

WHEN CAN WE OPEN? FREQUENTLY ASKED QUESTIONS ON FEDERAL AND TEXAS GUIDELINES TO RESTART THE ECONOMY

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On April 16, the Federal Coronavirus Task Force outlined its [“Opening Up America Again” Guidelines](#). The following day and again on April 27, Governor Greg Abbott outlined next steps for the reopening of Texas.

As noted by National Institute of Allergy and Infectious Diseases Director Dr. Anthony Fauci, there is no “light switch” that will return everything to normal automatically. Instead, reopening America’s economy will require a series of phases that loosen existing restrictions and adjust based on the situation on the ground. But, if these phases are followed, substantial portions of the country can be opened gradually over 45-60 days, with the remaining portions to follow in the coming months.

These Frequently Asked Questions will help answer questions our clients may have on the Federal and Texas guidelines.

Q. When can we reopen under the Federal Guidelines?

The Federal Guidelines are divided into three phases, each with its own benchmarks to loosen the current restrictions. The guidelines allow each state to make their own decisions on when to reopen and even allow those decisions to occur on a county-by-county basis. Under the Federal Guidelines, the following phases apply:

- *Phase 1 – Days 0-14*
- **When It Begins:** Phase 1 begins as soon as there is a “downward trajectory” of “COVID-like syndromic cases” and “positive tests as a percent of total tests” for a full 14-day period. Based on statements by

federal officials, some states or areas within states can proceed to Phase 1 in the next 1-2 weeks based on their current trajectories. Federal officials are claiming that 20-30 states may begin Phase 1 for parts of their states by May 1st.

- Restrictions During Phase 1:
 - Return to work in “phases” if possible.
 - Employers “continue to encourage telework, whenever possible and feasible with business operations.”
 - Vulnerable individuals continue to shelter in place. Special accommodations should be made for them to continue to work.
 - Workplaces will close common areas where personnel are likely to congregate and interact.
 - Maximize physical distance from others when in public.
 - No socializing in groups of more than 10 people.
 - Minimize non-essential travel.
 - Schools and organized youth activities (e.g., daycare, camp) that are currently closed should remain closed.
 - Visits to senior living facilities and hospitals are prohibited.
 - Large venues (i.e., sit-down dining, movie theatres, sporting venues, places of worship) can operate under strict physical distancing protocols.
 - Gyms can open if they can adhere to strict physical distancing and sanitation.
 - Bars remain closed.

Analysis: Phase 1 will look similar to the two weeks leading up to the shelter in place orders with workplaces open, but with heavy social distancing. With the continued closure of schools, daycares and camps, the lightened restrictions will not likely change much for school-age parents (who make up over one-third of the workforce). But, the reductions will have a noticeable loosening on persons without childcare needs and younger workers. It will also open additional non-essential businesses which will allow some workers to return from furloughs.

• *Phase 2 – Days 15-29*

- When It Begins: If a state can satisfy the same “downward trajectory” of “COVID-like syndromic cases” and “positive tests as a percent of total tests” for a second straight 14-day period, then it can progress to Phase 2. This means that some states or areas within a state can start Phase 2 as early as May 15th, if

they can make it through Phase 1. If, however, cases begin to spike again, they may have to return to Phase 1 or abide by additional restrictions.

- Restrictions During Phase 2:
 - Most workplaces are open.
 - Businesses should still encourage telework.
 - Vulnerable individuals continue to shelter in place. Special accommodations should be made for them to continue to work.
 - Common areas in businesses should remain closed or, at least, enforce moderate social distancing protocols.
 - Continue maximizing physical distance.
 - No social settings of more than 50 people.
 - Non-essential travel can resume.
 - Schools and organized youth activities (e.g., daycare, camp) can reopen.
 - Visits to senior living facilities and hospitals are prohibited.
 - Large venues (i.e., sit-down dining, movie theatres, sporting venues, places of worship) can operate under moderate physical distancing protocols.
 - Gyms can remain open if they can adhere to strict physical distancing and sanitation.
 - Bars may open with diminished standing-room occupancy, where applicable and appropriate.

Analysis: The key difference in Phase 2 is the reopening of schools, daycares and camps. With those facilities back in operation, it will free up more employees (up to one-third of the workforce) to return to work unencumbered by family obligations. In addition, lifting the ban on non-essential travel will help business activity return closer to normal. Business meetings and other travel purposes will generate more work functions for employees and, thus, create demand that encourages the return of furloughed workers. It would also open up some vacation destinations, which will allow some hotel workers to return from furlough and stimulate our economy through some (albeit reduced) vacation travel.

• *Phase 3 – Days 30+*

- When It Begins: Once a state has passed through Phases 1 and 2 AND if a state can satisfy the same “downward trajectory” of “COVID-like syndromic cases” and “positive tests as a percent of total tests” for another 14-day period, then they can progress to Phase 3. This means that some states or areas within a state can start Phase 3 as early as May 30th. However, if cases spike, a state may have to re-impose Phase 1 or Phase 2 restrictions.

- Restrictions During Phase 3:
 - Unrestricted staffing of worksites.
 - Vulnerable populations can resume public interactions, but should practice physical distancing.
 - Visits to senior living facilities and hospitals may resume.
 - Same restrictions on large venues, gyms, and bars as Phase 2.

Analysis: Vulnerable populations can resume public interactions for the first time in Phase 3. Also, business restrictions are lifted at this point (though social distance and hygiene practices will undoubtedly remain part of our habits).

Phase 3 is as close to “normal” as we will be until there is a viable and widespread vaccine for COVID-19, which may be 12-18 months. If effective treatment options are approved in the next few months and critical medical equipment is stockpiled, then it is possible that restrictions could be loosened further.

Q. When can we reopen under Texas guidelines?

Based on the guidance offered by Governor Abbott on April 27th, Texas is following the federal guidelines closely. Dr. Bix stated that the “Texas plan is great.” Specifically, Governor Abbott announced that Texas is entering Phase 1 of the federal guidelines on May 1st, with a tentative plan to enter Phase 2 on May 18th.

Governor Abbott’s previous order on April 17th eased some restrictions of the state’s shelter in place order, but still kept it in effect until April 30th. Specifically, the following changes were made:

- Retail – All retail (including that designated as non-essential) was allowed to re-open on April 25th, but limited to “to go” only. The procedures currently utilized for essential retail (e.g, restaurants) will now be expanded to other retail (e.g., clothing, office supplies, bookstores, etc.). This could allow some furloughed retail employees to return to work.
- State Parks – Re-opened on April 20th, but strict social distancing and face masks are required.
- Medical – Beginning on April 22nd, some elective medical procedures are allowed so long as a certain number of beds are available to handle COVID-19 patients.
- Schools – Texas acknowledged that schools and universities will not return this school year. This move was not surprising, as most school years ended in late-May.

On April 27th, Governor Abbott followed that order by announcing that he would allow the shelter in place order to expire on April 30th. He also announced additional openings for May 1st. These openings track the federal Phase 1 guidance very closely. Specifically:

- Vulnerable populations are encouraged to limit public exposure.

- Retail, restaurants, malls, and movie theatres may open with occupancy limited to 25%.
- Museums and libraries may open at 25% occupancy, but interactive and "hands on" sections of those museums are to remain closed.
- Churches are allowed to expand their capacity, but online church is still strongly encouraged
- Single person offices may return to work in their offices.
- Outdoor sports with no more than four participants and with proper distancing (i.e., golf, tennis) are allowed.
- Doctors, dentists, and other licensed healthcare allowed to return to work, so long as hospitals maintain at least 15% capacity to treat COVID-19 cases.
- For any counties that have five or fewer cases, the capacity limits described above can be immediately lifted to 50%.
- For all other counties, if there is no spike in cases, then the occupancy limits may lift to 50% on May 18th.

This order overrides any local orders to the extent the local orders restrict the activities described above. More details on the Texas plan to re-open (including specific checklists and safety procedures for different types of businesses) are available [here](#).

On May 5th, Governor Abbott lifted further restrictions and allowed barbershops, hair dressers, nail salons, and tanning salons to re-open as of May 8th. He also announced that on May 18th gyms, non-essential manufacturing, and non-essential offices may re-open with significant reductions in capacity (25%) and with social distancing and enhanced hygiene measures in place.

As for Phase 2, Governor Abbott stated that additional businesses will be allowed to return on May 18th, assuming that there is no spike in cases. Businesses expected to be covered by this order include bars, and other non-essential businesses. As for daycares and summer camps, he stated that guidance is being developed for their return. According to The Washington Post, [the federal Coronavirus Task Force is also developing guidance for daycares and summer camps](#), which is expected to be announced in the next few days. We expect that Texas will follow the federal guidance. As for Phase 3, if Texas is following the federal guidance and the case rates do not spike, look for Texas to enter Phase 3 in early June. Semi-normal work environments and the return of vulnerable populations would occur in Phase 3 at the earliest

Q. Will the entire state be reopened at the same time?

Governor Abbott's April 27th orders create a distinction between counties with five or fewer cases and those over. Those under the five case line, can reopen most businesses at 50% capacity, while those over have further limitations. Further, the state's order does not override all shelter in place orders, just those portions that conflict with the state's order (described above). So a county can end its local shelter in place order and essentially lift most restrictions on its residents, if that county has less than five cases. As a

result of this, some areas of the state, particularly the metro areas, will likely trail other parts of Texas by a few weeks.

It is likely that there will be some tension between state and county authorities on lifting restrictions, with state authorities pushing to lift restrictions earlier rather than later. There will likely be some patience with local officials in the first few weeks, but if county authorities ignore state guidance beyond that, fireworks may ensue. The state leadership has not been shy about overriding local control when the state feels a different course is proper. For example, [in Governor Abbott's Executive Order GA-16](#) (issued April 17, 2020), the state included a provision that “[t]his executive order shall supersede any conflicting order issued by local officials in response to the COVID-19 disaster.”

When you couple this history with rising protests across the political spectrum, a clash may be inevitable. This state vs. county dynamic will be interesting to monitor as it presents a host of legal and constitutional issues.

Q. What considerations should I, as an employer, use to reopen?

For further discussion of the employment law implications of reopening, please click [here](#).

Q. How will this affect court proceedings?

Shortly after Governor Abbott issued his orders on April 17th, the Texas Judiciary Branch (TJB) issued [“Updated – Guidance on Conducting Court Proceedings.”](#) In this guidance, the TJB noted that “in-person proceedings of any size should be delayed until at least June 1.” It also provided that essential proceedings can occur in person “only if holding the proceeding remotely is not possible or feasible” and, in that circumstance, strict social distancing procedures must be observed and participants must wear face coverings.

Beyond this guidance, courts will probably remain physically closed until Phase 2 is reached (which may be why the court closing date was extended to June 1).

The major issue will be the resumption of jury trials. Jury trials will probably have to wait until deep into Phase 3 because that will be the first opportunity for vulnerable populations to re-enter social settings. Otherwise, the jury pool will be restricted to younger persons (which will make filling a jury venire difficult). Even then, courts may have to re-think their facilities to accommodate a jury trial that allows physical space between jurors (which cannot be provided in currently configured jury boxes).

Even within Phase 2 or 3, it is fair to assume that some practices such as telephonic hearings may stay in place for lower-stakes matters (*i.e.*, status conferences, discovery disputes, motions to extend, etc.) for the near or long-term.

As for arbitrations, in-person arbitrations may be able to resume in Phase 3 as well. Parties may want to plan on using larger facilities for arbitrations, instead of a typical conference room, to allow for more physical space between participants.

Q. When can I go to a Rangers game?

Alas, it may be awhile before you can enjoy a hot dog and peanuts at the new Globe Life Field. Phase 3 does allow some large venues to open with moderate social distancing procedures. What that looks like is unclear at this point, but it seems unlikely that spectators at sports will be present until deep into Phase 3.

Until then, the best we can hope for may be some sports on TV.

The next couple of months will continue to be a trying time for our country and our state. Many of the habits that we have developed since the start of the outbreak (*i.e.*, lowered physical touch, increased physical distance, increased handwashing, more aggressive cleaning) are likely here to stay. But others hopefully will leave us and allow us to get closer to normal.

As the government builds up stockpiles of necessary medical equipment and potential therapeutic drugs get approved, the sliding scale of normal should get closer and closer to where we were just two months ago.

If you have questions or would like to discuss further, please contact [Heath Cheek](#).

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