

Model Public Meetings During Emergencies Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-THIRTY-FIRST YEAR
PHILADELPHIA, PENNSYLVANIA
JULY 8–13, 2022



WITH COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

December 5, 2022

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Model Public Meetings During Emergencies Act

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Model Public Meetings During Emergencies Act

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Model Public Meetings During Emergencies Act

Section 1. Title

This [act] may be cited as the Model Public Meetings During Emergencies Act.

Section 2. Definitions

In this [act]:

(1) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(2) “Emergency declaration” means a declaration of emergency issued under other law of this state, law of a political subdivision of this state, or federal law.

(3) “Meeting” has the meaning of [meeting] in an open meetings law governing the public body.

(4) “Observe” means listen to and watch, listen to, or watch, whether or not permitted to participate.

(5) “Open meetings law” means a law of this state or a political subdivision of this state that governs when and how a meeting of a public body must be open to the public.

(6) “Participate” means speak or submit a comment.

(7) “Person” means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency or instrumentality, or other legal entity.

(8) “Political subdivision of this state” includes a city, [county,] district, and any other local or regional governmental authority.

(9) “Public body” means an entity subject to an open meetings law. [The term does not include the [Legislature or an agency of the Legislature] or a state [or local] court.]

(10) “Record” means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable

form.

(11) “Virtual meeting” means a meeting of a public body during at least part of

which one or more members of the public body attend by electronic means.

Legislative Note: *If a state uses a term other than “meeting” in its open meetings law, insert that term in the brackets in paragraph (3).*

A state that uses a different term for “county” should insert that term in the brackets in paragraph (8). If a state does not have a governmental unit corresponding to a county, it should delete the bracketed term.

In paragraph (9), a state that includes the state legislature and its agencies or its state and local courts in the state’s open meetings law and does not choose to extend the scope of the act to those branches of government should include the bracketed sentence. If the bracketed sentence is included, the state should insert the language used in the state to describe its state legislature and legislative agencies. In a state that does not have local courts, the bracketed text “or local” should be omitted.

Comment

The Public Meetings During Emergencies Act builds on and fits into existing state laws authorizing the declaration of emergencies and subjecting public meetings to various procedural and public access requirements, particularly open meetings laws and laws providing for public comment on and participation in the deliberations of public bodies. During the COVID-19 pandemic, most governors included within their declarations of emergency provisions suspending many state laws concerning the meetings of public bodies, such as those governing the location of meetings and public access and participation, and authorized virtual meetings. Some of the executive orders included provisions intended to create public access and participation rights in virtual meetings comparable to those applicable to traditional in-person meetings. Since the onset of the pandemic a number of states have adopted laws – some temporary, intended to expire after the pandemic, and others permanent – authorizing public bodies to hold virtual meetings during emergencies, subject to various requirements for the conduct of those meetings, including public access. States that adopted such laws or amended pre-existing laws that provided some authorization for remote or virtual meetings in 2020-2022 include Arkansas, California (teleconference meetings for local agencies; emergency provisions expire December 31, 2023, other provisions take effect January 1, 2024); Connecticut (expired) Delaware, Hawaii, Maine, Massachusetts (expires March 31, 2023), Minnesota, Nevada, New York (expired), North Carolina, Oklahoma (expired), Vermont (expires January 15, 2023), and Virginia. This Act would provide a statutory basis for the authorization of virtual meetings during an emergency conditioned on compliance with requirements intended to assure

comparable public access and participation.

The Act uses a state's open meetings law to provide definitions of "public body" and "meeting." Different states use different terms – including but not limited to "open meetings," "sunshine" or "government in the sunshine," "open doors," "freedom of information" – for the law that sets the requirements for public observation of meetings of public bodies. The Act's use of the term "open meetings law" is intended to reach all such laws regardless of how they are referred to in a specific state. The Act uses the open meetings law to define "public body" and "meeting" for several reasons. Most of the executive orders or laws addressing virtual meetings during emergencies have, to date, been operated as exceptions to or amendments of an open meetings law as that is necessary to allow a public body to meet in a physical location that is not publicly accessible. So, too, an important purpose of these orders or laws has been to provide alternative means of public access via electronic technology comparable to the access required by open meetings laws. Moreover, a state's open meetings law typically includes a comprehensive definition of what the state considers to be its public bodies. Rather than provide a new definition of "public body" consisting of a lengthy list of agencies, authorities, boards, bureaus, commissions, committees, councils, etc. that would surely vary from state to state, the Act incorporates by reference the state's open meetings law definition.

The Act also assumes the broad definition of "meeting" – a convening or gathering of a public body to discuss or transact the public's business – typically found in state open meetings laws.

The Act uses the term "virtual" to refer to a meeting of a public body conducted by electronic means. The executive orders and state laws that have authorized such meetings more commonly use the term "remote." However, "remote" may imply that there is an in-person meeting of the public body with only some members participating remotely by electronic means. Indeed, a number of states before the pandemic had adopted laws permitting some members of public bodies to participate remotely in a public meeting that occurred at the public body's usual physical location. "Virtual" makes it clearer that this Act applies to meetings where there need not be a central gathering. The "one or more" phrase permits the Act to apply in hybrid settings in which some members of the body are at a central location but the meeting involves the use of electronic means to connect them to other members of the body who are participating virtually.

Section 3. Scope

(a) This [act] applies to the conduct of a virtual meeting only while an emergency declaration is in effect.

(b) This [act] does not limit or supersede other law authorizing a public body to permit a member of the public body to participate, or a member of the public to observe or participate, by electronic means, in a meeting of the public body, whether or not an emergency declaration is in

effect.

Comment

A number of states have laws authorizing remote participation in public meetings by individual members of a public body and some forms of remote observation or participation by members of the public. These laws assume that the meeting of the public body will be in a physical location, and may specify that members of the public body also be at a publicly accessible physical location, such as at a state office building. The Act does not supersede those laws but supplements them with an authorization for an entirely or primarily virtual meeting during an emergency.

Section 4. Authorization for Virtual Meeting

(a) A public body may conduct a virtual meeting while an emergency declaration that applies to all or part of the jurisdiction of the public body is in effect if:

(1) the emergency declaration prohibits, limits, or has the effect of prohibiting or limiting an in-person meeting of the public body; or

(2) the presiding officer of the public body or other individual authorized to act for the public body:

(A) determines it is not practical or prudent for the public body to conduct an in-person meeting because of the emergency;

(B) communicates to the members of the public body that the meeting will be a virtual meeting; and

(C) takes reasonable steps to inform members of the public that the meeting will be a virtual meeting.

(b) An action taken in a virtual meeting that complies with this [act] has the same effect as an action taken in an in-person meeting of the public body.

(c) Other law that applies to an in-person meeting of a public body applies, to the extent practicable, to a virtual meeting.

Comment

Subsection (a) creates a two-part test for authorizing public bodies to meet virtually. First, the individual authorized by state law to declare an emergency has done so with respect to a geographic area that is part of the public body's jurisdiction. That individual is likely to be the governor, but for local emergencies it could be a county executive, mayor or other local official. Minnesota's law, for example, requires that "the presiding officer, chief legal counsel, or chief administrative officer for the affected governing body" make the determination that an in-person meeting is "not practical or prudent." Minn. Stat. Ann. § 13D.021.1 (1). Second, either the emergency declaration itself must have the effect of preventing an in-person meeting – such as by a direct prohibition, a stay-at-home order, or an order limiting the number of people at a gathering – or the presiding officer of the public body or another individual authorized to act for the public body determines that due to the emergency it would be impractical or imprudent for the body to meet.

The reason for the second requirement is that sometimes emergency declarations remain in effect long past the most acute phase of an emergency. This may be necessary for the area to continue to receive special emergency assistance or because some emergency measures may still be needed. However, it might be possible for the public body to meet in person. The second requirement addresses that concern. If the emergency declaration in effect continues to have the effect of prohibiting an in-person meeting, the public body may continue to meet virtually. Alternatively, if the emergency declaration by its terms does not have the effect of prohibiting an in-person meeting, a virtual meeting will be authorized only if the public body's presiding officer or someone else – such as its executive director – determines that it would be impractical or imprudent due to the emergency for the public body to meet and advises the members of the public body and the public of that determination prior to the meeting.

With the authorization for a virtual meeting triggered by an emergency declaration, the exigent circumstances of the emergency may interfere with the ability of the presiding officer of the public body or other authorized individual to provide the other members of the public body and members of the public with notification of the change to a virtual format in the manner ordinarily required for notices of meetings of public bodies. This is most likely to occur with respect to meetings scheduled prior to the issuance of the emergency declaration. This section requires that at a minimum the presiding officer or other authorized individual shall communicate to the other members of the public body that a meeting will be held virtually and shall make a reasonable effort so to inform the public. If, however, emergency conditions do not interfere with the ability of a public body to comply with notice requirements, it must comply with the notice provisions of Section 8 in addition to any other applicable notice requirements.

Subsection (b) creates a safe harbor for actions taken at a virtual meeting conducted in accordance with the requirements of the act. The converse will also be true. That is, if the meeting is not conducted in accordance with the requirements of the act, the action taken may not be valid if, under the open meetings law, it would not be valid if taken at an in-person meeting that is not conducted in accordance with the rules for the meeting required by the law.

Section 5. Conduct of Virtual Meeting

(a) A public body conducting a virtual meeting, to the extent practicable, shall conduct the meeting using a means compatible with assistive technology commonly used by individuals with disabilities and that facilitates the accommodation needs of individuals with disabilities to access the meeting.

(b) Except as provided in subsections (c) and (d), the means used to conduct a virtual meeting must permit each member of the public body who attends the meeting, contemporaneously and throughout the meeting, to see and hear, and to be seen and heard by, the other members of the public body who attend the meeting.

(c) If a member of a public body is unable to obtain visual access to the virtual meeting but is able to obtain audio access that permits the member contemporaneously and throughout the meeting to hear and be heard by the other members of the public body who attend the meeting, the member may attend the meeting by audio access.

(d) If a public body lacks the capacity to provide contemporaneous visual access to a virtual meeting for members of the public body, the public body may conduct the meeting by audio-only access that permits each member of the public body who attends the meeting, contemporaneously and throughout the meeting, to hear and be heard by the other members of the public body who attend the meeting.

(e) A member of a public body who attends a virtual meeting is considered present for all purposes, including for determination of a quorum and voting, if contemporaneously and throughout the meeting the member can:

(1) for a meeting conducted in compliance with subsection (b), see and hear and be seen and heard by the other members of the public body who attend the meeting; or

(2) for a meeting conducted in compliance with subsection (c) or (d), hear and be

heard by the other members of the public body who attend the meeting.

(f) A member of a public body who attends a virtual meeting through electronic means that provide audio-only access to the meeting shall state the member's name each time the member speaks. A member's failure to state the member's name does not invalidate an action taken in the virtual meeting.

(g) A vote taken in a virtual meeting must be by a process that identifies the vote of each member of the public body.

(h) The minutes of a virtual meeting must report any vote taken, state that the meeting was conducted by electronic means, identify the technology used, and identify the members of the public body who attended by electronic means.

Comment

The provisions of this Section derive from some of the gubernatorial executive orders or state laws authorizing remote public meetings, adopted between 2020 and 2022. These include: Cal Gov't Code § 54953; 5 Ill. C.S. 120/7(e), Ind. Code 5-14-1.5-3.7, Ky SB 150, ch. 73, Ls of 2020; Me. Rev. Stat. tit. 1, § 403-A; Michigan Gov. E.O. 2020-154 (July 17, 2020); Mich. Comp. L. Ann. § 15.263a; N.J.S.A. § 52:27D-18.11; N.C. Gen. Stat. § 166A-19.24; 25 Okla Stat. § 307.1; Va Code Ann. § 2.2-3708.2; Vt. Laws 2022, No. 78.

Consistent with Title II of the Americans with Disabilities Act of 1990, the Rehabilitation Act of 1973, and other applicable law, subsection (a) directs the public body conducting a virtual meeting to select, to the extent practicable, technology that reasonably accommodates the needs of individuals with a disability in accessing the meeting. This applies to access by both members of the public body and members of the public when authorized to observe the meeting under section 6 or to participate under sections 7 or 8. The public body shall furnish appropriate auxiliary aids and services, as defined in 28 C.F.R. § 35.104, to enable individuals with disabilities to effectively participate in or observe a virtual meeting of the public body.

As subsection (b) indicates, the intent of this section is to require technology that permits the members of the public body attending the meeting to see and hear each other throughout the meeting. However, this may not always be possible. Subsection (c) addresses the situation of a meeting conducted by technology that provides both visual and audio access but where a particular member may not be able to obtain video access. Subsection (d) addresses the situation where the public body as a whole lacks the technical capacity to provide video access. That could be due, for example, to Internet bandwidth limitations in the public body's area. In that case, the virtual meeting may still be conducted using technology that provides only audio

access. In any of those events, the member will still be treated as attending for purposes of a quorum and voting. Subsection (h) provides that the type of technology used, e.g., audio-visual or just audio, shall be reflected in the minutes of the virtual meeting.

Section 6. Public Observation

(a) If the open meetings law requires that the public be able to observe contemporaneously all or part of a meeting of a public body:

(1) the public body shall permit the public to observe contemporaneously a virtual meeting, or the part of a virtual meeting that would be required to be open to the public if it were an in-person meeting; and

(2) the public body shall provide technological means to allow members of the public who observe the virtual meeting to see and hear or, if the public body conducts the meeting by audio-only access under Section 5(d), to hear members of the public body and members of the public authorized by the public body to speak in the meeting.

(b) A document, exhibit, or other record presented to a public body in a virtual meeting that under the open meetings law would have been available to the public at an in-person meeting must be made available to the public, including members of the public observing or participating in a virtual meeting under Section 7, contemporaneously with the virtual meeting to the extent practicable.

Comment

This Section confirms that the state's open meetings law applies to a virtual meeting to the same extent as it would to a comparable in-person meeting. If a meeting, or a portion of meeting, such as a closed session, would not be open to the public under the state's open meetings law, that meeting or portion would not be open when conducted virtually. The form of public observation will inevitably be affected by the nature of the technology used. For a meeting conducted by audio-only technology because, under section 5, the public body lacks the capacity for an audio-visual meeting, public observation may be limited to listening to the meeting. Public observation of the meeting requires that the members of the public body, depending on the technology used, be visible and audible, or audible, to the members of the public observing the meeting. As noted in the comment to section 5, appropriate auxiliary aids and services shall be

made available to afford individuals with disabilities an equal opportunity to observe the virtual meeting. Subsection (a)(2) is intended to confirm that members of the public who have a right to observe the virtual meeting also have a right to observe members of the public – such as government officials, staff of the public body, experts, witnesses, or parties to a proceeding before the public body – that the public body has invited or authorized to address the public body. Any documents or exhibits considered by members of the public body may be provided by making those documents or exhibits available for inspection separately from the meeting, such as by posting them to the public body’s website. Any such document shall be provided in a format accessible to individuals with disabilities.

Section 7. Public Participation

(a) If law of this state or a political subdivision of this state or a rule, practice, or procedure adopted by the public body requires that members of the public be permitted to participate in a meeting of the public body, the public body, to the extent practicable, shall permit members of the public to participate in a virtual meeting, subject to conditions that apply to an in-person meeting of the public body.

(b) If members of the public are permitted to speak in a virtual meeting, the technology used to conduct the meeting must permit members of the public body and members of the public attending the meeting to hear the members of the public who speak in the meeting.

(c) If a public body considers in a virtual meeting a matter affecting the right or interest of a person entitled by other law of this state or a political subdivision of this state or by rule of the public body to participate, present evidence, or examine or cross-examine witnesses in an in-person meeting, the public body shall permit the person to use the same technology that the public body uses to conduct the virtual meeting, or provide equivalent access, to participate, present evidence, or examine or cross-examine witnesses in the virtual meeting.

(d) A person to which subsection (c) applies may object that the virtual meeting does not allow the person effectively to protect the person’s right or interest. The public body shall consider the objection and may proceed with the matter in the virtual meeting if the public body

determines the virtual meeting will allow the person effectively to protect the right or interest.

The public body shall state in a record the determination and the reason for the determination.

Comment

Subsections (a) and (b) address the situation in which members of the public have a right to provide comments at the meeting of a public body, either orally or in writing. This right to participate may derive not from an open meetings law but from some other law, such as an administrative procedure act, another law dealing with the operations of state and local public bodies, or the organic law governing the specific public body. Compliance with public comment requirements may require flexible arrangements. For example, the public body could provide for the submission of written comments by e-mail or text message in advance of, or within a limited time after, the virtual meeting. As noted in the comment to section 5, appropriate auxiliary aids and services shall be made available to afford individuals with disabilities an equal opportunity to observe the virtual meeting.

Subsections (c) and (d) address the situation in which the action of the public body will so affect the rights or interests of a specific member of the public that they have a due process right to be heard at the meeting. These are commonly referred to as quasi-adjudicative proceedings, and typically involve land use matters such as variances, special use permits, and site-specific rezonings, but may also include the grant (or revocation) of licenses, franchises, permits, or benefits. Georgia and North Carolina would bar quasi-adjudicative action at a virtual proceeding unless all persons whose interests are affected agree. The North Carolina law also requires that the right to a hearing occur during the emergency. This Act follows the approach of New Jersey's virtual meeting law, which does not require the consent of the parties or that a decision must be made during the emergency. The Act anticipates, however, that the public body will undertake a "totality of the circumstances" examination to determine whether a virtual meeting could provide due process. This tracks the approach of a New Jersey administrative rule during the Covid emergency. Among the circumstances a public body should consider in determining whether a virtual meeting can provide due process is the ability of interested parties to examine exhibits, transcribe testimony, and examine or cross-examine witnesses, as well as the ability of the public to comment upon the proceeding. Factors in making this determination could also include the scale of the project, the number of approvals requested, the degree of public interest, and the number of potential objectors." The public body should also consider the consequences of delay until an in-person meeting can be held. Consistent with the comment to section 5, appropriate auxiliary aids and services shall be made available to afford individuals with disabilities entitled to present evidence and examine or cross-examine witnesses during the meeting an equal opportunity to do so.

The requirements of this section apply not only when the member of the public affected by the public body is participating virtually but also when the member of the public and some members of the public body are present at an in-person meeting of the public body but one or more members of the public body are participating virtually under this act.

Section 8. Notice

In addition to any other requirement concerning notice a public body must give for a meeting of the public body, notice of a virtual meeting must specify:

- (1) that the meeting will be a virtual meeting;
- (2) the technology to be used for the meeting;
- (3) how members of the public can observe the meeting contemporaneously under Section 6;
- (4) if permitted under Section 7, how members of the public can participate, present evidence, or examine or cross-examine witnesses in the meeting;
- (5) how a member of the public can alert the public body of a technical problem preventing the member from accessing the meeting; and
- (6) how a reasonable accommodation can be requested by or for a member of the public with a disability.

Comment

As noted in the comment to Section 4, the exigent circumstances underlying the declaration of emergency that triggers the authorization for a virtual meeting may interfere with the ability of a public body to comply with statutory requirements governing how notice is to be given, particularly for meetings scheduled prior to the issuance of the emergency declaration or at or shortly after the onset of the emergency. The public body should use the best means available in light of the circumstances to give the notice required by this section.

Section 9. Rulemaking Authority

A public body may adopt rules [under [cite to state administrative procedure act]] for conducting a virtual meeting under this [act]. The rules may include:

- (1) the means by which the public body will inform members of the public that a virtual meeting will be held;
- (2) the effect of a technical problem that interferes with a virtual meeting or access to the meeting by a member of the public body or the public;

(3) the means by which a record considered in a virtual meeting is made available to the public body and, if required by other law, the public;

(4) the means for access to a virtual meeting by an individual with a disability;
and

(5) the process by which a person may object under Section 7(d).

Legislative Note: *Insert the bracketed phrase in a state with an administrative procedures act that requires specific reference to that act if it is intended to apply to the rulemaking authority under this section.*

Section 10. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “, as amended”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

Comment

The federal Electronic Signatures in Global and National Commerce Act, popularly known as “E-Sign”, was adopted in 2000 to facilitate the use of electronic records and signatures in commercial transactions. Subject to exceptions not relevant here, E-Sign mandates the acceptance of electronic contracts and electronic signatures in interstate or foreign commerce. It largely tracks the Uniform Electronic Transactions Act, adopted by the ULC in 1999, but includes consumer consent provisions and prohibits state law from giving greater legal effect to any specific technology or technical specification. Under Section 102 of E-Sign, state legislation attempting to regulate electronic records and signatures can opt out of federal preemption, allowing some modification to the federal law, so long as the State treats the records or signatures consistent with E-Sign. In order to take advantage of the exception to preemption, the state law must make specific reference to E-Sign as provided in this Section. See 15 U.S.C. Section 7002(a)(2)(B).

[Section 11. Severability

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state stating a general rule of severability.*

[Section 12. Repeals; Conforming Amendments]

(a) . . .

(b) . . .]

Legislative Note: *The state should examine its statutes to determine whether conforming revisions are required by provisions of this act relating to meetings of a public body and open meetings requirements.*

Section 13. Effective Date

This [act] takes effect . . .