

## Texas Expands Measures to Reopen Its Economy: What Employers Should Know

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Texas has undertaken one of the earliest and most expansive initiatives to reopen businesses throughout the state.

As we previously [reported](#), on April 27, 2020, Texas Governor Greg Abbott announced Phase One of his much-anticipated plan to reopen the state, while minimizing the spread of COVID-19. The Phase One [Executive Order, GA-18](#) (“EO GA-18”), supplemented by [“Texas Helping Texans: The Governors Report to Open Texas”](#) (“Governor’s Report”), permitted the reopening of retail stores, restaurants and other venues, as discussed below, at 25 percent of capacity or total listed occupancy, beginning May 1, 2020.

EO GA-18 was also accompanied by two other orders. [Executive Order GA-19](#) provided that, as of May 1, all licensed health care professionals and facilities were permitted to resume normal business operations, as long as they adhered to any “emergency rules promulgated by their respective licensing agencies” with regard to minimum safety requirements during the COVID-19 pandemic. Additionally, hospitals must reserve at least 15 percent of capacity to treat COVID-19 patients. [Executive Order GA-20](#) provides that any person entering the state of Texas as his or her final destination through an airport from the states of California, Connecticut, New Jersey, New York, or Washington, and the cities of Atlanta, Chicago, Detroit, or Miami, must self-quarantine for a period of 14 days from the time of entry into Texas or the duration of his or her stay in Texas, whichever is shorter. This self-quarantine requirement does not apply to people traveling in connection with military service, emergency response, health response, or critical infrastructure functions, as may be determined by the Texas Division of Emergency Management.

On May 6, 2020, Governor Abbott issued [Executive Order GA-21](#) (“EO GA-21”), structured as Phase Two of his plan to reopen Texas. Phase Two expands the categories of businesses allowed to reopen, subject to specific guidelines and limitations, and updates prior directives outlined in EO GA-18. Pursuant to EO GA-21, “essential services,” as outlined by the U.S. Department of Homeland Security and its [“Guidance on the Essential Critical Infrastructure Workforce, Version 3.0”](#) are permitted to continue to

operate. EO GA-21 underscores that while providing or obtaining essential or reopened services, all Texans should use “good-faith efforts and available resources” to follow the [minimum health protocols](#) recommended by the Texas Department of State Health Services (“DSHS”), and those provided by President Trump and the Centers for Disease Control and Prevention (“CDC”). While Texans are encouraged to wear face coverings, the EO GA-21 asserts that no jurisdiction may impose a civil or criminal penalty for an individual’s failure to do so. However, proprietors of essential and reopened services may require customers to adhere to specific hygiene protocols, which may include face coverings.

## **Businesses and Services Permitted to Reopen in Texas**

### *Reopenings Starting May 1, 2020*

Pursuant to EO GA-18 and EO GA-21, which expanded the list of “reopened services” permitted to reopen at 25 percent capacity, the following businesses are currently permitted to reopen in Texas: in-store retail establishments; dine-in restaurants; movie theaters; shopping malls; museums and libraries, if permitted by local law; and wedding venues, services, and receptions held somewhere other than in a house of worship. Valet parking is not permitted, except for vehicles with disability parking placards or plates. Within shopping malls and museums, all food court dining areas, play areas, and interactive displays must remain closed. In rural areas and counties with five or fewer confirmed cases of COVID-19 (as verified by the DSHS), in-store retail, dine-in restaurants, movie theaters, shopping malls, museums, libraries, indoor wedding venues, and wedding reception services may operate at 50 percent capacity. Under EO GA-18 and EO GA-21, golf courses and local government operations also may reopen.

### *Reopenings Starting May 8, 2020*

Effective Friday, May 8, 2020, cosmetology salons, barbershops, and hair and nail salons are also currently permitted to reopen, provided that their employees and patrons observe social distancing protocols, including maintaining six feet of distance between work stations and designating one stylist per customer. Appointments are recommended to minimize walk-ins. Customers are encouraged to wait outside or in their vehicles, unless the salons can accommodate social distancing for waiting customers inside the premises. Private indoor and outdoor swimming pools may operate at 25 percent capacity. Public swimming pools, however, may operate only if permitted to do so by the local government. Swimming pools in rural areas and counties with five or fewer confirmed cases of COVID-19, as verified by the DSHS, may operate at 50 percent capacity.

### *Reopenings Starting May 18, 2020*

Currently, individuals who work alone in an office may pursue their in-office work. Starting on May 18, offices within office buildings with up to the greater of five individuals or 25 percent of the total office workforce may return to the office, provided that they maintain appropriate social distancing protocols. Notably, the headcount standard based on “total office workforce” differs from the capacity limits based on total listed occupancy, as applied to all other “reopened services.”

Also, starting on May 18, non-essential manufacturers may resume their activity, provided that (a) they operate at no more than 25 percent of total listed occupancy, (b) the employer staggers work shifts and prohibits congregating, and (c) employees maintain proper social distancing.

Lastly, gyms and exercise facilities are permitted to reopen on May 18, at up to 25 percent of the facility's total permitted occupancy. But the facility's showers and locker rooms must remain closed. Further, all gym equipment must be disinfected after each use, social distancing must be maintained, and customers should wear gloves while exercising.

Offices with more than five employees, manufacturing services, and gyms and exercise facilities and classes in rural areas and counties with five or fewer confirmed cases of COVID-19, as verified by the DSHS, may operate at 50 percent capacity.

### **Businesses and Services to Remain Closed**

EO GA-21 also identifies businesses, services, and activities that are not yet allowed to reopen. Specifically, all Texas schools must remain closed for the remainder of the academic year. Bars, massage establishments, tattoo and piercing studios, and amusement parks must stay closed through this Phase Two, which is set to expire on May 19, 2020. Individuals are also barred from visiting nursing homes or assisted living facilities.

### **Unemployment Insurance Guidance and Other Considerations**

With the announcement of Phase One of the reopening of Texas, many workers were weighing the benefits of returning to work and earning a paycheck against the potential risks of exposure to COVID-19 and the relinquishment of their unemployment benefits. In response to these concerns, on April 30, 2020, the Texas Workforce Commission ("TWC") issued [guidance](#) ("TWC Guidance") concerning workers' eligibility for continued unemployment benefits if they choose not to return to work. While stressing that each claim is assessed on a case-by-case basis, the TWC Guidance outlines specific circumstances under which workers may still be granted unemployment benefits, even if suitable work is available.

Per the TWC Guidance, a worker who refuses to return to work due to **one** of the following COVID-19-related reasons may retain unemployment benefits eligibility:

- *High Risk:* As defined by the TWC, the worker is at "high risk" if he or she is at least 65 years old.
- *Household Member at High Risk:* A member of the worker's household is 65 years old or older.
- *Diagnosed with COVID-19:* The worker has tested positive for the virus by a tester authorized by the State of Texas, and he or she has not yet recovered.

- *Household Member Diagnosed with COVID-19:* A member of the worker's household has tested positive for the virus, the test was conducted by a duly authorized tester, the household member has not yet recovered, and 14 days have not yet passed.
- *Quarantined:* The worker is currently under a 14-day quarantine due to close contact with or exposure to an individual with COVID-19.
- *Childcare Needs:* The school or daycare facility attended by the worker's child is closed, and there are no available childcare alternatives.

The TWC Guidance is instructive and provides some clarity with regard to specific circumstances that would allow an individual to continue receiving unemployment benefits upon refusing to return to work. However, the TWC Guidance also raises a number of questions. For example, it identifies "high risk" individuals as those 65 years or older, but the guidance does not specify other high-risk groups, such as those with underlying medical conditions or those who are "immunocompromised," as defined by the CDC. Should the TWC, at some point, determine that those with underlying health conditions or the immunocompromised qualify for the "high risk" exemption, employers should be aware of the Americans with Disabilities Act implications of engaging in conversations with employees about their health histories.

Further, the TWC Guidance does not address whether unemployment benefits, which [currently](#) are not charged against employer accounts, will continue not being charged. Since the TWC will be making determinations on a case-by-case basis, we envision that the scope of these exceptions, and their impact on the chargebacks, will be further clarified. As Texas employers are among the first in the nation to confront this issue, they may want to consult with counsel on how best to handle unemployment insurance benefit claims during this unprecedented time.

### **Local "Stay at Home" Orders**

As we have also previously [detailed](#), in addition to Governor Abbott's state-wide directives, several Texas counties and cities, including Austin, Dallas, El Paso, Houston, and San Antonio have issued their own "stay at home" orders. EO GA-21 prohibits local officials from imposing restrictions in their cities and counties that are inconsistent with the governor's orders, but it does allow local officials to impose additional limitations that are consistent with those orders. Accordingly, a number of Texas cities and counties have extended their "stay at home" orders, while enforcing Governor Abbott's orders to reopen certain industries.

#### *Austin/Travis County*

The [Austin Stay Home—Work Safe Order](#) is in effect through May 30, 2020. The [Travis County Stay Home Order](#) is set to expire on June 15, 2020. These orders direct all persons over the age of six to wear a face covering or mask outside the house, observe social distancing, and stay home except for essential activities.

## *Dallas*

Via a [Supplemental Order](#), Dallas County has also extended its “Stay Home Stay Safe” Order until May 15, 2020. The Supplemental Order allows patronage and work at essential and reopened services from May 4, 2020, to May 15, 2020. The Supplemental Order made the recommended Minimum Health Standard Protocols outlined in the Governor’s Report mandatory in Dallas County, with violations of these protocols punishable by a fine of up to \$1,000 and/or 180 days in jail.

## *El Paso*

As of May 1, 2020, El Paso [lifted](#) its “Stay Home, Work Safe” Order and imposed reopening measures that align with Governor Abbott’s efforts to reopen the state.

## *Houston/Harris County*

On May 1, 2020, Harris County extended its “[Stay Home, Work Safe](#)” Order, consistent with EO GA-18, until May 20, 2020. The Harris County order calls on all Texans to continue to minimize social gatherings and to stay home aside from essential and work travel. The order also encourages—but does not require—Harris County residents to wear face coverings in public. Notably, Harris County launched a system for residents to report violations, including businesses that are not authorized to reopen and businesses operating at a greater capacity than permitted.

## *San Antonio/Bexar County*

San Antonio and Bexar County have [extended](#) parts of their “Stay Home, Work Safe” Order until May 19, 2020, but will allow individuals to work at essential and reopened services. San Antonio residents 10 years of age or older are required to wear cloth face coverings in public spaces where social distancing is difficult, such as grocery stores and other retail establishments.

## **Minimum Recommended Health Protocols**

The DSHS has issued a “[Protocol for All Employers](#),” which outlines the minimum recommended health protocols for all businesses choosing to operate in Texas. The minimum standards include the following:

- Training all employees on appropriate cleaning and disinfection, hand hygiene, and respiratory etiquette;
- Screening employees before coming into the business:
  - Employees exhibiting the following new or worsening signs or symptoms of possible COVID-19 must be sent home:
    - Cough
    - Shortness of breath or difficulty breathing

- Chills
  - Repeated shaking with chills
  - Muscle pain
  - Headache
  - Sore throat
  - Loss of taste or smell
  - Diarrhea
  - Feeling feverish or a measured temperature greater than or equal to 100.0 degrees Fahrenheit
  - Known close contact with a person who is lab-confirmed to have COVID-19
- Not allowing employees with new or worsening signs or symptoms listed above to return to work until:
    - For an employee diagnosed with COVID-19 or with symptoms that could be COVID-19, he or she may not return to work until:
      - At least three days (72 hours) have passed since resolution of fever,
      - Improvement in symptoms, *and*
      - At least 10 days have passed since they symptoms first appeared.
    - For an employee with symptoms of COVID-19 who wishes to return to work before completing the above three steps, he or she must obtain a medical professional's note clearing the individual for return.
  - Not allowing employees with known close contact to a person lab-confirmed to have COVID-19 to return to work until the end of the 14-day self-quarantine period from the last date of exposure, with exception granted for health care and critical infrastructure workers.
- Having employees and contractors work or sanitize their hands upon entering the business.
  - Having employees maintain social distancing—at least six feet apart from other individuals. If such social distancing is not feasible, other measures, such as face covering, hand hygiene, cough etiquette, cleanliness, and sanitation are to be rigorously practiced.

### **What Texas Employers Should Do Now**

Employers operating in Texas should assess whether (and how) any of the orders or guidance discussed above impacts their business operations or plans to reopen. Employers should keep in mind that most of the business reopening guidelines issued by Governor Abbott are “recommended” but not required. Businesses that are permitted to reopen may do so on their own timeline, consistent with DSHS protocol and guidance and their determination as how best to ensure the safety and well-being of their employees, guests, and patrons.

As such, employers should consider the following safety measures when developing their return-to-work plans:

- Establish proper sanitation and disinfecting practices, and social distancing protocols, such as one-way corridors, partitions between work stations, staggered work schedules, occupancy limits, and the like. Make hand sanitizer and handwashing stations readily available to employees and patrons, and encourage their use.
- If employees and/or patrons and visitors will be required to wear face coverings, decide if the business will provide the coverings to employees, patrons, and visitors, or if the company will, for example, reimburse employees for their cost.
- Determine how employees will be screened as they arrive for work each day, who will be making suitability-for-work determinations based on screening results, and how records of screening results will be maintained. While EO GA-21 recommends that employers “screen” their employees, it does not set forth guidelines for conducting such screenings. Some employers may consider taking employees’ temperatures or conducting diagnostic testing for COVID-19. At a minimum, employees should be asked whether they are experiencing any of the symptoms the [CDC has identified](#) as indicative of COVID-19.
- Upon reopening, if faced with employees who refuse to report to work, determine on a case-by-case basis if an employee falls within one of the categories that allows for continued unemployment benefits under the TWC Guidance.

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