

ELECTRONIC MEETINGS OF PUBLIC BODIES

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Senate Bill 1108 (H-1) as reported from House committee

Sponsor: Sen. Lana Theis

House Committee: Ways and Means

Senate Committee: Local Government

Complete to 10-13-20

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

Senate Bill 1108 would amend the Open Meetings Act to allow meetings of a public body to be held electronically or with remote participation under certain circumstances and to provide procedures and requirements for a meeting held that way.

Absence of a public body member under the act

The Open Meetings Act generally requires all meetings of a public body to be open to the public and held in a place available to the general public, and all decisions of a public body must be made at a meeting open to the public.

Except for meetings of a state legislative body, a public body has to establish procedures to accommodate the absence due to military duty of any member of the body. The procedures have to allow the absent member to participate in, and vote on, business before the public body, including, if feasible, ensuring two-way communication. The procedures also must provide a way to notify the public of the member's absence and let them know how to contact that member before the meeting to give input on anything that will come before the public body.

Absence of a member under the bill

The bill would revise these provisions, subject to conditions described below, to require the public body to establish procedures to accommodate the absence of a member of the public body due to any of the following reasons:

- Military duty.
- ***A medical condition.***
- A statewide or local state of emergency or state of disaster declared by the governor or by a local official or governing body that would risk the personal health or safety of members of the public or the public body if the meeting were held in person.

Medical condition would mean an illness, injury, disability, or other health-related condition.

The procedures would have to provide for two-way communication ("if feasible" would be deleted). In addition, each member of the public body attending the meeting remotely would have to make a public announcement at the outset of the meeting, to be included in the minutes, that he or she is doing so. A member attending remotely for a reason other than military duty would have to further specify the county, city, township, or village and state where he or she was physically located.

The bill would still require the procedures to provide a way to notify the public of the member's absence and let them know how to contact that member before the meeting to give input on anything that will come before the public body.

In addition, the bill would revise the exception for a state legislative body so that only a meeting of a state legislative body at which a *formal vote* is taken would be excepted.

Formal vote would mean a vote on a bill, amendment, resolution, motion, proposal, recommendation, or any other measure on which a vote by members of a state legislative body is required and by which the state legislative body effectuates or formulates public policy.

Requirements for electronic public meetings

Under the bill, a meeting of a public body that was held wholly or partly electronically by telephonic or video conferencing in compliance with the provisions described below, and that was otherwise in compliance with compatible provisions of the act applicable to a nonelectronic meeting, would be permitted in the following circumstances:

- Before January 1, 2021, and retroactive to March 18, 2020, any circumstances, including those requiring accommodation of absent members described above.
- On and after January 1, 2021, through December 31, 2021, only those circumstances requiring accommodation of members absent due to military duty, a medical condition, or a statewide or local state of emergency or disaster.
- After December 31, 2021, only in the circumstances requiring accommodation of members absent due to military duty as described above.

From January 1, 2021, through December 31, 2021, a meeting could be held electronically due to a state of emergency or disaster only to allow the electronic attendance of a member who lives in the affected area or to allow the electronic meeting of a public body that regularly holds its meetings in the affected area.

At a meeting held electronically to accommodate members absent due to military duty or a medical condition, only those members could participate remotely. The other members would have to be physically present to participate.

A meeting held electronically would have to be conducted in a way that allows two-way communication so that the members of the public body can all hear one another. During a public comment period, public participants would have to be able to hear the public body members and be heard by the members and other participants. A public body could use technology that allows members of the public to submit typed comments that can be shared with all the meeting participants to satisfy the requirements that members of the public must be allowed to address the meeting and be able to be heard by others.

Except as otherwise specified, a physical place would not be required for an electronic meeting. Members of a public body and members of the public participating electronically in a meeting held under these provisions that occurs in a physical place would be considered present and in attendance at the meeting for all purposes.

In addition to any other notices required under the act, a public body with an official internet presence would have to post advance notice of an electronic meeting on its website where the public can access it, either on or linked from its homepage, at least 18 hours before the start of the meeting. It would have to clearly explain all of the following:

- Why the public body is meeting electronically.
- How members of the public can participate in the meeting, including any phone number or internet address needed to do so.
- How members of the public can contact members of the public body to ask or give input about any business that will come before the public body at the meeting.
- How persons with disabilities can participate.

If an electronic meeting had an agenda, a public body with an official internet presence that included regular updates of posted meeting agenda or minutes would have to make the agenda available to the public on the internet at least two hours before the start of the meeting. This agenda could be amended at the meeting.

A public body could not require a person to register or provide his or her name or other information as a condition of participating in an electronic meeting, or require a person to otherwise fulfill a condition for attendance, except for mechanisms the public body requires that are necessary to allow the person to participate in a meeting's public comment period.

If during an electronic meeting a closed session of the public body were held electronically in compliance with applicable provisions of the act, members of the public otherwise participating in the meeting would have to be excluded from participating in the closed session.

MCL 15.263 and proposed MCL 15.263a

BACKGROUND:

On October 2, 2020, in a 4–3 opinion, the Michigan Supreme Court ruled that the governor did not have the authority to declare a state of emergency or issue emergency orders after April 30, 2020.¹

The governor's declarations of a state of emergency, and the executive orders issued under them, were primarily based on two acts: 1945 PA 302 (commonly known as the emergency powers of the governor act) and the Emergency Management Act (1976 PA 390).

Each act authorizes the governor to proclaim a state of emergency and issue orders responding to the emergency. 1945 PA 302 provides that these orders are effective until the state of emergency ends. Under the Emergency Management Act, a state of emergency or disaster must be terminated after 28 days unless the legislature approves an extension.

In its opinion, the Supreme Court ruled 1945 PA 302 to be an unconstitutional delegation of legislative power. Because the legislature had extended the state of emergency under the Emergency Management Act to April 30 but did not extend it past that time, the court also

¹ <https://courts.michigan.gov/Courts/MichiganSupremeCourt/Clerks/Documents/2020-2021/161492/In%20re%20Certified%20Questions-OP.pdf>

ruled that the governor had no authority to declare a state of emergency or issue emergency orders under that act after that date.

Although some COVID-19-related orders can be effective under other authority (the Public Health Code, for example), the governor's orders issued after April 30 have no continuing legal effect. In a court filing, the governor said that over 30 executive orders in effect on October 2 were based on authority granted under 1945 PA 302.

This bill would address the same issues as the provisions of EO 2020-154 that dealt with public meetings conducted under the Open Meetings Act.²

FISCAL IMPACT:

The bill could result in indeterminate cost increases to the state and to local units of government. The bill would require public bodies to conduct meetings with absent members that “permits 2-way communication so that members of the public body can hear and be heard by other members of the public body, and so that public participants can hear members of the public body and can be heard by members of the public body and other participants during a public comment period.” Potential costs to public bodies would depend on the extent to which each body possesses the technology capable of providing two-way communication as described in the bill and whether the body would be required to purchase equipment or software capable of providing the required technology. The bill's requirement for two-way communication technology would codify a substantially similar requirement first included in March 2020 under Executive Order 2020-15 and subsequently under Executive Orders 2020-48, 2020-75, 2020-129, and 2020-154.

POSITIONS:

The following organizations indicated support for the bill (10-13-20):

- Michigan Association of Counties
- Michigan Association of School Boards
- Michigan Municipal League

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

² Executive Order 2020-154, issued July 17, 2020 (<https://www.legislature.mi.gov/documents/2019-2020/executiveorder/pdf/2020-EO-154.pdf>).