

COVID-19

CORONAVIRUS DISEASE

VISION: To improve the health of all Texans.

MISSION: TMA supports Texas physicians by providing distinctive solutions to the challenges they encounter in the care of patients.



Physicians Caring for Texans

TMB Emergency Rule 22 T.A.C. § 190.8(2)(U)

TMA Frequently Asked Questions (FAQs)

TMA Office of the General Counsel

MAY 14, 2020

1. What is Executive Order GA-19?

[Executive Order GA-19](#) (EO GA-19), issued by Gov. Greg Abbott on April 27, 2020, effective May 1, 2020, at 12:01 am, directs applicable licensing agencies to “dictat[e] minimum standards of safe practice during the COVID-19 disaster” for licensed health care professionals.

It also requires a hospital licensed under Chapter 241 of the Texas Health and Safety Code to reserve “at least 15 percent of its hospital capacity for the treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patients, as determined by the Texas Health and Human Services Commission.”

This executive order remains in effect until modified, amended, rescinded, or superseded by the governor.

2. What is 22 T.A.C. § 190.8(2)(U)?

To execute the governor’s directive in EO GA-19, the Texas Medical Board (TMB) adopted emergency rule [22 T.A.C. § 190.8\(2\)\(U\)](#), which requires physicians to adhere to the following minimum standards of safe practice when providing care or engaging in an in-person patient encounter during COVID-19:

- (I) a mask must be worn by both the patient and physician or the physician’s delegate when in proximity of the patient (meaning less than a 6-foot distance between the patient and the physician or the physician’s delegate);
- (II) follow policies the physician, medical and healthcare practice, or facility has in place regarding COVID-19 screening and testing and/or screening patients;
- (III) that, before any encounter, patients must be screened for potential symptoms of COVID-19 or verified previously screened within last 20 days; and
- (IV) that prior to care involving a medical procedure or surgery on the mucous membranes, including the respiratory tract, with a high risk of aerosol transmission, the minimum safety equipment used by a physician or physician’s delegate should include N95 masks, or an equivalent protection from aerosolized particles, and face shields.

TMB’s rule also requires physicians providing patient care or engaging in an in-person patient encounter in medical and health care practices, offices, and facilities other than hospitals as defined under Chapter 241 of the Texas Health & Safety Code to post a COVID-19 Minimum Standards of Safe Practice Notice in each public

area and treatment room or area of the office, practice, or facility stating the minimum standards of safe practice described in 190.8(2)(U)(i).

TMB released guidance on its rule through an [FAQ](#). The last update to TMB's FAQ was on May 6, 2020.

3. Who do the minimum standards of safe practice apply to?

TMB's rule on COVID-19 minimum standards of safe practice states it applies to *all* physicians providing care or engaging in an in-person patient encounter during COVID-19. TMB's FAQ is broader and states that it applies "all licensees, certificate holders, and permit holders subject to regulation by the TMB or its advisory boards and committees ..." including the physician's delegate. *See* TMB FAQ Nos. 4, 5, and 17.

4. Who must post notice?

Any "provider" must post the required notice if performing medical acts in a practice, office, or facility other than hospitals as defined under Chapter 241 of the Texas Health & Safety Code. *See* TMB FAQ No. 3.

The [Chapter 241](#) hospital exclusion includes both general and special hospitals.

It appears that the posted-notice requirement does **not** make an exception for a nursing home facility, a psychiatric facility licensed under Chapter 577, an off-campus hospital department, or an ambulatory surgical center. Those settings and many others where a physician provides care or engages in a patient encounter must post the required notice.

5. What notice must I post?

TMB does not require a specific notice, so long as the notice contains the minimum safe standards of practice described in paragraph 190.8(2)(U)(i). *See* TMB FAQ No. 9. TMB does provide a sample [notice](#).

TMA has also prepared an alternative sample [notice](#) which clearly establishes that the minimum safe standards of practice are mandated by TMB (versus the practice/practitioner).

6. Where must notice be posted?

The required notice for practices, offices, and facilities (other than hospitals as defined under Chapter 241 of the Texas Health & Safety Code) must be posted in each public area and treatment room or area of the office, practice, or facility.

Note that TMB encourages "a robust approach when displaying the required posting, making them the most visible to patients." *See* TMB FAQ No. 9.

7. Who must comply with the hospital capacity part of EO GA-19?

The hospital is responsible for compliance. *See* TMB FAQ Nos. 6, 7. The Texas Health and Human Services Commission regulates this portion of the governor's order, not TMB.

8. Are there separate rules governing nonsurgical, or elective surgical or medical procedures?

No. EO GA-19 and TMB's minimum safe standards of practice govern all medical acts. The last order on nonsurgical, elective procedures, [Executive Order GA-15](#), was superseded by EO GA-19.

All medical acts may be performed so long as performed in compliance with the COVID-19 minimum safe standards of practice, any other TMB rule, and any applicable laws. *See* TMB FAQ No. 16 (specifically referencing Botox and other medical cosmetic procedures). TMB also “encourages healthcare practitioners to consider taking all necessary safety measures, beyond the minimum requirements delineated in the new emergency rule, to help prevent the spread of COVID-19 and allow the re-opening of Texas to safely progress.” *See* TMB FAQ No. 8.

9. Who must wear a mask or face covering?

TMB's rule requires a physician, the physician's delegate, and a patient to wear a mask when the physician and the physician's delegate are within less than six feet of the patient. A patient may also instead wear a face covering if the patient does not have a mask. *See* TMB FAQ No. 10. There are exceptions to this general requirement, discussed below in TMA FAQ Nos. 13, 14, and 15.

Also, before “care involving a medical procedure or surgery on the mucous membranes, including the respiratory tract, with a high risk of aerosol transmission, the minimum safety equipment used by a physician or physician's delegate should include N95 masks, or an equivalent protection from aerosolized particles, and face shields.”

10. Must a mask or other face covering be provided to the patient?

Yes. If the patient does not have a mask or face covering to use when less than six feet from the physician and/or the physician's delegate, the practice must provide the patient with a mask or some type of face covering. TMB does not have specific requirements for the face covering or mask a patient must wear. *See* TMB FAQ No. 10.

11. Is the mask required even if the patient tests negative for COVID-19?

Yes. The requirements still apply even if the patient tested negative for COVID-19. *See* TMB FAQ No. 14.

12. Can a medical setting set other safety requirements?

Yes, as long as the medical setting's policies do not conflict with the less-than-six-feet-mask requirement set by TMB's emergency rule and FAQ guidance. The medical setting can create its own policies on masks, gloves, and other precautions. *See* TMB FAQ No. 10.

13. Are there exceptions to the rule on a required mask or face covering?

Yes. TMB provides the following broad exceptions (*see* TMB FAQ Nos. 12, 15):

- The patient's mask may be removed if needed during the course of an examination and/or during treatment, including a surgery or procedure.
- The patient cannot wear a mask or face covering.

- The patient’s mask may be removed if it would impede medical procedures or other medical acts from being performed.
- The medical act is being performed on an infant. (*See* TMA FAQ No. 14 below.) The patient needs care and/or treatment for head and neck trauma.
- The patient requires a mouth examination.
- The patient cannot put on a mask.

TMB states in TMB FAQ No. 15 that each “practitioner must use his or her judgment in these situations,” factoring “all possible safety means while taking into account the patient’s needs and the safety of the health care workers and patient.” TMB also states that a physician “should” document the circumstances around the physician’s decision to provide care to a patient who is not wearing a mask. While it is unclear if this is a requirement or a suggestion, it is always good risk management practice to provide clear documentation in the patient’s medical record.

Also remember, the mask or face covering is not required by TMB’s rule if the patient is six feet or more away from the physician and/or physician’s delegate.

14. Must children wear a mask or face covering?

TMB’s guidance on children is not clear. It appears that the board recommends (versus mandates) that physicians follow [Centers for Disease Control and Prevention guidelines](#) and the [American Academy of Pediatrics guidance](#). *See* TMB FAQ No. 13. Both state that cloth face coverings or masks should not be placed on young children under age 2. The American Academy of Pediatrics guidance also states that children should not wear masks if:

- The only face covering available is a possible choking or strangulation hazard;
- The child has difficulty breathing with the face covering or is unconscious, incapacitated, or otherwise unable to remove the cover without assistance; or
- Wearing the face covering causes the child to increase risk of getting exposed to the virus because the child is touching his or her face more frequently.

The guidance also notes that children who are “at least six feet away from others” and are “not in contact with surfaces that could harbor the virus” do not need to wear a mask.

15. What if the patient refuses to wear a face covering and no exception applies?

TMB does not require a physician to treat a patient who is physically and mentally capable of wearing a mask or face covering but refuses to do so. *See* TMB FAQ No. 11. However, there may be other duties that apply in certain circumstances, such as for a patient with an urgent or emergent condition. For example, the American Medical Association [Ethics Opinion No. 1.1.7](#) requires a physician to provide care in emergency situations. There is also a duty in certain circumstances to provide emergency care under the federal [Emergency Medical Treatment and Active Labor Act](#) (42 U.S.C. § 1395dd). [Ethics Opinion No. 8.3](#) discusses specific obligations a physician has during a disaster or pandemic to provide urgent medical care. Also please note that AMA [Ethics Opinion No. 1.1.2](#) prohibits a physician from rejecting a patient solely on the basis of the individual’s infectious disease status.

For specific legal advice on a physician's duty to provide urgent or emergent care, please contact your retained counsel.

16. Is there a mandatory reporting requirement?

Emergency rule 190.8(2)(U) does not contain a mandatory reporting provision. However, there is still the requirement to report information to TMB "relating to acts of a physician if, in the opinion of the person or [peer review] committee [as specified by [Tex. Occ. Code § 160.003](#)], that physician poses a continuing threat to the public welfare through the practice of medicine." See [id. at § 160.003\(b\)](#).

An older emergency rule (formerly 22 T.A.C. § 178.4(d)) mandated immediate reporting of a violation of the underlying governor's order, Executive Order GA-09 (EO GA-09), relating to nonurgent, elective procedures and surgeries. This previous rule required certain individuals and entities to report an alleged violation, regardless of whether the allegation was being investigated by a peer review committee or otherwise being looked into. EO GA-09 is no longer effective. TMB withdrew this emergency mandatory reporting rule when EO GA-09 expired.

17. What happens if a violation of the rule occurs?

A violation of the rule is considered unprofessional and dishonorable conduct, and TMB may bring a disciplinary action against the physician. The attorney general may also assess a fine not to exceed \$1,000.

18. Can the attorney general or local law enforcement throw me in jail for a violation of EO GA-19 and the board's rule?

No. Governor Abbott issued [Executive Order GA-22](#), which modified EO GA-19 by removing the potential penalty of confinement for a violation of the order or TMB's emergency rule relating to EO GA-19.

19. Where can I get additional information?

For additional questions or information on the TMB's emergency rule and FAQ, please contact the TMA Knowledge Center by email at knowledge@texmed.org or by phone at (800) 880-7955. TMA Office of the General Counsel also published a [white paper](#) with more information.

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