

COVID-19 Impacts in Massachusetts: Governor Returns Businesses to Phase 3 Step 1 and State Jury Trials Delayed Until January

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Update Highlights:

- COVID-19 infection rates, case numbers, hospitalizations, and deaths are at or approaching the highs seen in the spring.
- Governor Baker ordered businesses back to Phase 3 Step 1, restricting some businesses and closing others.
- Massachusetts state courts delayed the timetable for resuming jury trials until the new year.

This and other updates on the Commonwealth's response are collected on its [website](#) and the separate [court system site](#).

Massachusetts Reopening Status

In the face of dramatic increases in the various metrics used to track COVID-19 infections in Massachusetts, Governor Baker rescinded last month's attempts at tightening restrictions ([COVID-19 Order No. 54](#) and [COVID-19 Order No. 56](#)) and issued COVID-19 Order No. [COVID-19 Order No. 57](#) and [COVID-19 Order No. 58](#) under the powers of the March 10, 2020 [declaration of a state of emergency](#).

Order No. 57 reduced the limits on outdoor gatherings from 100 to 50 persons and required outdoor gatherings in excess of 25 to be reported to local boards of health. The order reiterated most of the substance of Order No. 54:

- All gatherings must disperse by 9:30 pm, impacting restaurants and other venues.

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- Everyone older than 5 years old must wear a mask or face covering when in a public location – regardless of whether social distancing can be achieved;
 - Participants in indoor and outdoor gatherings including in private residences must maintain 6 feet of distance;
 - Private residence indoor gatherings limited to 10 people;
 - Private residence outdoor gatherings limited to 25 people;
 - Mandatory participation in contact tracing efforts.

Order No. 58 returned the entire state to Phase III, Step 1 COVID-19 Safety Rules, effective Sunday, December 13, impacting the operation of restaurants and businesses:

- Nearly all businesses will retreat to 40 percent capacity restrictions;
- Diners at restaurants are limited to 90 minutes at their table, must be masked when they are not actively eating or drinking, and may gather in groups of 6 or less (previously 10 were permitted) and encouraged to eat only with those from their own households; and
- Theaters and other indoor performance venues and some high-contact indoor recreational facilities will be closed again.

The previously issued Stay at Home Advisory issued by the Department of Public Health urging people to remain home between 10 pm and 5 am remains in effect.

Some areas of the Commonwealth had proceeded to Phase III, Step 2 of its four-phase reopening plan, pursuant to Governor Baker's comprehensive plan to open the Massachusetts economy contained in [COVID-19 Order No. 43](#). The plan's four sequenced phases were described in the Administration's "[Reopening MA Report](#)." This report provides detail on allowed commercial activities in each of the phases, which are called "start", "cautious", "vigilant" and "new normal."

Phase III, Step 1 commenced in July including the limited reopening of fitness centers and health clubs, museums and aquariums, movie theaters and performance halls, and casinos. A list of which business can re-open during each phase, and under what restrictions, [is maintained here](#).

Even in the midst of increasing numbers statewide, Governor Baker's [COVID-19 Order No. 56](#) on November 6 reiterated that some municipalities continue to make steady progress on the key metrics and continued to authorize "Lower Risk Communities" to proceed to Phase III, Step 2 provided their metrics remain low. Phase III, Step 2 businesses include indoor performance venues for live performances and indoor recreational activities like laser tag, roller skating, and obstacle courses. Where monitored metrics fall below thresholds, municipalities have had to close these businesses. Unfortunately, the cautious optimism that the steps taken in November would address the troubling trend in COVID-19 cases has not proven itself in the data and the Baker Administration has been forced to retreat to Phase III, Step 1 across the state. A move to Phase IV – where bars, nightclubs, and other indoor activities are permitted – seems even more remote and unlikely likely any time before a vaccine is widely available.

Businesses should closely monitor the Commonwealth's "[Reopening Massachusetts](#)" website for additional updates.

State Courts

State Courts Scale Back and Delay Restart of Jury Trials. On November 2, 2020, the SJC again [delayed the restart](#) of jury trials, this time until the week of January 11, 2021. In its [Fourth Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 \(coronavirus\) Pandemic](#), the SJC had previously set the end of October as the start of its Phase 1 return to trials with restrictions on the size of juries and the location. In early November, the start date was changed to November 30.

The SJC has scaled back its ambitions for the two-month Phase 1, reducing the number of jury trials and locations. The plan is for trials to juries of six to commence in courthouses that have been identified as meeting recommended environmental and engineering controls. There will be a single jury trial each week in each courthouse.

Courthouses remain open with restrictions articulated in earlier orders, and parties are encouraged to conduct business virtually whenever possible. Trial courts are directed to "conduct in-person proceedings in emergency and non-emergency matters that either can be handled more effectively or efficiently in person or cannot be handled virtually because a virtual proceeding is not practicable or would be inconsistent with the protection of constitutional rights." Each trial court is directed to maintain a list of case types that they plan to hear in person. State courts will continue to hear all other civil matters virtually. All criminal bench trials shall be held in person.

The SIC order further identifies which individuals may access courts under the reopening plan, and references prior orders for screening and other access requirements. All people entering a courthouse must wear a mask, and the order continues to permit cell phones and other devices in courtrooms given the increased reliance on electronic information to facilitate communications and proceedings during the pandemic. Notably, the order also calls for all clerk, register, and recorder offices to be physically open to the public for court business, while continuing to conduct business virtually where possible to limit traffic within each courthouse.

Tolling of Civil Statutes of Limitation and Court Deadlines Ends. Tolling of civil statutes of limitations ended on June 30. All criminal statutes of limitation were tolled through October 23, 2020, due to the limited availability of grand juries per the [SJC's September 17 order](#). The SJC's latest announcement delaying the restart of jury trials does not address this deadline, which would appear to have expired without further extension.

Electronic Service Permitted in Many Instances. Parties in civil cases may use email for service of most pleadings under Mass R. Civil P.5(b) where the email addresses of the lawyers have been disclosed in previous filings with the court. The SJC's [order](#) on March 30 cautioned attorneys that they must periodically check spam and quarantine folders to make sure they have not missed an email, but prohibited email service for summons and complaint, attachment, trustee process, third-party complaints, and subpoenas. This means that ongoing civil litigation is the main beneficiary of these rules, as new complaints, third-party complaints, and other more complicated matters will continue to require traditional service consistent with the additional consequences associated with those matters. In addition, pro se litigants cannot be served by email unless they assent.

Electronic Signatures. The SJC issued [an order permitting the use of electronic signatures](#) in

Massachusetts Courts effective April 7, 2020. The order applies to “all courts and case types” and to attorneys and self-represented parties alike. Electronic signatures may take the form of a scanned signature, an image representing the signature, or a “/s/ name of signatory” block (as is common practice in federal courts). Following the order, electronic signatures are permitted in all Massachusetts courts “unless the court specifically orders otherwise.” Electronic signatures also are acceptable for affidavits made under oath, although the party must make efforts to secure an original signature as soon as practicable after filing with the court.

Virtual Oral Arguments and Tolling at SJC and Appeals Court. The Appeals Court [continues to hold oral arguments](#) via Zoom video conference with a live stream to the Appeals Court’s [YouTube channel](#). Similarly, the SJC continues to hold oral arguments by video conference with [public access available](#).

Trial Court Helpline. The Trial Court has established a help line that the public and attorneys can call to ask general questions about civil and criminal cases and help them navigate the court system while it is experiencing COVID-19 disruptions. The Help Line is staffed from 8:30 a.m. to 4:30 p.m., Monday through Friday, and can be reached by calling 833-91COURT. For emergency matters, the Trial Court has directed that litigants and lawyers should call the clerk or register office at the court. Court contacts are located on the [Courthouse Locator page available here](#).

Federal Courts

Federal Courts are Open With Restrictions. The [Federal District Court for the District of Massachusetts](#) is open with [restrictions on visitors](#) and [limited public counter hours for clerks](#) (9 a.m. to 2 pm). The Court’s [General Order 20-35](#) established criteria for entry to the Federal District Courthouses including mandatory wearing of face masks. The suspension of jury trials abated in late September when the Federal court began conducting [limited criminal jury trials](#). It remains uncertain whether and under what conditions civil jury trials could resume.

In order to keep the work on the court moving, judges continue holding hearings and conferences by telephone and video and issued a [public notice](#) regarding public access to these teleconferences and videoconference hearings. The Court’s [General Order 20-31](#) paved the way for increased in-person proceedings in the District Court. Under the Order, the Court may conduct “a limited number of in-person, non-jury proceedings,” with specific protections in place, including social distancing in courtrooms and a mask requirement for all participants, except for witnesses under oath who will testify behind a Plexiglass screen. A [mandatory health screening self-assessment](#) also is required before visiting the Court. While most hearings and other matters will continue to be heard virtually, certain non-jury proceedings may be scheduled in-person in cases where “(1) further delay may harm the interests of justice and (2) the law does not permit video proceedings or the requisite consents cannot be obtained.” The Court does not expressly define such cases, but they may include a range of civil and criminal cases where prompt proceedings are necessary.

First Circuit Court of Appeals Extends Deadlines But Not for Filing of Appeals. The First Circuit continues to hold oral arguments by video conference. In an [explanation on its website](#), the First Circuit provided a link to its [YouTube channel](#) for live viewing and its archive of audio recordings of arguments. The court also suspended its requirement that appendices to brief be filed only in paper form (while retaining the right to request paper copies after the electronic version is accepted) while anticipating a resumption of paper filings at a later date.

Local Governments

Cities and towns have taken a variety of steps to confront the coronavirus in their municipalities that will interrupt day-to-day business in a variety of ways, including slowing permitting, responses to public record requests, and ongoing discussions on subjects outside the current crisis. Municipalities have declared [states of emergency](#), [closed town and city halls](#), and postponed municipal board and committee meetings. As towns begin to hold town meetings, some are doing so outdoors or in large open spaces, while limiting in-person public access in some cases and facilitating public participation by virtual means.

On April 3, the Governor signed [legislation](#) that addressed constructive approvals, scheduling and continuance of annual town meetings, implementation of budgets, and other time-sensitive financial issues. Paralleling the extensions for state permits and appeals, the legislation allows local hearings to be continued during the state of emergency, although there is language that appears to provide boards and committees the discretion to hold virtual meetings. The legislation:

- Suspends the requirement for a local board to act commence a hearing within a specified period of time as of March 10, 2020 to be resumed 45 days after termination of the state of emergency (or later if provided by statute or rule);
- Suspends constructive approvals when a local board fails to act within specified period of time until 45 days after the state of emergency ends (or later if provided by statute or rule);
- Extends deadlines by which local permit applications are to be heard and acted upon, with that period resuming 45 days after the state of emergency ends (or later if provided by statute or rule);
- Continues all hearings for which a hearing was held before March 10, 2020 but not concluded until the first hearing date of the permit granting authority after the state of emergency ends, but not later than 45 days after the termination of the order; and
- Suspends the time for required recording of local permits or approvals with the Registry of Deeds.

In order to aid municipalities to carry on their business, on March 12, Governor Baker issued [an order](#) suspending some provisions of the state's Open Meeting Law (G.L. c. 30A, § 20). This order eased the requirement to meet in a public place and permitted remote participation by all members of a meeting of a public board or committee provided the public has a way to monitor the proceedings in real-time (e.g. telephone, internet, etc.). Where a municipality cannot accomplish real-time participation "due to economic hardship and despite best efforts" the municipality must post the transcript or recording on its website. Based on this order, many municipalities are rescheduling certain town meetings and hearings to occur by video or audio conference. [Legislation](#) subsequently codified the governor's order.

Environmental Compliance Considerations

During the public health crisis presented by COVID-19—and the mandatory business closures resulting from it—businesses will need to keep a careful eye on environmental compliance and permitting. Environmental compliance requirements remain in effect, meaning that businesses will need to continue compliance with permits, environmental regulations, and other environmental

requirements that apply to their operations.

Massachusetts and MassDEP

The Massachusetts Department of Environmental Protection (MassDEP) has not issued broad guidance or policy updates regarding environmental compliance, enforcement, or flexibility mechanisms related to challenges presented by COVID-19. On a webinar on March 31, MassDEP Commissioner Marty Suuberg said that he did not expect to issue a document similar to US EPA's enforcement memorandum discussed below. Instead, MassDEP has issued a sector-specific [FAQ for Public Water Suppliers and Wastewater Service Providers](#) and has [suspended bottle redemption enforcement](#). But apart from these limited measures, MassDEP has not yet provided guidance or altered compliance requirements. A list of COVID-19 Guidance and Directives issued by state agencies [is maintained here](#); businesses may want to check this page periodically as new items are added on a near-daily basis.

With many government offices closed and staff working remotely, including much of the Massachusetts Department of Environmental Protection (MassDEP), it may be more difficult for some entities to carry out routine permitting and compliance actions. Nonetheless, Massachusetts businesses should assume that environmental compliance and permitting requirements continue to apply.

Through his initial [COVID-19 Order No. 17](#), Governor Baker sought to ease the pressure of permitting and appeal deadlines under the authority of the Executive Office of Energy and Environmental Affairs and the Executive Office of Housing and Economic Development. On July 2, the governor issued [COVID-19 Order No. 42](#), which rescinded Order No. 17 and restarted permitting and appeal deadlines:

- **Constructive approvals or denials**(defined as those approvals or denials that take effect if the state does not act within a specified time) that would have issued between March 10 and July 1 but were suspended under Order No. 17 are now deemed to be issued on August 17, 2020 unless the state permitting agency otherwise acts before that date.
- **Hearings** that a state permitting agency would have been required to begin between March 10 and July 1 but were suspended under Order No. 17 are required to commence on or before August 10, 2020.
- **Decisions and requests** that a state permitting agency would have been required to issue or make between March 10 and July 1 but were suspended under Order No. 17 must be issued by the permitting agency on or before August 10, 2020.
- **Appeal rights** of any person aggrieved by an appealable state permitting decision that would have expired between March 10 and July 1 but was suspended under Order No. 17 are extended to August 10, 2020. Any appeal right that expires after July 1, 2020 must be exercised by the regular deadline or by August 10, 2020, whichever is later.
- **Expiration dates of state permits remain tolled** during the state of emergency. Any permitting approval valid as of March 10, 2020 will not expire during the state of emergency, and the new expiration date for such approval will be calculated by determining how many days remained in the permit effectiveness as of March 10 and adding that number of days to the date of the eventual termination of the state of emergency. This tolling protection is not

extended to permit holders who were in violation of their permits as of March 10.

Federal and U.S. EPA

Following the filing of several lawsuits by environmental advocacy groups and a coalition of states, EPA announced plans to [terminate](#) guidance it had issued on March 26, 2020 entitled: “[COVID-19 Implications for EPA’s Enforcement and Compliance Assurance Program](#),” with the termination effective August 31, 2020.

EPA’s guidance addressed a range of issues relating to environmental enforcement and compliance and COVID-19. EPA warned in a June 29 memo that it “may terminate this temporary policy (i.e., indicate it does not apply to future noncompliance) on a state or national basis, in whole or in part, at any earlier time, taking into account changing conditions in a state or region of the country, including as appropriate the expiration or lifting of “stay at home” orders in a state, the status of federal and/or state COVID-19 public health emergency guidelines, and/or other relevant factors or considerations.” Following termination, EPA indicates that it will no longer base any exercise of enforcement discretion on the temporary policy for any noncompliance that occurs after the termination date.

Importantly, during its effective date range, EPA’s guidance did not relieve or eliminate any compliance obligations or deadlines; rather, it indicates how EPA will take certain enforcement actions in light of COVID-19 impacts. The policy is detailed and, in some instances, nuanced, and we recommend careful assessment to determine whether it may be applicable to your operations. [We have published a thorough analysis of EPA’s COVID-19 policy here.](#)

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