

Benesch COVID-19 Resource Center: Evaluating Risks of Performing Elective Procedures During the COVID-19 Pandemic

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On March 18, 2020, the Centers for Medicare and Medicaid Services (“CMS”) issued recommendations suggesting for healthcare providers to postpone all non-essential medical, surgical, and dental procedures in an effort to combat the spread of the 2019 Novel Coronavirus (“COVID-19”) and conserve key healthcare resources and personal protective equipment. This guidance has been broadly interpreted to apply to a wide variety of providers, including hospitals, surgery centers, office-based laboratories, physicians and dentists, among others. Many states have also issued stay at home orders and emergency orders and declarations discouraging or prohibiting providers from performing elective procedures during the COVID-19 emergency. Yet, in spite of federal and state guidance, a variety of providers have continued performing elective procedures, which can be a critical source of additional revenue for some providers and the only source of revenue for others.

CMS’s recommendations and states’ proclamations have injected significant uncertainty into clinical decision-making when determining whether a procedure should be classified as medically necessary or elective under a particular set of circumstances. As usual, clinical decision-making rests with a physician in consultation with his or her patient to evaluate attendant benefits and risks of delaying a particular procedure; however, current circumstances have made that decision-making process subject to greater scrutiny and potential legal risk. Healthcare providers - especially those practicing in cosmetic surgery, dermatology, optometry, dentistry and other specialties generally considered elective - should carefully consider a variety of criteria when evaluating whether to perform certain types of procedures during the COVID-19 pandemic.

CMS Guidance

Healthcare providers must initially determine whether a procedure is an essential medical service. In doing so, a physician should evaluate the degree of harm that could be caused by delaying a patient procedure in light of scarce medical resources and the risk of COVID-19 infection. CMS’s recommendations were published to assist healthcare providers in making this decision, and encourage providers to consider the following factors in making clinical decisions:

- Current and projected COVID-19 cases in the hospital, facility, health system, and surrounding area.
- Supply and availability of personal protective equipment.

- Healthcare provider and staff availability.
- Bed availability, especially intensive care unit beds.
- Ventilator availability.
- Health and age of the patient, especially given the risks of concurrent COVID-19 infection during recovery.
- Urgency of the procedure.

CMS's guidance is instructive. However, healthcare providers should also understand that they may be required to comply with a patchwork of quickly adopted and broadly interpreted state-specific rules that could impact their ability to perform certain types of procedures.

State Stay At Home Orders and Emergency Rules Intended to Curb Elective Procedures

As of April 8, 2020, as many as 35 states and Washington, DC, have issued official statements or emergency orders related to elective procedures during the COVID-19 emergency. The scope and source of these state-level proclamations vary significantly. For example, the Illinois Department of Public Health issued a "recommendation" to postpone elective procedures. "Elective" is defined as "those procedures that are pre-planned by both the patient and the physician that are advantageous to the patient but are NOT urgent or emergent." Meanwhile, Florida's Governor Ron DeSantis issued an [executive order](#) prohibiting "medically unnecessary, non-urgent, or non-emergency" procedures. Such procedures are prohibited so long as delaying the procedure does not place the patient's immediate health, safety, or well-being at risk. Penalties for violations also vary dramatically by state. While some states may levy small fines for non-compliance, other states' medical boards and departments of health may take action to revoke or suspend a healthcare provider's license. In light of these considerations and risks, healthcare providers may wish to engage in the following diligence before performing certain types of procedures:

1. **Review published guidance.** Consider the above CMS recommendations and any state-specific guidance or emergency orders related to elective procedures to help evaluate whether not performing a procedure is likely to result in greater harm than if a procedure is performed. Further, consider any state-specific definitions of what may (or may not) be considered "elective."
2. **Understand penalties.** Understand potential penalties at the state level for violating applicable emergency orders or prohibitions.
3. **Document, document, document.** In most cases, providers still have broad discretion to determine whether a procedure is elective or essential. While some types of procedures will almost always be classified as elective procedures, there will likely be many close calls in clinical decision-making. In those instances, it is important for providers to clearly and thoroughly document the decision-making process and criteria used to evaluate the degree of potential patient harm if a particular procedure is not performed in case a provider's decision-making later becomes the subject of scrutiny.
4. **Be aware of potential lawsuits.** In addition to malpractice lawsuits, it is possible that a patient or staff member may take legal action against a healthcare provider for performing an elective

procedure in violation of an emergency order or official guidance, especially in cases where staff members or patients become ill with COVID-19 as the result of performing elective procedures. Certain states, including Illinois, have granted civil immunity to certain healthcare providers and professionals that treat COVID-19 patients. Such protection, however, generally does not extend to elective procedures or procedures conducted outside of the response to the COVID-19 emergency.

5. **Understand your malpractice insurance coverage.** Providers may wish to confirm that their professional liability insurance coverage will continue to be effective if they perform elective procedures in violation of a state emergency order or other government proclamation.
6. **Consider reputational harm.** Even in states where there are few, if any, repercussions for performing elective procedures, it is important to keep in mind that supplies and equipment - such as ventilators, beds, and personal protective equipment - are scarce. Performing elective procedures during the crisis may result in reputational harm both during and after the COVID-19 emergency.

Governmental policy and response to the COVID-19 emergency continues to evolve rapidly. It is therefore critical for healthcare providers to understand published guidance and emergency orders issued in response to this unprecedented crisis.

For more information regarding the information above, please contact a member of the Benesch Healthcare+ Practice Group.

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Benesch stands ready to assist with any questions as we closely follow COVID-19 developments and support client's response efforts.

Please note that this information is current as of the date of this client bulletin, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by CDC and local officials.

