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LEGAL UPDATE

September 24, 2021

To: Superintendents, Member School Districts (K-12)
From: Erin E. Stagg, Associate General Counsel *EF*
Subject: Updated Brown Act Teleconferencing/Virtual Meeting Requirements (AB 361)
Memo No. 29-2021

Assembly Bill (“AB”) 361, signed into law on September 16, 2021, amends Government Code section 54953 to provide authority and specific requirements for public agencies to hold virtual meetings during a proclaimed state of emergency and remain in compliance with the Brown Act (Gov. Code §§ 54950 *et seq.*).

Enacted as urgency legislation, AB 361 would typically be effective immediately. However, on September 20, 2021, the Governor issued Executive Order N-15-21, delaying the full application of AB 361 until 11:59 p.m. on October 1, 2021. As such, public agencies may generally continue to hold virtual meetings through September 30, 2021 consistent with the requirements of Executive Order N-29-20 issued on March 17, 2020 due to the COVID-19 pandemic (“COVID Executive Order”).

September 24-September 30, 2021

The COVID Executive Order allowing electronic or virtual meetings remains in force until September 30, 2021. Public agencies may continue to hold regular and special meetings under that authority through September 30, 2021.

Please note, however, and, as further explained below, a public agency holding a virtual meeting from September 24, 2021 through September 30, 2021, ***for the purpose of making the required AB 361 findings to continue with virtual meetings after September 30***, shall conduct such virtual meeting in compliance with the AB 361 requirements.

After September 30, 2021

A public agency that intends to continue with virtual or hybrid meetings after September 30 must have a separate meeting before any other regular or special



October meetings to comply with AB 361 and make appropriate findings in order to hold future meetings remotely. In other words, if a public agency would like to meet electronically in October, it must make the AB 361 determination *before* that meeting.

To assist clients navigating the expiration of Executive Order N-29-20 and the enactment of AB 361, our office has prepared a brief Frequently Asked Questions guide. We have also prepared sample agenda language that may be modified to address the specific local circumstances of a public agency. Please contact the office to speak with an attorney if you are interested in receiving sample agenda language and guidance to modify it for your specific local circumstances.

As a reminder, the information provided in the guide is a summary of the law and the application of that law to a specific client's factual situation may vary. We, therefore, strongly recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

AB 361 – FREQUENTLY ASKED QUESTIONS

Q: What are the circumstances under which AB 361¹ virtual meetings are permitted?

A: Gov. Code § 54953(e)(1) provides that a local agency may use teleconferencing [audio, video or both] in any of the following circumstances:

(A) The legislative body holds a meeting during *a proclaimed state of emergency*, and state or local officials have imposed or recommended measures to promote *social distancing*.

(B) The legislative body holds a meeting *during a proclaimed state of emergency for the purpose of determining*, by majority vote, *whether as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees*.

(C) The legislative body holds a meeting during *a proclaimed state of emergency* and *has determined*, by majority vote, pursuant to subparagraph (B) that, *as a result of the emergency, meeting in person would present imminent risks to the health or safety of attendees*.

Q: Does AB 361 only apply to the current declared COVID-19 state of emergency?

A: No. AB 361 does apply to emergencies arising from the COVID-19 pandemic, but it also specifically references Government Code section 8558, which contains a broad definition of emergency including, among others, fire, flood, storm, epidemic and earthquake.

¹ AB 361 is not to be confused with AB 339, a pending bill awaiting Governor Newsom's signature, which seeks to establish new public teleconferencing requirements for city councils and boards of supervisors with jurisdiction over 250,000 people.



Q: If a public agency has not resumed in-person meetings, are there any specific actions to take to continue holding virtual meetings after September 30, 2021?

A: Yes. To continue holding virtual meetings after September 30, a public agency will need to:

- Confirm that they can meet the AB 361 technical requirements for public attendance and real-time comment.
- Develop a plan in the event of a technical disruption during a virtual meeting.
- Unless the public agency is located in a region where state or local officials require or recommend social distancing,² the governing body will need to determine, by majority vote, that meeting in person would present imminent risks to the health or safety of attendees.
 - This determination meeting should be held before any other special or regular October meetings.
 - This determination meeting – even if held during September – should be in compliance with the AB 361 virtual meeting requirements.³

Q: If a public agency has resumed in-person meetings, what changes under AB 361?

A: With the expiration of Executive Order N-29-20, a public agency will be required to comply with the traditional Brown Act meeting and teleconferencing requirements if they do not proceed under AB 361. As more fully detailed below, the traditional Brown Act requirements include that:

- A quorum of the local body shall be physically present within the local body’s boundaries;
- The meeting and all teleconference locations must be physically accessible to the public;
- The address of the teleconference location shall be included on the agenda;
- An agenda shall be posted at each teleconference location; and,
- Public participation must be allowed at the meeting and all teleconference locations.

Q: Can a public agency conduct a “hybrid” meeting with the governing body and staff in person and the public participating remotely?

Yes. However, if the in-person meeting is not open to in-person attendance by members of the public, the meeting must meet the requirements of AB 361.

Q: Are there differences in how a public agency may conduct virtual meetings under AB 361 compared to the March 17, 2020 Executive Order N-29-20?

² A public agency in these circumstances should consult with their legal counsel regarding the specific facts.

³ Executive Order N-15-21 states, “[t]he provisions governing teleconference meetings in ... subdivision (e) of Government Code section 54953 are suspended through September 30, 2021, except that *any local legislative body that meets to take a majority vote pursuant to subparagraph (B) of paragraph (1) of subdivision (e) of Government Code section 54953 shall conduct the meeting at which such vote is taken as required by paragraph (2) of subdivision (e) of Government Code section 54953.* Except as otherwise specified in this paragraph, the requirements related to public meetings of local legislative and state bodies specified in Paragraph 42 of Executive Order N-08-21 shall continue to govern such meetings through September 30, 2021.”



A: Yes. As more fully detailed below, AB 361 imposes additional requirements for virtual meetings, including, among others, that:

- Public agencies may not require public comments be submitted in advance (this is still a permissible option, but cannot be a requirement);
- Members of the public must be allowed to address the board in real-time during the meeting; and,
- In the event of a technical disruption, the public agency cannot take any further action on the agenda until the issue is resolved.

Q: Once the initial AB 361 finding is made, does a public agency have to do anything further to continue with virtual meetings?

A: Yes. To continue with AB 361 virtual meetings, the public agency must reconsider the circumstances of the emergency *every 30 days* and determine that either the state of emergency continues to directly impact the ability of the members to meet safely in person; or, state or local officials continue to impose or recommend measures to promote social distancing. These findings must be made by majority vote. Gov. Code § 54953(e)(3).

Q: What are the differences between the standard Brown Act teleconferencing requirements and AB 361?

A: Quorum

Brown Act Teleconferencing Requirements	AB 361
During teleconference meetings, at least a quorum of the members of the local public agency body must participate from locations within the boundaries of the territory over which the local public agency body exercises jurisdiction.	Quorum not required to be located within the boundaries of the territory.

A: Agenda

Brown Act Teleconferencing Requirements	AB 361
<p>Each teleconference location from which a member will be participating must be specifically identified in the meeting notice and agenda, including full address and room number.</p> <p>An agenda must be posted for the required period of time (24 or 72 hours) at each teleconference location from which a member will be participating.</p>	<p>Public agency must only give notice and post agenda in accordance with the Brown Act provisions for in-person meetings.</p> <p>The agenda shall identify and include an opportunity for all persons to attend via a call-in option or an internet-based service option.</p>



A: Teleconference Location

Brown Act Teleconferencing Requirements	AB 361
<p>Each teleconference location must be physically accessible to the public.</p> <p>Members of the public must be able to physically address the body from each teleconference location.</p>	<p>Public agencies do not have to let members of the public attend at each teleconference location, but must allow the public to access the meeting via a call-in or an internet-based service option.</p> <p>The public agency is not required to provide a physical location for the public to attend or provide comments.</p>

A: Public Comment

Brown Act Teleconferencing Requirements	AB 361
<p>Public Comment must be allowed at the in-person meeting and from every teleconference location.</p>	<p>The legislative body shall allow members of the public to access the meeting and the agenda shall provide an opportunity for members of the public to address the legislative body directly pursuant to Section 54954.3. In each instance in which notice of the time of the teleconferenced meeting is otherwise given or the agenda for the meeting is otherwise posted, <i>the legislative body shall also give notice of the means by which members of the public may access the meeting and offer public comment.</i> Gov. Code § 54953(e)(1)(B).</p> <p>The legislative body <i>shall not require public comments to be submitted in advance of the meeting and must provide an opportunity for the public to address the legislative body and offer comment in real time.</i> Gov. Code § 54953(e)(1) (E).</p> <p>An individual desiring to provide public comment through the use of an internet website, or other online platform, not under the control of the local legislative body, that requires registration to log in to a teleconference <i>may be required to register as required by the third-party internet website or online platform to participate.</i> Gov. Code § 54953(e)(1)(F).</p>



	<p>[Note: The Brown Act does not allow a public agency to require a meeting attendee to provide their name and address as a condition of attendance and public agencies may need to consider whether pseudonyms will be allowed].</p> <p>A legislative body that provides <i>a timed public comment period for each agenda item shall not close the public comment period for the agenda item, or the opportunity to register until that timed public comment period has elapsed.</i></p> <p>A legislative body that <i>does not provide a timed public comment period, but takes public comment separately on each agenda item, shall allow a reasonable amount of time per agenda item to allow public members the opportunity to provide public comment</i>, including time for members of the public to register, or otherwise be recognized for the purpose of providing public comment.</p> <p>A legislative body that provides <i>a timed general public comment period</i> that does not correspond to a specific agenda item <i>shall not close the public comment period or the opportunity to register until the timed general public comment period has elapsed.</i></p> <p>Gov. Code § 54953(e)(1)(G)(i)-(iii)</p>
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Please contact our office with questions regarding this Legal Update or any other legal matter.

The information in this Legal Update is provided as a summary of law and is not intended as legal advice. Application of the law may vary depending on the particular facts and circumstances at issue. We, therefore, recommend that you consult legal counsel to advise you on how the law applies to your specific situation.

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