

From: KP Law, P.C. <KPLAW@k-plaw.com>
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Important Changes to Open Meeting Law Regulations

The Attorney General's office promulgated revisions to the Open Meeting Law ("OML") regulations at 940 CMR 29.00 – 29.11. While several of the amendments are organizational or intended to remove superfluous terms, there are also several important substantive changes. This update summarizes the most important amendments to the regulations, which may be found in their entirety at the Attorney General's website at <https://www.mass.gov/the-open-meeting-law>. Public bodies must familiarize themselves with these new regulations, which are currently in effect.

940 CMR 29.02 - Definitions

The definition of "intentional violation" has been revised to remove reference to reliance on advice of the public body's legal counsel. However, reliance on the advice of legal counsel remains a defense to a claim of intentional violation if the body made a "good faith attempt at compliance [with the OML] but was reasonably mistaken".

940 CMR 29.03 - Notice Posting Requirements

The principal change to this section concerns the "alternative posting location" for meeting notices. Notices must still be filed with the city or town clerk's office. However, Section 29.03(2)(a) now states that the clerk shall post notice in a location "in, on or near" the municipal building that houses the clerk's office and that is visible at all hours (an exterior bulletin board, for example).

Importantly, the regulations now expressly provide that a municipality may use its official website to satisfy the "all hours" requirement. It is no longer necessary to post meeting notices in two locations. The decision to use the website as the official posting location must be made by the "chief executive officer", generally the Mayor in a city and the Board of Selectmen in a town, although reference should be made to a municipal charter if applicable. Municipalities that previously designated the municipal website for this purpose

need not repeat the process. Be aware, however, that notice of the designation of the website as the official posting location must itself be posted on or adjacent to the city or town hall, with instructions as to how to locate the website. Copies of posted meeting notices must be accessible at the clerk's office during normal business hours.

If the website is the official posting location, the Attorney General's regulation requires "every effort" to insure that the website is accessible at all times. If a website becomes inaccessible for any reason within 48 hours of a meeting, the clerk or other person responsible for the website must restore access to the website posting within 6 hours of when the problem is discovered. If this cannot be accomplished, then the meeting notice will be considered to be insufficient and "the public body must re-post notice of its meeting for another date and time." [emphasis added]. This could have significant implications for public hearings that have been advertised, etc., making a functioning website meeting calendar very important.

Finally, the regulations expressly provide that the date and time of a meeting notice posting must be recorded "thereon or therewith". If the meeting notice is amended, the date and time of the amendment must also be conspicuously recorded in the same manner.

940 CMR 29.04 - Certification

The municipal clerk remains responsible for providing any new public body member with copies of the OML, the Attorney General's regulations, and the Attorney General's "Open Meeting Law Guide" located on the Division of Open Government's ("Division") website. The member must submit a certification of receipt to the clerk within two weeks.

Importantly, however, the regulations now require the municipal clerk to provide new members with all Division OML determinations of violation issued to that public body within the previous five years. While this also appears to be the clerk's responsibility, be reminded that the municipal clerk does not receive these determinations when issued by the Division. Therefore, a public body that receives any such determination must maintain its own file and provide copies to the clerk's office.

Another new provision states that individuals that serve on multiple public bodies must submit a certification for each body, and further that members that are reappointed or reelected must sign a new certification.

940 CMR 29.05 - Complaints

The Attorney General has clarified two important points in the complaint process. First, the regulation now states that if an OML complaint is filed with a public body but not on the Attorney General's official complaint form, the body "need not address" such complaint. In addition, the regulation now specifically states that although the public body may delegate responsibility to prepare a response to the complaint to another individual, the body must meet prior to a final response being sent to the complainant to review the complaint and discuss its response and any remedial action it might take.

The regulations at 940 CMR 29.05(7) now state the established position of the Attorney General that a complaint must be filed within 30 days of the alleged violation or 30 days after the violation "should reasonably have been discovered". Complaints must still be filed both

with the public body and with the municipal clerk.

Section 29.05(9) authorizes use of a mediation process if a complainant files multiple complaints. This process would be at the city or town's expense, however. If a municipality seeks to engage in mediation, and the complainant declines, the Attorney General may decline the complainant's request to review the OML complaint and issue a determination.

940 CMR Section 29.07 - Resolution

Notably, the revised regulations deleted the requirement that the Attorney General conduct a formal hearing in front of an administrative law judge before issuing an order to nullify a public body's action, or reinstate an employee whom the Attorney General concluded was terminated in violation of the OML. Another important revision requires the municipality to notify the Attorney General in writing within 30 days of action taken to comply with a determination of violation.

940 CMR Section 29.10 - Remote Participation

This section has been revised by deleting the five "permissible reasons" for participating remotely. Instead, a member of a public body may participate remotely if that member's attendance would be "unreasonably difficult". The new regulation also recognizes that a commission on disability may allow remote participation at its discretion, and further that unlike other public bodies using remote participation, it is not mandatory for a quorum to be physically present in the meeting room.

940 CMR 29.11 - Meeting Minutes

The new regulations resolve uncertainty as to the time frame for approval of meeting minutes. Approval of open and executive session meeting minutes must now occur within the next three meetings or 30 days, whichever is later. If approval takes longer, the public body will need to demonstrate to the Attorney General that good cause exists for the delay.

In summary, the new regulations add several new provisions of which public bodies must be aware. If you have any questions about these new regulations, or any other aspect of the Open Meeting Law, please contact Attorneys Brian W. Riley (briley@k-plaw.com), Lauren F. Goldberg (lgoldberg@k-plaw.com) or any other member of the firm's Government Information and Access Group at 617.556.0007.

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