Texas Governor Permits Most Businesses to Operate at 75% Capacity

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On September 17, 2020, Texas Governor Greg Abbott issued two new executive orders modifying the limits on business operations and hospital capacity in Texas amid the COVID-19 pandemic. Effective statewide at 12:01 a.m. on September 21, Executive Order GA-30 provides that many businesses, including most retail establishments, dine-in-restaurants, gyms, offices, and manufacturers, may operate at 75% of their total listed occupancy. Executive Order GA-31 narrows restrictions on non-medically necessary surgeries and procedures.

Executive Order GA-30 states that while June 2020 saw "substantial increases in COVID-19 cases and hospitalizations" in Texas, those numbers have "steadily and significantly decreased since late July." The order attributes these developments to improved medical treatments, increased testing, "abundant" personal protective equipment, and "Texans' adherence to safe practices like social distancing, hand sanitizing, and use of face coverings." (Notably, GA-30 does not alter Texas's statewide face covering requirement, which the Governor ordered in early July.)

GA-30 provides a baseline for "[e]very business establishment in Texas to operate at 50% of total listed capacity." But many businesses may exceed that limit.

No Occupancy Limit

The following types of establishments have "no occupancy limit":

- Essential services—those listed in the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Agency (CISA) Guidance on the Essential Critical Infrastructure Workforce (v. 4.0 or later)
- Religious services, including those conducted in churches, congregations, and houses of worship

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- Local government operations
- Child-care services
- Youth camps, including all summer camps, day camps, overnight camps, and those camps defined in Chapter 141 of the Texas Health and Safety Code.
- Recreational sports programs for youths and adults
- Any public or private school
- Drive-in concerts, movies, or similar events generally requiring spectators to stay in their vehicles and minimize contact with others.

The following types of establishments have "no occupancy limit" if they operate with six feet of social distancing between work stations:

- Cosmetology, hair, and nail salons
- Massage establishments
- Other establishments focused on personal-care or beauty services, such as tanning salons, tattoo and piercing studios, and hair removal or replacement facilities.

75% Occupancy Limit

Under GA-30, the following types of establishments may operate as 75% of their total listed capacity:

- In-store retail (non-essential)
- Dine-in restaurants
- Office buildings (non-essential)
- Manufacturers (non-essential)
- Museums and libraries
- Gyms, and exercise facilities and classes

To qualify as a "dine-in restaurant," an establishment must have less than 51% of its gross receipts from alcoholic beverages and must require customers to eat and drink only while seated.

50% Occupancy Limit

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Operating at 50% of total listed capacity is the baseline rule of all businesses in Texas. If an establishment that would otherwise be permitted to operate at 75% of capacity is located in an area with "high hospitalizations," that establishment may operate at only 50% capacity.

GA-31 defines "areas with high hospitalizations" to mean any "Trauma Service Area" with seven consecutive days in which the number of COVID-19 patients exceeds 15% of all hospitalized patients. Counties encompassing these areas are listed and regularly be updated at https://www.dshs.texas.gov/ga303. They currently include: Calhoun, DeWitt, Goliad, Jackson, Lavaca, Victoria, Jim Hogg, Webb, Zapata, Cameron, Hidalgo, Starr, and Willacy.

Amusement parks may operate at no more than 50% of normal operating limits as determined by the owner.

An establishment subject to the 50% capacity limit may operate at 75% capacity or normal operating limits if it operates in a county that has attested to the Texas Department of State Health Services "regarding minimal cases of COVID-19." In these counties, the county judge must certify and affirm to the Governor that it has 10 or fewer laboratory confirmed cases or 10 or fewer active COVID-19 cases and has specific safety and testing measures in place.

Bars and Rafting/Tubing Services

Unlike dine-in restaurants, bars appear to remain closed to walk-in customers. Bars may offer drive-thru, pickup, and delivery services for food and drinks (to the extent allowed by the Texas Alcohol and Beverage Commission).

Commercial rafting and tubing services remain closed.

Medical Procedures

GA-31 provides that hospitals located in "areas with high hospitalizations" must "postpone all surgeries and procedures" that are not "medically necessary." That restriction does not apply to any surgery or procedure that would not "deplete any hospital capacity needed to cope with the COVID-19 disaster." At least 10%

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of any hospital's (or hospital system's) capacity must be reserved for treatment of COVID-19 patients. Any hospital that is part of a hospital system consisting of more than one hospital may reserve less than 10 % of its capacity so long as the cumulative capacity reserved throughout the hospital system within the same Trauma Service Area is at least 10 %.

Nursing Homes and Outdoor Gatherings

GA-30 is notable because it permits people to visit nursing homes and other assisted-living facilities. For much of the COVID-19 pandemic, such facilities have been largely off-limits to visitors.

GA-30 addresses outdoor gatherings. In general, the baseline 50% occupancy limit does not apply to "outdoor areas, events, or establishments." But, based on an earlier executive order (GA-28), the following types of establishments are still limited to operating at 50% occupancy:

- Professional, collegiate, or similar sporting events
- Swimming pools
- Water parks
- Zoos, aquariums, natural caverns, and similar facilities
- Rodeos and equestrian events

Other than the gatherings identified in this order, outdoor gatherings of 10 or more people are "prohibited" unless the local mayor or county judge where the event will occur "approves of the gathering." The mayor or judge may also impose additional "conditions or restrictions" on such gatherings "not inconsistent with this order."

Preemption and Enforcement

GA-30 preempts "any conflicting order issued by local officials in response to the COVID-19 disaster." Preemption applies "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."

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Failure to comply with "any executive order issued during the COVID-19 disaster" is punishable by a fine not to exceed $1,000, as well as possible "regulatory enforcement." But violators of these orders, as well as any local government order issued in response to COVID-19, may not be punished by confinement in jail.

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

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