that grocery workers have the incentive and means to protect their health and the public’s health, and to protect the public and other workers from ill frontline or essential workers, Burien considers the following ordinance for the benefit of the frontline or essential workers and the community;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BURIEN, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section One.

A. “Grocery business” means a retail store operating in Burien that:

1. Has 250 or more employees worldwide, and is primarily engaged in retailing groceries for offsite consumption including but not limited to the sale of fresh produce, meats, poultry, fish, deli products, dairy products, canned and frozen foods, dry foods, beverages, baked foods, and/or prepared foods; and

2. “Grocery business” does not include convenience stores or food marts primarily engaged in retailing a limited line of goods that generally includes milk, bread, soda, and snacks. “Grocery business” also does not include farmers’ markets.

B. “Grocery employee” means any hourly individual employed by an employer in a retail store, including but not limited to full-time employees, part-time employees, and temporary workers in Burien that works exclusively in a grocery store facility and is unable to work remotely due to employment requirements. ”

Section Two. As permitted [by police powers to adopt and enforce regulations] under Washington State Constitution Article XI, Section 11, Grocery businesses [employers operating in Burien] shall pay [grocery workers] Grocery employees \$5.00 an hour [in addition to the Burien grocery workers’] over the Grocery employees’ hourly rate of pay as hazard pay for any work performed during this Washington State of Emergency. This ordinance shall not apply to [farmers’ markets, convenience stores, or dollar stores with less than 10 full time employees employed in each Burien store, or grocery stores with less than 250 employees worldwide. This ordinance shall not apply to those employees that are already receiving hazard pay of at least \$4.00 an hour.] those Grocery employees that were receiving hazard pay before this ordinance became effective, but if the hazard pay amount is less than \$4.00, the Grocery business shall pay the difference between the regular rate and the hazard rate.

Section Three. Safety. Each Grocery business shall comply with health, safety, staffing, and workplace requirements consistent with applicable federal, state, and local health district requirements. Grocery businesses must disclose any COVID-19 outbreak to Grocery employees within 24 hours of notifying a health district.

Finally, the CDC COVID-19 Guidance or an equivalent must be conspicuously posted in the Grocery employee breakrooms, locker rooms, or lunchrooms. This provision applies to all Grocery businesses regardless of whether Grocery employees are already receiving hazard pay.

Section Four. Enforcement. Grocery employees who find that they have suffered or been injured physically or financially by a Grocery business by its failure to comply with this ordinance shall resort to any remedies that apply according to their employment contract or a collectively bargained agreement. Before resorting to remedies, the Grocery employees shall give a supervisor notice of the violation and give the Grocery business a reasonable time to cure or correct the violation. Violations that do not relate to compensation shall be “grieved” consistent with the Grocery worker’s employment contract or an applicable collectively bargained agreement.

~~[Regarding enforcement,] If no collective bargaining agreement exists, or if those remedies have been exhausted, consistent with Article XI, Section 11, in addition to any existing right to pursue equitable or legal remedies, this ordinance authorizes ~~[grocery workers]~~ Grocery employees or a union acting on a Grocery employee’s behalf to bring an equitable or legal action to enforce or recover unpaid hazard pay in King County Superior Court. ~~[working in Burien to bring an equitable or legal action to enforce this ordinance, or with the permission of the involved Burien grocery workers, a union may bring an equitable or legal action on behalf of those Burien grocery workers.]~~~~

Section Five. Penalties. ~~[Penalties for violation of these provisions shall be a payment to the Burien grocery workers of unpaid earnings;]~~ For any successful claim by a Grocery employee against a Grocery business for unpaid hazard pay, the Grocery employee shall be entitled to recover all unpaid compensation; all attorneys’ fees, court costs, and expenses; and up to a 50% penalty of the unpaid compensation as a court of competent jurisdiction may find appropriate.

Section Six. Termination or revocation. The ordinance shall cease to be effective on the date and at the time that the Washington State of Emergency ends. Council may review whether the ordinance should remain in effect after 4 months from implementation date.

The Enforcement and Penalties sections of this ordinance shall continue for an additional 3 months excluding any time that the Grocery employee has been diagnosed with COVID-19 during those 3 months.

The City Council may revoke or terminate this ordinance as and when it finds appropriate.

Section Seven. Grocery businesses must post a copy of this ordinance next to or near the CDC COVID-19 Guidance or CDC COVID-19 Guidance equivalent within 3 calendar days of adoption.

Section Eight. Passage of this ordinance immediately revokes Ordinance 756.

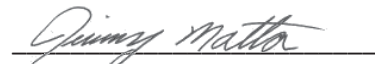
Section Nine. Severability. Should a court of competent jurisdiction find any section, paragraph, sentence, clause, or phrase of this ordinance, or its application to any person or circumstance, unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or pre-emption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

Section Ten. Edits. For purposes of this ordinance, additions are underlined and deletions are stricken with brackets around the deleted language.

Section Eleven. Effective Date. This ordinance shall be published in Burien's official newspaper and shall take effect five (5) calendar days after publication.

ADOPTED BY THE CITY COUNCIL OF THE CITY OF BURIEN, WASHINGTON, AT A REGULAR BUSINESS MEETING THEREOF THIS 8th DAY OF FEBRUARY 2021.


CITY OF BURIEN


Jimmy Matta, Mayor

ATTEST / AUTHENTICATED


Megan Gregor, City Clerk

APPROVED AS TO FORM:


Garmon Newsom II, City Attorney

Passed by the City Council: February 8, 2021
Effective Date: February 17, 2021
Ordinance No. 757
Date of Publication: February 12, 2021