

Legal Q&A

By TML Legal Staff

Does TML have a web page with COVID-19 resources for cities?

Yes, TML has a Coronavirus Resource page with helpful state and federal links, TML and other resources, and current news items. The page is updated every day, and it can be accessed from the TML home page at www.tml.org. More information on the questions in this abbreviated list of Q&As is available on the page by subject matter. City officials with legal questions can always email legalinfo@tml.org or call 512-231-7400 and select option 2.

Is the State of Texas operating under the governor's declared state of disaster?

Yes. On March 31, the governor issued a new executive order (GA-14) that superseded his original social distancing order (GA-08). The new order extends through April 30, 2020. Also, he closed all Texas schools through May 4, 2020, and that date may be extended.

Each city official should read the entire order (available at www.gov.texas.gov), but in summary the order provides that:

- Every person in Texas shall, except where necessary to provide or obtain essential services, minimize social gathering and minimize in-person contact with people who are not in the same household.
- Essential services are those defined by TDEM according to the United States Department of Homeland Security.
- All Texans should follow the President's and CDC's hygiene guidelines.
- All Texans should avoid eating out, but take advantage of carry out and drive-thru restaurants.
- It does not prohibit people from accessing essential services or engaging in essential daily activities, such as going to the grocery store or gas station, providing or obtaining other essential services, visiting parks, hunting or fishing, or engaging in physical activity like jogging or bicycling, so long as the necessary precautions are maintained to reduce the transmission of COVID-19 and to minimize in-person contact with people who are not in the same household.
- Texans should stay away from nursing homes and similar facilities.
- Schools shall remain temporarily closed to in-person classroom attendance and shall not recommence before May 4, 2020.

Does the governor's new order supersede local (e.g., city and county) orders?

Yes, at least partially. It clearly supersedes "any conflicting order issued by local officials in response to the COVID-19 disaster, but only to the extent that such a local order restricts essential services allowed by this executive order or allows gatherings prohibited by this executive order." That means a city may not define essential services differently than TDEM and

the United States Department of Homeland Security have, but even their guidance leaves unanswered questions. It appears that the most significant preemptive effect of the new order is to allow religious gatherings conducted in churches, congregations, and houses of worship, so long as appropriate social distancing guidelines are followed.

Depending on the subject matter, the answer to this question could get complicated. In any case, the Texas attorney general has issued a letter providing that: (1) state agencies and their contractors are not subject to local declarations; and (2) the governor's orders are superior to cities and counties.

Each city should consult local legal counsel with specific conflict-of-law questions.

Has the governor taken action to make videoconference and teleconference meetings easier under the Texas Open Meetings Act?

Yes. The governor has suspended various provisions of the Open Meetings Act pursuant to his state disaster authority, and the attorney general's office has issued guidance on the suspension. The changes are effective March 16, 2020, until further notice or until the state disaster declaration expires.

According to the attorney general, "statutes that may be interpreted to require face-to-face interaction between members of the public and public officials are suspended; provided, however, that governmental bodies must offer alternative methods of communicating with their public officials."

TML understands this to mean that a city doesn't have to allow members of the public to physically attend meetings, but it would need to allow them to submit comments via videoconference, telephone, written submissions, email, or similar means. Id. § 551.007. The idea is to provide as much transparency as possible, while avoiding contact with COVID-19.

Do cities have to provide two-way communication for the public to make comments during an open meeting via telephonic or video conferencing during the emergency?

The answer isn't exactly clear. After the governor suspended various requirements of the Texas Open Meetings Act, the attorney general's office issued guidance on his suspensions. (See detailed reporting on that in a previous update.) The guidance states:

"[T]he dial-in number or videoconference link provided in the [meeting] notice must make the meeting audible to members of the public and allow for their two-way communication..."

Many cities are struggling with finding the technology to allow two-way communications in a reasonable format. The questions above and below provide guidance and options on that issue. However, one quirk has become apparent.

In addition to the above guidance, the governor suspended the new requirement (added by H.B. 2840 last legislative session) that the public has a right to speak on agenda items. The suspended

provision reads as follows:

"Sec. 551.007. PUBLIC TESTIMONY...

(b) A governmental body shall allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting of the body to address the body regarding the item at the meeting before or during the body's consideration of the item..."

Because - for the duration of the statute suspensions - that section no longer mandates a city to allow public comment on normal agenda items, a city isn't required to do so. And, if a city doesn't allow public comment on normal agenda items, the requirement to have two-way communications is superfluous.

Thus, a city might be able to have a telephone conference for city councilmembers and not provide a general public comment session or allow members of the public to speak on agenda items. In any case, it makes sense for a city to allow as much public input as possible. One way cities have done so is to provide an email address and/or drop box where citizens can submit written comments. Another way is that some cities have required citizens who wish to comment to sign up in advance with a telephone number, and then have city staff call the person on the phone at the appropriate time to make their comments.

That advice DOES NOT apply to statutorily-mandated public hearings, such as zoning and similar hearings. A city would need to arrange for public communication at those. Because the attorney general's guidance has conflicting provisions, city officials should consult with local legal counsel regarding their open meetings efforts.

Are Public Information Act (PIA) deadlines modified by COVID-19 disaster response?

In certain circumstances. The days that a city is closed, working with a skeleton crew, or working remotely do not count as business days for purposes of the PIA. The attorney general's office has released a clarification at www.texasattorneygeneral.gov concerning the PIA, calculating business days, and COVID-19.

Are cities eligible for reimbursement from the federal government for expenses related to COVID-19?

On March 13, 2020, the President declared an emergency in response to the COVID-19 pandemic. As a result, local governments, including cities, are eligible to apply for federal assistance.

The declaration provides that eligible emergency protective measures taken to respond to the COVID-19 emergency at the direction or guidance of public health officials may be reimbursed under Category B of FEMA's public assistance program. More detailed information on the eligibility of expenses can be found on under the TML Resources heading on the League's Coronavirus Resources web page.

What action has the governor taken with regard to the May 2, 2020 election?

The governor issued a proclamation authorizing all political subdivisions holding general or special elections on May 2, 2020 to postpone that election to the November 3, 2020 uniform election date. Please be advised that a postponement of your election does not happen automatically; the governing body of the political subdivision MUST take an official action for such a change to be effective.

The Elections Division of the Secretary of State's Office subsequently issued guidance that all but mandates cities make the move:

“Governor Abbott’s March 31, 2020 executive order includes, but is not limited to, the following items. It: (1) extends social distancing guidelines through April 30th, (2) defines essential services, and (3) extends school closures across the state through May 4, 2020. If you haven’t already moved your May 2nd election, you must take action to do so immediately! This most recent executive order will prevent you from securing polling places, recruiting election workers, and allowing voters a safe way to exercise their right to vote. If you don’t move your May 2nd election, you are subjecting voters to health risks and potential criminal violations. Failure to postpone your election will put your election at severe risk for an election contest. (Please note, that while Elections Personnel have been included in the federal government’s advisory on essential critical infrastructure workers, this does not include voters.)”

What is the Families First Coronavirus Response Act?

The Families First Coronavirus Response Act (the "Act") is a federal law that was passed by Congress on March 18, 2020 in response to COVID-19. The Act creates, among other things, Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act. The Act provides payroll tax credits to employers to cover the wages paid to employees under the Act, but state and local governments are not eligible to claim these credits. The law goes into effect on April 2, 2020, and the Department of Labor has issued guidelines at www.dol.gov to help employers navigate the new law.