

Local Government Response to COVID-19

On March 13, 2020, Governor Cuomo issued Executive Order No. 202.1 which suspends Article 7 of the Public Officers Law (also known as the Open Meetings Law), to the extent necessary to permit any public body to meet and take such actions authorized by law without allowing the public to be physically present at the meeting. The order also authorizes public bodies to meet remotely by conference call or similar service. If a public body restricts in-person access to its meetings or conducts a meeting remotely by conference call or similar service, the public body must provide the public the ability to view or listen to such meetings and must record and later transcribe such meetings.

The Executive Order also requires that events with 500 or more attendees be cancelled or postponed for a minimum of 30 days. Additionally, events, gatherings, and places of business or public accommodation for which anticipated attendance is less than 500 attendees operate at 50 percent occupancy or capacity for 30 days, effective March 13, 2020. These directives do not apply to a school, hospital, nursing home, other medical office or facility as determined by the Commissioner of Health, mass transit or mass transit facility, governmental facility, law enforcement facility, or retail establishments including grocery stores. Additionally, the Commissioner of Health may allow for businesses that are not public gathering spaces to exceed 500 persons if the occupancy is less than 50 percent capacity, subject to public health review.

A copy of the Governor's Executive Orders may be viewed online at www.governor.ny.gov/executiveorders.

There continues to be no nationwide or statewide standards or guidelines for how local governments specifically should be responding to the COVID-19 outbreak.

Consequently, local government officials should be working with their county boards of health to coordinate their response to the COVID-19 virus. While in some instances communities may be able to contain outbreaks of COVID-19, the current goal of addressing COVID-19, as articulated by the CDC and the NYS Department of Health, is to mitigate against the spread of the virus and reduce its rate of transmission.

Personal Conduct

The current advice from the CDC and the NYS Department of Health is as follows:

1. Individuals should frequently wash their hands with soap and water for at least 20 seconds. If soap and water are not available, individuals should use an alcohol-based hand sanitizer.
2. Individuals should avoid touching their eyes, nose and mouth with unwashed hands.
3. Individuals should avoid close contact with people who are sick.
4. Individuals should stay home when they are sick.
5. Individuals should cover their cough or sneeze with a tissue, then throw the tissue in the trash.
6. Touched objects and surfaces should be frequently cleaned and disinfected.

Meetings of Public Bodies

As mentioned above, Governor Cuomo has suspended the Open Meetings Law to allow public bodies to restrict the public from physically attending meetings of public bodies. If a public body restricts in-person access to its meetings or conducts a meeting remotely by conference call or similar service, the

public body must provide the public the ability to view or listen to such meetings and must record and later transcribe such meetings. If a public body is unable to allow the public to view or listen to such meetings or is unable to record and transcribe such meetings, the public body should follow the guidance below.

Pursuant to the NYS Open Meetings Law, a meeting is a physical gathering of a quorum of a public body for the purpose of conducting business. Note, however, that in 2000, the Open Meetings Law was amended to allow members of public bodies to attend and participate in meetings via videoconferencing.

The Open Meetings Law does not allow public bodies to take action via email voting or telephone conference calls. Moreover, Open Meetings Law § 104(4) provides that if videoconferencing is used to conduct the meeting, the notice of the meeting must indicate that members of the public body will be participating via videoconferencing technology. Additionally, the notice must identify the locations from which the members will be participating and state that the public has the right to attend the meeting at any of the meeting locations. Consequently, the Open Meetings Law mandates that meetings of public bodies allow for “in-person” attendance by the public.

On March 9, 2020, the New York State Committee on Open Government issued guidance regarding the “Open Meetings Law ‘In-Person’ Requirement and the Novel Coronavirus.” The guidance acknowledges that there is no process for waiving the Open Meetings Law’s “in-person” requirement for conducting meetings.

Furthermore, the Committee conceded that there is no jurisprudence regarding the ability of local governments to forego or waive the “in-person” meeting requirement. Nonetheless, the Committee opined that judicial review of alleged violations of the Open Meetings Law will likely take into consideration the public body’s desire to protect the public health while continuing to perform necessary government functions. However, the Committee urges that if a public body determines that limiting public in-person access to an open meeting is necessary in response to the COVID-19 virus, that the public body limit discussions and actions taken to those matters for which harm would be caused by delay in order to mitigate potential impact of constituents.

Stated differently, while State law does not expressly allow public bodies to conduct a meeting without allowing the public to be actually present, if local officials deem that conducting in-person meetings would threaten public health, they should limit non-in-person meetings to discussions and actions of business which must be conducted to keep the local government operating and to protect the public’s health, safety, and welfare. Moreover, public bodies should consider implementing technology that allows the public to observe such meetings via web-based video technology. Alternatively, public bodies may wish to consider minimizing the number of attendees at meetings or holding meetings in larger venues so that the recommended minimum social distancing of 6 feet may be maintained by members of the public who do attend the meeting.

Events, Gatherings, Businesses, and Places of Assembly

As previously noted, the Governor has prohibited gatherings of more than 500 people and required events, gatherings, and places of business or public accommodation for which anticipated attendance is less than 500 attendees to operate at 50 percent occupancy or capacity. Local officials that are

considering imposing more restrictive limitations on gatherings and occupancy limits are encouraged to contact their county health department for guidance.

Should the Local Chief Executive Officer Declare a Local State of Emergency?

The local chief executive officer (the mayor or the manager) should declare a local state of emergency only if it is necessary to accomplish a specific goal, such as exercising one of the powers that are enumerated in Executive Law § 24. Unnecessarily declaring a local state of emergency will generally only serve to sow confusion and fear among the public.

Pursuant to Executive Law § 24, local chief executive officers may issue the following orders after declaring of local state of emergency:

- Establish a curfew;
- Prohibit/control traffic, except essential emergency vehicles and personnel;
- Designate specific zones within which the occupancy/use of buildings and the ingress/egress of vehicles and persons may be prohibited or regulated;
- Regulate and close places of amusement and assembly;
- Suspend or limit the sale, dispensing, use or transportation of alcoholic beverages, firearms, explosives, and flammable materials and liquids;
- Prohibit and control the presence of persons on public streets and places;
- Establish or designate emergency shelters and/or emergency medical shelters; and
- Suspend any of its local laws, ordinances or regulations which may prevent, hinder, or delay necessary action in coping with a disaster or recovery only when (1) a request for the governor's assistance has been made, or (2) whenever the governor has declared a State Disaster Emergency. Suspension of any local law, ordinance or regulation in this manner is subject to standards and limits listed in the statute.

A local emergency order is effective from the time and in the manner prescribed in the order and must be published as soon as practicable in a newspaper of general circulation in the area affected by the order and provided to the media (radio and television) for publication and broadcast. These orders may be amended, modified and rescinded by the local chief executive during the State of Emergency. The orders terminate five days after issuance or by declaration of the local chief executive that the State of Emergency no longer exists, whichever occurs sooner. The local chief executive may extend these orders for additional periods up to five days each during the local State of Emergency. The local chief executive's powers are limited to their municipal boundaries.

The local emergency orders must be executed in quadruplicate and must be filed within 72 hours or as soon as practicable in the office of the municipal clerk, the office of the county clerk, the Office of the Secretary of State, and the State Office of Emergency Management.

Pursuant to Executive Law § 24(4), a local government board may grant its chief executive any additional duties or responsibilities deemed appropriate. Furthermore, pursuant to Executive Law § 24(5), any

person who knowingly violates any local emergency order of a chief executive issued pursuant to this section will be guilty of a class B misdemeanor.¹

More information regarding declaring a local state of emergency, including forms for declaring a local state of emergency and orders closing places of amusement and assembly and controlling presence of persons on public streets and places are available in NYCOM's Guide to Local Government Emergency Management which is available on www.nycom.org.

Alternatives to Declaring of Local State of Emergency

Instead of declaring a local state of emergency and issuing emergency orders, local officials may wish to issue advisories, suggesting specific actions that the public, businesses, and organizations voluntarily take to minimize the risk of spreading COVID-19. For example, recommending that places of worship or event spaces temporarily suspend services or limit the maximum allowed attendance or occupancy during the crisis may be adequate.

Local officials are encouraged to be clear when issuing an order or an advisory. Moreover, officials should provide a timeline for how long the order or advisory is in place. Clear, consistent messaging is extremely important to allay fear, reduce confusion, and allow people to manage their expectations and plan accordingly.

Local Government Labor and Employment Considerations

The question of employees working from home is another issue facing employers across the country. Many private sector employers have already directed their employees to work from home in an effort to contain the spread of COVID-19. Implementing a work from home policy may be more difficult for some public sector employers given the nature of the work. For example, police officers, firefighters and public works personnel would generally not be able to do their jobs from home. However, working from home or working different shifts may be a viable option for certain office personnel. Management should anticipate this inquiry from employees and begin analyzing what positions, if any, can be done from home in the event such action is necessary.

COVID-19 and Unionized Workforces

While local governments have broad authority to implement employee policies (including work from home requirements), for non-unionized workforces, NYCOM members with unionized workforces are required under the Taylor Law to negotiate terms and conditions of employment for union employees. This is particularly relevant if the need arises to adjust working conditions for employees as a result of COVID-19 concerns. Local officials should engage with their unions now to plan for what new policies may be needed so that such policies can be implemented quickly if and when the time comes.

Online Resources for Employers and First Responders

The Center for Disease Control and Prevention (CDC) has issued several interim guidance documents for employers and other potentially impacted personnel:

Interim Guidance for Business and Employers: <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

¹ Executive Law § 24(5).

Interim Guidance for Emergency Medical Services (EMS) Systems and 911 Public Safety Answering Points (PSAPs) for COVID-19 in the United States: <https://www.cdc.gov/coronavirus/2019-ncov/hcp/guidance-for-ems.html>

What Law Enforcement Personnel Need to Know About Coronavirus Disease 2019 (COVID-19): <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-law-enforcement.pdf>