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FBT COVID-19 Team: Texas Governor Orders “Phase III” of State Reopening

On June 3, 2020, Governor Greg Abbott ordered the “Phase III” 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 March, the Governor in late April and May ordered the “Phase I” and “Phase II” reopening—on a gradual basis—of establishments like restaurants, salons, malls, libraries, summer camps, and sporting events. These orders also clarified the potential consequences for non-compliance. “Phase III” consists of additional and expanded openings, including, for the first time, amusement parks.

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.”

In late April and May, the Governor issued several orders beginning the process of reopening the Texas economy, called “Open Texas.” Among other things, “Phase I” and “Phase II” of Open Texas permitted the limited reopening of retail services on a pickup or delivery basis, and then extended to permit many businesses—including in-dining restaurants—to open at partial operating capacity. (Please see Frost Brown Todd’s [earlier articles](#) for more details.)

Phase III: most businesses may operate at 50% capacity

On June 3, 2020, Governor Abbott issued [Executive Order GA-26](#), ushering in “Phase III” of “Open Texas.” After reciting the various COVID-19-related executive orders since March 2020, Order GA-26

outlines a number of business establishments that may operate at greater or even full capacity. Even so, “as normal business operations resume,” the Order urges everyone to “act safely” by following the health protocols established by the Texas Department of State Health Services (“DSHS”). Or, as the Governor stated in his press release, Texans should “remain vigilant” as the State balances three principal goals: “mitigate the spread of this virus, protect public health, and get more Texans back to work and their daily activities.”

To that end, Order GA-26 reiterates that people in Texas should follow safe public health practices. Except as otherwise provided in this order or in the DSHS minimum health protocols, people in Texas should not gather in groups larger than ten and should maintain six feet of social distancing from those not in their group. People over age 65 are “strongly encouraged to stay at home as much as possible,” to maintain social distancing from any household member “who has been outside of the residence in the previous 14 days,” and to practice social distancing and good hygiene when leaving the home.

Order GA-26 establishes a baseline that, effective immediately, “[e]very business in Texas” shall operate at no more than 50% of its total listed capacity. Beginning on June 12, for Texas counties certifying to the DSHS that they have 10 or fewer active cases of COVID-19, the establishments otherwise subject to the 50% limit may operate at up to 75% capacity.

Notably, businesses may require customers to follow heightened safety measures when visiting their establishments. “Nothing in this executive order or the DSHS minimum standards precludes requiring a customer to follow additional hygiene measures when obtaining services.”

A. No occupancy limit

Unlike the baseline, the following types of businesses and establishments are subject to “no occupancy limit”:

- Any services listed in the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Agency ("CISA") [Guidance on the Essential Critical Infrastructure Workforce](#) (v. 3.1 or later)
- Religious services conducted in churches, congregations, and houses of worship
- Local government operations
- Child-care services
- Youth camps, including summer camps, day camps, and overnight camps
- Recreational sports programs for youths and adults
- Outdoor areas, events, or establishments not otherwise addressed in the order.

B. Restaurants and bars

- Beginning June 12, dine-in restaurants that do not primarily serve alcohol may operate at up to 75% of their total listed capacity (up from 50%).
- Bars are subject to the 50% capacity limit and may serve "only those customers who are seated."

C. Salons

- Hair, nail, and other cosmetology salons are not subject to the 50% capacity limits, but must ensure six feet of social distancing between operating workstations.
- The same rules apply to other personal-care and beauty salons, such as tattoo and piercing studios, and licensed massage establishments.

D. Outdoor venues

The following outdoor areas and venues may operate at 50% capacity:

- Swimming pools

- Water parks
- Museums and libraries
- Zoos, aquariums, natural caverns, and similar facilities
- Rodeos and equestrian events

E. Sports

- Professional, collegiate, or similar sporting events—considered to be “outdoor areas or venues”—may operate at 50% of normal operating limits “as determined by the owner.”

F. Amusement parks

- Amusement parks and carnivals in counties with fewer than 1,000 confirmed positive cases of COVID-19 may open at 50% capacity, as determined by the owner.
- Beginning June 19, amusement parks and carnivals in counties with more than 1,000 cumulative cases of COVID-19 may open at 50% capacity, as determined by the owner.

G. Outdoor gatherings of more than 500 people

- For other outdoor gatherings estimated to be in excess of 500 people, the local county judge or mayor (as applicable) may “impose additional restrictions” in consultation with the local public health authority.

H. Schools

- Schools may resume summer operations, 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.

Preemption and enforcement

Like earlier executive orders, Executive Order GA-26 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 that such a local order restricts services allowed by this executive order, allows gatherings prohibited by this executive order, or expands the list or scope of services set forth in this executive order.” Order GA-26 also “suspend[s]” certain provisions of the Texas Government Code “to the extent necessary to ensure that local officials do not impose restrictions . . . that are inconsistent with this executive order.”

Regarding enforcement, Order GA-26 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.” But, as established in an earlier executive order, no one who violates a Texas order issued in response to COVID-19—whether by the Governor or a local government official—may be punished by confinement in jail. Any such order or relevant law is “suspended.” Local jurisdictions are also prohibited from imposing civil or criminal penalties for persons who do not wear face coverings.

Executive Order GA-26 went into effect immediately upon issuance.

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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