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FBT COVID-19 Team: Texas Governor Orders Phased Reopening (May 8 Update)

On May 5, 2020, Texas Governor Greg Abbott issued a new executive order continuing the reopening of the Texas economy in the wake of the COVID-19 disaster. After the closure of schools and "non-essential" businesses across the state, the Governor in late April ordered the opening—on a limited, phased-in basis—of a broad swath of establishments, including restaurants, malls, libraries, and movie theaters. The new order expands the range of "reopened services" that may resume operations on a limited basis, while also clarifying the potential consequences for non-compliance.

Open Texas: Gradual Reopening of the Texas Economy

In March 2020, Governor Abbott declared the COVID-19 virus to be a public health disaster. Following this declaration, the Governor issued a series of executive orders limiting commercial activities to "essential services" and imposing social-distancing and other restrictions on a "statewide basis." The category of "essential services" currently encompasses everything listed in the U.S. Department of Homeland Security's Guidance on the Essential Critical Infrastructure Workforce (v. 3.0 or later), "plus" religious services "conducted in churches, congregations, and houses of worship."

In mid-April, the Governor issued several orders taking "the first step to Open Texas." Among other things, the orders permitted "reopened" retail services to operate on a pickup or delivery basis. (Please see Frost Brown Todd's earlier Texas updates from April 20, 2020 and April 7, 2020).

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Phase 1: Most Businesses May Open at 25% Capacity

On April 27, Governor Abbott issued Executive Order GA-18 as "Phase 1" of the "Open Texas" initiative. On May 5, the Governor issued Executive Order GA-21, "relating to the expanded reopening of services as part of the safe, strategic plan to Open Texas in response to the COVID-19 disaster." Order GA-21 builds upon and supersedes GA-18.

Order GA-21 recites that while COVID-19 remains "a serious threat across Texas," the State "must continue to protect lives while restoring livelihoods." To that end, "except where necessary to provide or obtain essential or reopened services," people in Texas should still "minimize" social gatherings and in-person contact with "people who are not in the same household." This is particularly true for persons over age 65, who are "strongly encouraged to stay at home as much as possible." The order does not, however, specify the maximum size of such gatherings or otherwise prohibit them.

"Reopened Services" Include Restaurants, Hair Salons, and Manufacturing Facilities

Executive Order GA-21 contains an expanded list of "reopened services" that may resume operations. The following "reopened services" may operate at up to 25% of their total listed capacity:

- In-store retail services (in addition to the existing pickup, mail, and delivery services)
- Dine-in restaurant services (for restaurants that do not primarily serve alcohol), though "the occupancy limits do not apply to customers seated in outdoor areas of the restaurant"
- Movie theaters
- Shopping malls (though food courts, play areas, and interactive displays and settings must remain closed)
- Museums and libraries (if permitted by local governments, while interactive functions and child play areas must remain closed)

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- Indoor weddings (other than at a house of worship) and wedding receptions—outdoor venues may operate at full capacity

For Texas counties certifying five or fewer confirmed cases of COVID-19, the same establishments may operate at up to 50% capacity.

Beginning at 12:01 a.m. on May 8, 2020, the following "reopened services" may resume operations:

- Hair, nail, and other cosmetology salons (with "at least six feet of social distancing between operating work stations")
- Tanning salons (subject to the same distancing requirement between stations)
- Swimming pools (indoor pools at 25% of total capacity, outdoor pools at 25% of normal operating limits, and public pools only if permitted by local governments)

Beginning at 12:01 a.m. on May 18, 2020, the following "reopened services" may resume operations:

- Services provided by office workers in offices operating with five workers or at 25% of normal workforce, whichever is greater
- Manufacturing services with facilities operating at 25% of listed occupancy
- Gyms and other exercise facilities operating at 25% of listed occupancy (locker rooms and shower facilities remain closed)

Other "reopened services" include:

- Golf course operations
- Local government operations, as determined by the local government
- Additional services to be enumerated by the governor in the future

Schools across Texas remain closed through the 2019-2020 academic year. Order GA-21 permits schools to conduct graduation ceremonies and use their facilities for administrative and remote-learning purposes.

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Other facilities that remain closed include bars, interactive amusement venues (such as amusement parks, arcades, and bowling alleys), massage establishments, and tattoo and piercing studios. The order also keeps in place prohibitions on non-essential visits to nursing homes, state-supported living centers, and assisted-living and long-term care facilities.

Preemption and Enforcement

Like earlier orders, Executive Order GA-21 contains a preemption provision. The order "shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster," but only to the extent such an order "restricts" or "expands" the essential services and reopened services authorized by the order or allows gatherings prohibited by the order. This provision is notable because some Texas counties and cities have imposed different levels of restrictions in response to the COVID-19 disaster. During the question-and-answer portion at a recent press conference, Governor Abbott made clear that any local ordinances or orders contradicting his Executive Order would be preempted.

The order builds in additional flexibility and softens penalties for non-compliance. For example, the order "encourage[s]" people to wear face coverings," but also prohibits local jurisdictions from imposing civil or criminal penalties for not wearing such coverings. Similarly, the order states that while all persons should follow minimum safety protocols, those protocols "should not be used to fault those who act in good faith but can only substantially comply with the standards in light of scarce resources and other extenuating COVID-19 circumstances."

Finally, on May 7, the Governor modified Order GA-21 to "eliminate confinement as a punishment" for violating his executive orders. Normally, under the Texas Government Code, violating an executive order is punishable by a fine of no more than $1,000, jail time of no more than 180 days, or both.

Executive Order GA-21 went into effect immediately upon issuance, and will remain in effect through May 19, 2020, subject to further extension or modification.

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Texans Helping Texans

On April 27, Governor Abbott released *Texans Helping Texans: The Governor's Report to Open Texas*, a 64-page document providing guidance regarding the implementation of Phase 1 of the Open Texas plan. The beginning of the *Texans Helping Texans* report describes special guidance for Texans over age 65; general guidance for all Texans; mitigation recommendations for nursing facilities; actions to increase the availability of COVID-19 testing; and a contact tracing initiative involving 1,000 employees beginning on April 27 and 4,000 employees by May 11.

The report also describes steps to reopen Texas businesses, including detailed health protocol checklists for individuals, employers, retailers, retail customers, restaurants, restaurant customers, movie theaters, movie theater customers, museums and libraries, museum and library visitors, outdoor sports participants, churches/places of worship, and single-person offices. Finally, the *Texans Helping Texans* report provides a list of qualifications that any Texas county must meet, in addition to having no more than five (5) COVID-19 laboratory-confirmed cases, to increase the 25% capacity threshold for certain businesses to 50%, as described in the Executive Order. Any county wishing to increase that threshold capacity must have its county judge complete an attestation form, a link to which is provided in the *Texans Helping Texans* report.

For more information, please contact Thomas Allen, Mark Platt, Fred Gaona, or any attorney in the Government Services practice group.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a Coronavirus Response Team. Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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