



# Frequently Asked Questions Regarding the COVID-19 – Stay Home, Stay Healthy Order

Issued 03/29/2020

## What is the Stay Home, Stay Healthy Order?

To help prevent the spread of COVID-19 (Coronavirus), effective midnight on Wednesday, March 25th, Governor Inslee issued a statewide "Stay Home, Stay Healthy" order in Proclamation 20-25. The Order will initially last for two weeks and "prohibits all people in Washington State from leaving their homes" and requires the closure of all "non-essential critical infrastructure businesses," subject to limited exceptions. Workers that are considered non-essential and who do not have in-person contact with others, can continue to work remotely from home only. Brokers should be prepared for the possibility that the Order is extended and may be modified.

On Saturday, March 28<sup>th</sup>, in cooperation with Washington Realtors, Governor Inslee made certain modifications to the Order for the benefit of the residential real estate brokerage industry, revising several of the original restrictions on in-person activities – provided that strict protocols for social distancing are implemented. Said differently, the modifications do not allow 'business as usual' in residential transactions. Rather, they allow for very specific real estate services and only if strict adherence to social distancing and hygiene protocols are met. The modifications to the Order DO NOT APPLY TO COMMERCIAL REAL ESTATE.<sup>1</sup>

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<sup>1</sup> "Commercial real estate" means a fee title interest or possessory estate in real property located in this state except an interest in real property which is (a) improved with one single-family residential unit or one multifamily structure with four or less residential units, or (b) unimproved and the maximum permitted development is one to four residential units or structures under the county or city zoning ordinances or comprehensive plan applicable to that real estate, or (c) classified as farm and agricultural land or timberland for assessment purposes pursuant to chapter [84.34](#) RCW, or (d) improved with single-family residential units such as condominiums, townhouses, timeshares, or stand-alone houses in a subdivision that may be legally sold, leased, or otherwise disposed of on a unit-by-unit basis.

This memorandum addresses real estate brokerage services with regard to commercial property. For a discussion of the additional real estate brokerage services that may be provided with regard to residential real estate, please see the bulletin published by NWMLS and WR (the "Residential Bulletin") which can be accessed [here](#).

### **Are commercial real estate brokerage services considered "essential"?**

No. Real estate brokerage services, neither residential nor commercial, are on the list of essential services.

Real estate brokers may, however:

- Provide services to their clients remotely from their house; and
- Use technology services that enable remote business, including online forms, electronic signatures, electronic data and analyses, electronic photographs and videos, and similar tools that can be used from home.

Real estate brokers may not:

- Conduct any business outside of their home, including physically showing properties, visiting clients in-person anywhere, viewing properties, taking property photos, etc. except when brokering residential properties and then **only** in accordance with the protocols established by the Governor as set forth in the Residential Bulletin. There are **no exceptions**.

Any broker who violates the Governor's order not only puts himself/herself and his/her family at great personal risk, but also puts his/her clients at risk and the broker's firm at risk of civil liability for any resulting injury as well as criminal responsibility.

### **Can real estate firms continue "Basic Minimum Operations"?**

Yes. Real estate *firms* may continue to process payroll and benefits, preserve equipment, ensure security, and support the firm's brokers' ability to work from home. Social distancing guidelines must be followed. This exception is to continue only basic, minimum business functions is for identified essential workers only. This is not an exception to the prohibition against a broker leaving home to provide real estate brokerage services.

### **Can lenders, title, and escrow continue to operate during the Stay Home, Stay Healthy Order?**

Yes. The "Financial Services Sector" has been deemed essential. This includes workers who are needed to process and maintain systems for processing financing transactions and services and insurance companies including mortgage lenders, escrow and title insurers.

Because the Financial Services Sector is considered essential, it may be possible for real estate transactions under contract to proceed to closing. Of course, there may be delays, which is why

the parties should use CBA's recently published new Force Majeure addendum and be familiar with the Force Majeure provisions in many of CBA's existing forms. Similarly, brokers should be familiar with any Force Majeure provisions in the non-CBA contracts they use and recommend their clients consider including such provisions in contract documents that lack them.

**Can notaries or mobile notaries function outside their home?**

No. Their function is not considered essential. However, on March 24, 2020 by Proclamation 20-27, Governor Inslee made the provisions Senate Bill 5641, codified at RCW 40.45 which provides for electronic notarization of documents, effective immediately instead of October 1, 2020. The text of the law can be found [here](#).

**Can appraisers conduct in-person appraisals during the Stay Home, Stay Healthy Order?**

Probably not. An appraiser can certainly conduct a remote appraisal, if acceptable to the lender. Appraisers are likely prohibited from conducting in-person appraisals.

**Can experts such as architects, engineers, surveyors and inspectors perform work related to feasibility studies and due diligence?**

No. Such expert services are not considered essential. Those services can be provided only from home.

**Can brokers or their representatives go to a property to provide access to a tenant or buyer before or after a closed transaction?**

Currently, no. If access is not otherwise available to a buyer or tenant at closing, a broker in the transaction may make arrangements for the owner to leave keys at the property, observing social distancing guidelines but brokers may not provide access in-person.

**What if my buyer or seller has questions about their rights and obligations under their purchase and sale agreement or lease?**

As always, brokers have a duty to refer their clients to experts regarding matters in which the broker lacks expertise. Particularly in matters affected by Covid-19 and the Stay Home, Stay Healthy Order, it is unlikely that brokers will have expertise and should advise their clients to seek the advice of an attorney.

**Can brokers continue to physically preview or show properties in any fashion – even alone?**

No. In-person previewing or showing properties is in direct violation of the Governor's order. In addition to property photos, brokers and buyers should utilize marketing materials and data created before the effective date of the order.

**Can real estate brokers input new listings in the CBA system during the Stay Home, Stay Healthy Order? What about property photos?**

Yes. Real estate brokers are permitted to input new listings into the CBA system – from their home. However, brokers may not physically visit the property or otherwise leave their home to take or promote the listing. Likewise, professional photographers are not permitted to visit the property to take photos or create virtual tours or enter the property for any purpose. However, the order does not prohibit an owner permitted to be on the property from taking photos or gathering information and providing it electronically the listing broker.

*PLEASE NOTE:* There is no excuse for submitting photographs to CBA from third parties unless the broker has a license from the third party to do so. By submitting a photograph to CBA, the listing broker warrants that the broker has the legal right to do so, either because the broker owns the photograph and has the copyright or the broker has a license from the copyright holder. Brokers who submit photographs that violate others’ copyrights are liable to CBA and other members for any resulting claim or loss. Do not violate others’ copyrights!

**May moving companies provide services during the Stay Home, Stay Healthy Order?**

No. Movers may not move furnishings or equipment for the duration of the order, unless such services are necessary to support another essential service as defined in the Order.

**Can for-sale/for-lease signs be installed at a property during the Stay Home, Stay Healthy Order?**

No. Brokers and sign companies are not permitted to leave their home to install for sale signs for the duration of the order.

**Can the property manager of a commercial building take action to continue to maintain commercial buildings?**

Yes, such services are deemed essential within certain guidelines set forth in the Appendix to the Order, the provisions of which are too lengthy to be attached hereto but can be viewed [here](#). As always, such services must be provided while observing requirements of social distancing.

**What are Force Majeure Clauses?**

“Force Majeure” is a French term that translates literally as “superior force”. A “Force Majeure event” is an event or effect that can be neither anticipated nor controlled. Many contracts, including many CBA forms, contain a Force Majeure clause allocating risk between the parties if the contract becomes impossible or impractical to perform in the event of a Force Majeure. Common examples of Force Majeure events that may interfere with parties’ ability to perform contracts include acts of nature, such as floods, earthquakes, hurricanes, tornadoes and the

like, and acts of people, such as wars, riots or strikes and, of course, an epidemic/pandemic such as the current pandemic. While it is a near certainty that the COVID-19 pandemic is a Force Majeure, it does not excuse all contract obligations – on contract obligations that it renders impossible or impracticable to perform. Thus, it is always important to direct clients adversely impacted by a Force Majeure to legal counsel for advice.

Force Majeure clauses are not all the same and allocate risks differently. For example, CBA's leases provide that : “[t]ime periods for either party’s performance under any provisions of this Lease (excluding payment of Rent) shall be extended for periods of time during which the party’s performance is prevented due to circumstances beyond such party’s control, including without limitation, fires, floods, earthquakes, lockouts, strikes, embargoes, governmental regulations, acts of God, public enemy, war or other strife.” Thus, the parties have agreed that a Force Majeure event can extend time frames but will not excuse the tenant’s obligation to pay rent. Other Force Majeure provisions may differ. CBA’s purchase and sale agreements do not contain a Force Majeure provision.

### **What do my clients do if their lease or purchase and sale agreement does not include a “Force Majeure” provision?**

Think of a Force Majeure clause like a liquidated damages clause – just because a contract doesn’t have a liquidated damages clause doesn’t mean a party is not responsible for the damages their breach causes. Similarly, just because a contract does not have a Force Majeure clause does not mean that a party might not be excused from performance or timely performance as a result of the fact that it is impossible or impracticable for them to perform in accordance with their contract. Brokers have a nonwaivable duty to refer their clients to an expert to address matters in which the broker lacks expertise. Brokers lack expertise to advise their clients of their rights and obligations under a contract if it becomes impracticable or impossible to perform. Brokers must advise their clients to get the advice of a lawyer immediately if their performance is made impracticable or impossible as a result of Covid-19.

### **What are the sanctions for violation of the Stay Home, Stay Healthy Order?**

Violations of Proclamation 20-25 are a gross misdemeanor and violators may be subject to criminal penalties, meaning a fine of up to a \$5,000 and/or jail time. Further, violations of the Stay Home, Stay Healthy Order by a broker providing real estate brokerage services pursuant to RCW 18.85 are a license law violation and expose the broker and the firm to disciplinary action by the Washington Department of Licensing.

### **How do I stay up to date with matters affecting real estate brokerage and avoid being misled by false rumors?**

There many false rumors and much misinformation being circulated among brokers and the public. Many brokers have acted in reliance on bad information to their embarrassment and detriment. CBA, Washington Realtors, NWMLS and other industry experts communicate daily,

and often more frequently, to keep their members informed of any developments affecting the industry. CBA's, Washington Realtors' and NWMLS's websites will continue to offer the latest and most accurate information possible.