

CLIENT NEWS BRIEF

How to Address COVID-19 with Your Governing Board: Brown Act Reminders

Background

With growing concerns over the spread of the novel coronavirus (COVID-19), many public agencies are closely monitoring guidance and updates from health and science officials. The California Department of Public Health (CDPH) along with the Centers for Disease Control and Prevention (CDC) have been providing regular updates and recommendations for employers, and the fluidity of the situation has resulted in some public agencies taking or considering actions on an emergency basis or without the time for all the public notice and input required for routine public business.

Generally, the public has a right to attend meetings and address the legislative body on any item on the agenda or any item of interest to the public that is within the subject matter jurisdiction of the legislative body. With increased precautions in place related to large gatherings and travel, public agencies are faced with the need to make decisions quickly in response to the latest information available. The following provides guidance for conducting public meetings to discuss COVID-19 with your governing board and the public, in compliance with California's open meeting laws under the Brown Act.

How to Convene a Meeting:

- Notice must be given of the time and place for **regular meetings**, by posting an agenda at least seventy-two (72) hours in advance of the meeting. Posting must occur in a place that is freely accessible to the public and on the agency's website.
- A **special meeting** may be called at any time including weekends and holidays, by notice at least twenty-four (24) hours in advance of the meeting. Only the business set forth in the notice may be considered at the meeting.

Emergency Meetings:

- In case of an **emergency meeting** to consider matters that require prompt action due to the disruption or threatened disruption of public facilities and services, the Brown Act meeting notice described above is not required. However, absent a "dire" emergency, attempts must be made to contact the media by telephone at least one hour before the meeting, unless the telephones are not working. Following the emergency meeting, the minutes of the meeting, a list of persons notified or attempted to be notified of the meeting, and actions taken must be posted for ten (10) days in a public place.

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Mary Lerner
Partner
Governance Practice Group Co-Chair
Fresno Office
mlerner@lozanosmith.com



Anne Collins
Partner
Governance Practice Group Co-Chair
Sacramento Office
acollins@lozanosmith.com



Jerome Behrens
Partner
Fresno, Sacramento, Bakersfield Offices
jbehrens@lozanosmith.com



As the information contained herein is necessarily general, its application to a particular set of facts and circumstances may vary. For this reason, this News Brief does not constitute legal advice. We recommend that you consult with your counsel prior to acting on the information contained herein.

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Not all discussions about COVID-19 necessarily merit an “emergency” situation allowing for greater flexibility with certain legal requirements. For purposes of the Brown Act, an emergency is defined as a “work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a majority of the members of the legislative body.” A “dire emergency” is a “crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a legislative body to provide one-hour notice before holding an emergency meeting under this section may endanger the public health, safety, or both, as determined by a majority of the members of the legislative body.” (Gov. Code section 54956.5(a).) The legislative body should make findings supporting the existence of an emergency.

Attending Meetings Remotely: On March 12 and 17, 2020, as part of a larger effort to address the outbreak, Governor Gavin Newsom issued Executive Orders allowing state and local legislative bodies to hold meetings via conference calls without violating the Brown Act. Board members may attend regular, special, or emergency meetings by telephone (or video conference), and the Governor’s Executive Orders suspends the following requirements which normally apply to teleconference attendance:

- A quorum of the members participate from locations within the boundaries of the agency and each location is accessible to the public;
- Each teleconference location from which a member will participate must be publicly noticed, and agendas must be posted at each teleconference location;
- Each teleconference location be accessible to the public;
- Members of the public may address the body at each teleconference location; and
- At least one member of the legislative body must be physically present at the location specified in the notice of the meeting.

These requirements are suspended on condition that 72 hour or 24 hour (whichever applies) public notice is still given, and to give notice by which members of the public may observe the meeting and offer public comment. While the definition and parameters surrounding “public participation” are unclear, there are various options to allow the public to address items on the agenda and provide public comment including, but not limited to conducting the meeting via teleconference, using an internet platform such as Zoom or YouTube to stream the meeting allowing attendees to comment in real-time, or providing a special email address for the public to submit comments in advance of the meeting. Given the Order of the State Public Health Officer of March 19, 2020 and the Governor’s Executive Order of the same date placing limits on the public congregating, public agencies should work closely with their legal counsel as to whether and to what extent public meetings are permissible. Public agencies will need to decide whether to provide such an in-person opportunity for the public to attend meetings, as personal attendance is not “essential.” In addition, if the Board elects to meet in person, it should continue to monitor and adhere to all state and local public health directives and social distancing guidelines.

How to Act on Items Not on the Agenda: Under normal circumstances, the legislative body may not discuss or take action on any item that does not appear on the posted agenda. The following exceptions apply:

- *Subsequent Need.* The legislative body may act upon an item not appearing on a regular agenda upon a finding by two-thirds (2/3) vote of the members present, or by unanimous vote if less than two-thirds (2/3) but more than a quorum of members are present, that there is a need for immediate action and the need for action came to the attention of the agency after the agenda was posted.

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- *Emergency Situation.* If by a majority vote the legislative body determines prior to any such action that an “emergency situation” exists and that prompt action is required, they may take action on an emergency item not appearing on the posted agenda. The emergency situation exception is for an agenda that has already been posted, in contrast to the emergency meeting discussed above.

How to Address the Board in Closed Session:

- The legislative body may discuss COVID-19 in closed session if there has been a threat of or exposure to litigation. An attorney should be present at such closed session discussion.
- There is also an exemption under the Education Employment Relations Act for discussing negotiations. Therefore, topics such as changes to work day and work year, overtime for employees doing deep cleaning, addressing non-refundable staff travel plans, changes to employee leave provisions, all of which are negotiable, may be discussed in closed session as long as the purpose of the discussion is to discuss negotiation direction and strategy.
- The Brown Act provides that the legislative body may go into closed session to discuss threats to public safety/security, including a threat to the public’s right to access public facilities or public services. However, the intent of this exception appears to focus on allowing law enforcement officials or security consultants to advise during closed session and should be used with caution.

Local and State Agency Governing Bodies May Receive COVID-19 Updates Without Violating Open Meeting Laws:

On March 21, 2020, the Governor issued an Executive Order to allow all, or more than a quorum, of a legislative body (local and state), to listen in and ask questions for COVID-19 updates from federal, state or local officials. This limited exception from the open meeting laws does not authorize discussions, serial or otherwise, among members constituting a majority without complying with open meeting law requirements.

This Client News Brief (CNB) supersedes and replaces the prior CNB on this topic based on the new Executive Orders and public health officer directives.

For more information on issues arising from COVID-19, please contact one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).