

KROKIDAS & BLUESTEIN

ATTORNEYS

CLIENT ALERT

REMOTE PARTICIPATION UNDER THE OPEN MEETING LAW

The Massachusetts Attorney General's office has enacted new regulations (940 CMR 29.10, *et seq.*) that permit members of public bodies to participate in meetings by conference call, video conference and other technologies when illness, disability, emergency, military service or geographic distance makes physical attendance unreasonably difficult. Although the new regulations permit remote participation by members in certain circumstances, they still require that a quorum of the public body, and the chair of the meeting, be physically present at the meeting. This client alert summarizes the actions a public body must take to permit the practice of remote participation, and the steps the public body must follow in order to hold a meeting in which some attendees participate remotely.

To allow the practice of remote participation:

- **Prohibitions In By-Laws:** The public body should confirm that its by-laws do not prohibit or restrict remote participation or otherwise require participation in person at meetings. If the by-laws contain such provisions, an amendment will be required.

Special Note for Charter Schools: In the past, the Department of Elementary and Secondary Education ("DESE") has required that charter school by-laws state that trustee participation occurs in person for the purpose of quorum or voting. As a result, charter schools wishing to permit remote participation will need to obtain DESE's consent (as amendments to charter school by-laws require DESE consent).

- **Other Restrictions:** Since the Attorney General's regulations permit municipalities or public bodies to restrict or prohibit the use of remote participation by other public bodies within their jurisdiction, the public body should also confirm that there are no restrictions imposed by other entities on its ability to allow remote participation.
- **Decision Regarding Technology for Remote Participation:** The public body should determine which of the technologies specified in the regulations may be used by its members to access meetings remotely.
- **Vote Adopting Remote Participation:** *State public bodies* may adopt remote participation in accordance with the requirements of 940 CMR 29.10, *et seq.* by simple majority vote (unless the state public body's by-laws require a greater vote). Remote participation by *local public bodies* must be authorized by the "chief executive officer" (typically, the mayor in a city or the board of selectmen in a town).

Once the practice is allowed, to hold a meeting with some members participating by remote participation:

Before the Meeting:

- Notification to Chair: A member who wishes to attend the meeting remotely should notify the chair or in the chair's absence, the person chairing the meeting (referred to in this client alert as the "chair") and identify one of the following reasons for remote participation, with facts supporting his or her request:
 - Personal Illness;
 - Personal Disability;
 - Emergency;
 - Military Service; or
 - Geographic Distance.
- Confirmation by Chair: The chair must determine that the reason cited makes the member's physical attendance at the meeting unreasonably difficult. The chair may also wish to confirm that a quorum of the public body is expected to be present in person.
- Attendance by Chair: The chair must attend the meeting in person.
- Documentation for Remote Participant: When feasible, the chair should provide the remote participant with advance copies of any documents or exhibits that he or she expects will be used at the meeting.

At the Meeting:

- Technology Used at the Meeting: The remote participant may access the meeting by any technology (including telephone, internet, or satellite audio or video conferencing), so long as THE PUBLIC BODY HAS PERMITTED USE OF THE PARTICULAR TECHNOLOGY AND the remote participant and parties present at the meeting are clearly audible to each other. If video conferencing is used, the remote participant must be clearly visible to all persons present at the meeting.
- Beginning the Meeting: The chair should confirm that a quorum of the public body is present in person. At the beginning of the meeting, the chair should announce the name of any remote participants and the reason for his or her remote participation. This information should be recorded in the minutes.
- Voting: All votes must be taken by roll call vote.
- Executive Session: At the start of an executive session, the remote participant must state that no other person is present and/or able to hear the discussion at the remote location, unless the presence of that person is approved by a simple majority vote of the public body.
- Technical Difficulties: If there are technical difficulties that interfere with the remote participant's ability to hear and be heard clearly, the chair is encouraged to suspend discussion while reasonable efforts are made to correct the problem. If the remote participant is disconnected, that fact and the time of the disconnection should be noted in the minutes.

Despite these changes, the Attorney General strongly encourages physical attendance when possible.

Please contact Elka Sachs (esachs@kb-law.com) or Sheryl Howard (showard@kb-law.com) with any questions.

Links:

- For a copy of the new regulations, see:
<http://www.mass.gov/ago/government-resources/open-meeting-law/940-cmr-2900.html#Remote>