



ALERTS

In The Wake Of COVID-19, Texas Governor Halts Elective Surgeries And Procedures

March 24, 2020

[Texas Gov. Greg Abbott ordered](#) on March 22 all licensed healthcare providers and facilities immediately postpone all surgeries and procedures that are not “immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death.” The order is effective until midnight April 21, 2020.

Texas joins many other states who are adhering to the [Centers for Medicare and Medicaid Services \(CMS\) guidelines](#) that say “Decisions remain the responsibility of local healthcare delivery systems, including state and local health officials, and those surgeons who have direct responsibility to their patients. However, in analyzing the risk and benefit of any planned procedure, not only must the clinical situation be evaluated, but resource conservation must also be considered.”

The Texas governor’s order is designed to increase the availability of personal protective equipment for medical personnel fighting the COVID-19 pandemic, and decrease the potential sites for COVID-19 infections across the state. It also suspends regulations preventing the treatment of more than one patient in a room. “Together these orders will free up countless hospital beds across the entire state of Texas to be able to treat the potential increase in COVID-19 patients,” said Gov. Abbott.

The order requires providers and facilities to reschedule surgeries and procedures that are not necessary to prevent serious adverse medical consequences or death, although it did not explain the types of medical procedures that are prohibited. Surgeries or procedures that can be delayed until after the order is lifted are often referred to as “elective

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surgeries or procedures.” The applicability of the order to certain surgeries and procedures is not entirely clear and will require a case-by-case analysis from the licensed provider.

For example, under the order, it is easy to conclude that postponing a surgical repair of a torn meniscus is appropriate or that immediate medical care ought to be provided to a patient with a detached retina. It is unclear, however, regarding, what a provider should do about a patient with a lower risk cancer.

Just one day before the order went into effect, on March 21, the Texas Medical Board (TMB) provided the [Guidance on the Scheduling of Non-Urgent Elective Surgeries and Procedures During Texas Disaster Proclamation for COVID-19 Pandemic](#) for Texas-licensed physicians. The guidance instructs physician-licensees to comply with the CMS recommendations and tiered framework for determining when surgery or procedure is elective and the [Centers for Disease Control and Prevention's \(CDC\) guidelines](#) pertaining to COVID-19.

Given Gov. Abbott's limited guidance, the TMB, CDC and CMS's recommendations are instructive. CMS encouraged providers to consider the following criteria when determining whether a planned surgery should proceed:

- Current and projected COVID-19 cases in the facility and region
- Supply of PPE to the facilities in the system
- Staffing 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
- The urgency of the procedure

CMS instructed that the decision to delay surgery or a procedure should be made in consultation with the hospital, surgeon, patient, and other public health professionals.

Further, CMS encouraged providers to consider the following tiered approach on the table below to curtail elective surgeries:

| Tiers | Action | Definition | Locations | Examples |
|---------|--|--|--|---|
| Tier 1a | Postpone surgery/ procedure | Low acuity surgery/healthy patient- outpatient surgery Not life threatening illness | HOPD* ASC** Hospital with low/no COVID-19 census | -Carpal tunnel release -EGD -Colonoscopy -Cataracts |
| Tier 1b | Postpone surgery/ procedure | Low acuity surgery/unhealthy patient | HOPD ASC Hospital with low/no COVID-19 census | -Endoscopies |
| Tier 2a | Consider postponing surgery/procedure | Intermediate acuity surgery/healthy patient- Not life threatening but potential for future morbidity and mortality. Requires in-hospital stay | HOPD ASC Hospital with low/no COVID-19 census | -Low risk cancer -Non urgent spine & Ortho: Including hip, knee replacement and elective spine surgery -Stable ureteral colic -Elective angioplasty |
| Tier 2b | Postpone surgery/ procedure if possible | Intermediate acuity surgery/unhealthy patient- | HOPD ASC Hospital with low/no COVID-19 census | |
| Tier 3a | Do not postpone | High acuity surgery/healthy patient | Hospital | -Most cancers -Neurosurgery -Highly symptomatic patients |
| Tier 3b | Do not postpone | High acuity surgery/unhealthy patient | Hospital | -Transplants -Trauma -Cardiac w/ symptoms -limb threatening vascular surgery |

*Hospital Outpatient Department

** Ambulatory Surgery Center

The CDC guidance for COVID-19 instructed outpatient facilities to reschedule non-urgent outpatient visits, consider reaching out to vulnerable patient populations and ensure they are prepared and adhering to treatment protocols, accelerate the timing of high priority screening and intervention, require patients call before entering the facility for screening purposes, and eliminate patient penalties for cancelations and missed appointments related to respiratory illness.

The inpatient facility guidance from the CDC instructs these facilities to reschedule elective surgeries, shift inpatient procedures to outpatient settings (when feasible), limit visitors to COVID-19 patients, plan for a surge of critically ill patients, and identify additional space to care for these patients. The CDC also provides instruction to long-term care facilities – to limit visitors, post signs encouraging sanitary hygiene, ensure supplies are available, take steps to prevent COVID-19 spread, limit the movement of COVID-19 patients, identify dedicated staff for COVID-19 patients, and observe new patients for respiratory symptoms.

The penalty for violating the Texas governor's order is a fine not to exceed \$1,000, confinement in jail for up to 180 days, or both. Therefore, it is critical that providers and facilities analyze with close detail which surgeries and procedures should be postponed. More importantly, the provider and facility should clearly notate on the patient's records the reason for the physician and facility's decision to continue or postpone a surgery or procedure. This medical record notation may be equally important in defending providers and facilities' decision to delay or perform a particular surgery or procedure.

To obtain more information regarding this alert, contact the Barnes & Thornburg attorney with whom you work or Robert M. Castle at 214-258-4149 or robert.castle@btlaw.com or Matthew Agnew at 214-258-4153 or matthew.agnew@btlaw.com.

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