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FBT COVID-19 Team: Texas Governor Orders "Phase Two" of Texas Reopening

On May 18, 2020, Texas Governor Greg Abbott ordered the "Phase Two" reopening of the Texas economy in the wake of the COVID-19 pandemic. After the closure of schools and "non-essential" businesses across the state, in late April and May, the Governor ordered the "Phase One" reopening—on a limited basis—of establishments like restaurants, salons, malls, libraries, and movie theaters. Subsequent orders expanded the range of services permitted to resume limited operations, while also clarifying the potential consequences for non-compliance. "Phase Two" announced additional and expanded openings, including restaurants, bars, summer camps, and sporting events.

I. Open Texas: gradual reopening of the Texas economy

In March, 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."

In April and early May, the Governor issued several orders that begun the process of reopening the Texas economy, called "Open Texas." Among other things, "Phase One" of Open Texas permitted the limited reopening of retail services on a pickup or delivery basis. Phase One was then extended to permit many businesses—including dine-in restaurants—to open at 25% of their operating capacity. See Frost Brown Todd's earlier articles for more details.

II. Phase Two: "least restrictive means" of combatting COVID-19

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On May 18, 2020, Governor Abbott issued Executive Order GA-23, ushering in "Phase Two" of "Open Texas." After reciting the various COVID-19-related executive orders since March 2020, GA-23 states, "in coping with the COVID-19 disaster, and especially as services are being reopened in Texas, government officials should look for the least restrictive means of combatting the threat to public health."

As with earlier orders, Executive Order GA-23 urges safe public health practices. The order provides that, "except where necessary to provide or obtain 'Covered 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.

Executive Order GA-23 expands the list of "Covered Services" (formerly referred to as "reopened services") that may resume operations for the first time or may do so at expanded capacity. "Covered Services" encompasses everything listed in the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Agency ("CISA") Guidance on the Essential Critical Infrastructure Workforce, plus religious services "conducted in churches, congregations, and houses of worship," and a lengthy list of other types of establishments.

Notable changes for "Covered Services" include, but are not limited to, the categories below. Most of the listed establishments are permitted to operate at 25% of their total listed capacity. For Texas counties certifying to the Texas Department of State Health Services ("DSHS") five or fewer confirmed cases of COVID-19, the same establishments may operate at up to 50% capacity.

Restaurants and bars

- Beginning on May 22, all dine-in restaurants—those that do not primarily serve alcohol—may operate at 50% of their total listed capacity (up from 25%).

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- Bars, which had been closed entirely, may reopen at 25% capacity.

Salons

- Hair, nail, and other cosmetology salons were opened on May 8, subject to ensuring six feet of social distancing between operating workstations.
- Other personal care and beauty salons, such as tattoo and piercing studios, may now open, subject to the same social distancing requirements.

Entertainment venues

- Beginning on May 22, many recreation and entertainment venues may open at 25% capacity. This includes aquariums, natural caverns, bowling alleys, bingo halls, skating rinks, simulcast racing, rodeos, and equestrian events.
- Beginning on May 22, drive-in concerts are permitted under guidelines that facilitate appropriate social distancing. These guidelines generally require spectators to remain in their vehicles and to minimize in-person contact between people who are not in the same household or vehicle.
- On May 29, outdoor zoos may open at 25% capacity. As with museums and libraries, indoor areas and interactive features must remain closed.
- Amusement and theme parks remain closed.

Sports

- On May 31, practices for youth sports programs may begin. On June 15, games may begin.
- On May 22, amateur sporting events may begin. There can be no "access to the general public" for these events, and all players must have tested negative for COVID-19 before the event, remain quarantined during the event, tested at the end of the event, and monitored daily for a high temperature and other symptoms.

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- On May 31, professional basketball, baseball, softball, golf, tennis, football, and car racing events, "with no spectators physically present on the premises," may resume, with approval "on a league-by-league" basis by DSHS.

Summer camps

- On May 31, youth summer camps may open.

Schools

- Schools across Texas remain closed through the 2019-2020 academic year.
- Beginning on June 1, schools may offer summer school and in-person classroom instruction, subject to the minimum standard health protocols issued by the Texas Education Agency.
- Schools may conduct graduation ceremonies and use their facilities for administrative and remote-learning purposes.

III. Exceptions for Deaf Smith, El Paso, Moore, Potter, and Randall counties

Executive Order GA-23 delays by one week the opening of many "Phase Two" Covered Services in El Paso County, as well as counties in the Amarillo area (Deaf Smith, Moore, Potter, and Randall counties). Most of the activities identified above may begin in these counties on May 29, 2020, unless otherwise specified in the order. At his press conference on May 18, Governor Abbot explained that El Paso-area hospitals are near their full capacity, while the panhandle counties have seen a spike in positive COVID-19 tests associated with meat packing plants.

The order also provides that if "hotspots" emerge in other Texas counties, the Governor may return to more severe restrictions, such as permitting only CISA (i.e., essential) services.

IV. Preemption and enforcement

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Like earlier orders, Executive Order GA-23 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 Covered Services authorized by the order or allows gatherings prohibited by the order.

Regarding enforcement, Executive Order GA-23 notes that failure to comply with an executive order is punishable by a fine not to exceed $1,000, as well as possible "regulatory enforcement." The order makes clear that violators cannot be punished with confinement in jail. The same is true for violations of local government orders related to COVID-19; any such order or law providing for jail time as a penalty is "superseded retroactive to April 2, 2020." Local jurisdictions are also prohibited from imposing civil or criminal penalties for persons who do not wear face coverings.

Executive Order GA-23 went into effect immediately upon issuance, and will remain in effect through June 3, 2020, subject to further extension or modification.

V. *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 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.

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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 Governor's Executive Orders. 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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