

COVID-19

CORONAVIRUS DISEASE

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



Physicians Caring for Texans

TMB Releases Emergency Rules: Minimum Standards for Safe Practice Related to COVID-19

TMA Office of the General Counsel

UPDATED MAY 13, 2020

****Disclaimer:** The information relating to COVID-19 is continually evolving, and the information provided here is subject to change at any time. Please contact the TMA Knowledge Center (contact information provided at the end) or view the appropriate agency's website for the most up-to-date information.*

Gov. Greg Abbott issued a new executive order, [Executive Order GA-19](#) (EO GA-19), effective May 1 at 12:01 am. The order states:

[1] All licensed healthcare professionals shall be limited in their practice by, and must comply with, any emergency rules promulgated by their respective licensing agencies dictating minimum standards for safe practice during the COVID-19 disaster.

[2] Every hospital licensed under Chapter 241 of the Texas Health and Safety Code shall reserve at least 15 percent of its hospital capacity for 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 order supersedes [Executive Order GA-15](#) (EO GA-15) in its entirety (EO GA-15 restricted certain nonurgent, elective surgeries and procedures), and it has no expiration date and will remain effective until modified, amended, rescinded, or superseded by the governor. The governor also [amended](#) EO GA-19 to remove the potential for jail confinement as a penalty for a violation of the order. Please note though that a violation may still result in a fine assessed by the attorney general in an amount not to exceed \$1,000. The Texas Medical Board (TMB) may also bring a disciplinary action for violation of its emergency rule adopted as directed by EO GA-19.

To effectuate the governor's order, TMB adopted [emergency rule 190.8\(2\)\(U\)](#), providing the minimum standards for safe practice related to COVID-19 and requiring posted notice of the minimum standards in certain health care settings. It also released an updated [FAQ](#) to provide additional guidance on its rule. Rule 190.8(2)(U) and TMB's FAQ are discussed in detail herein.

I. TMB Emergency Rule 190.8(2)(U)

TMB issued a [press release](#) stating it withdrew its emergency rule related to EO GA-15, and adopted emergency rule 190.8(2)(U), effective at 12 am on May 1, to effectuate the governor's new order. Rule 190.8(2)(U) provides the minimum standards for safe practice related to COVID-19 for "all physicians providing patient care or engaging in an in-person patient encounter." Specifically, Rule 190.8(2)(U)(i) provides four minimum standards:

1. The physician, the physician's delegate, and the patient must wear a mask when the physician and/or delegate are within less than six feet from the patient.
2. Everyone must follow policies that have been put into place by the physician, the medical and health care practice, or the facility to address COVID-19 screening and testing, and/or screening patients.
3. Before any encounter with a patient, the patient must be screened for potential COVID-19 symptoms, or if the patient has been screened within the last 20 days before the encounter, the screening must be verified.
4. 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.

The rule also requires that 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 by Texas Health and Safety Code Chapter 241) 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." **TMB provided a sample [notice on its COVID-19 informational page that physicians may post to meet this requirement.](#) TMA also created a [sample notice.](#)**

Failure to post the notice or to comply with the standards may be considered unprofessional conduct in violation of this emergency rule and may subject the physician to an enforcement action by the board.

II. TMB FAQ

TMB published a new [FAQ](#)¹ document to help physicians understand how the board will enforce its new emergency rule, 190.8(2)(U). Some FAQs to highlight include:

FAQ No. 5: The minimum safety standards apply to physicians practicing in *all* settings. **There is no exception for medical care provided in emergency departments or hospitals.**

FAQ Nos. 6 and 7: TMB has no role, i.e., no enforcement authority, in the requirement that hospitals reserve 15% of their capacity for treatment of COVID-19. The Texas Health and Human Services Commission regulates a hospital's compliance with this part of the governor's order. Therefore, a physician must only comply with the

¹ Please continue to check the board's [website](#) for the most updated information as information is constantly changing to address the impact of the coronavirus.

board's minimum standards for safe practice related to COVID-19 and the notice requirement (if applicable). The notice requirement does not apply to hospitals as defined by Chapter 241 of the Texas Health and Safety Code.

FAQ No. 8: Office-based visits or encounters, including surgeries and procedures, may proceed so long as the physician (and the physician's delegate, as applicable) complies with the minimum safe standards required in emergency rule 190.8(2)(U)(i) and posts the required notice of the COVID-19 minimum safe standards. Again, TMB provides a model [notice](#) on its coronavirus resources page, and TMA also developed a sample [notice](#). Please note that the board "encourages a robust approach" when displaying the required notice so that it is "most visible to patients." See FAQ No. 9. The notice must be posted in each public area and treatment room or area of the office, practice, or facility.

FAQ Nos. 10, 12-15: Masks must be worn by the physician, the physician's delegate, and the patient when in "proximity of the patient" (i.e., less than six feet). An office may set its own policy on gloves, and it may set its own policy on masks outside of a patient-physician interaction.

The mask requirement applies regardless of whether the patient has a negative screen for COVID-19. TMB also states that "[i]f a patient does not have a mask for use during an exam with the physician, the practice must provide a mask or some type of face covering."

TMB does not require the [patient](#) to wear a specific type of mask. And when treating or examining a patient, "the patient does not have to be wearing a mask if it needs to be removed during the course of examination and/or during treatment including a procedure or surgery."

Remember also that the emergency rule states a physician and his or her delegate should wear an N95 mask (or equivalent) and a face shield prior to care involving a surgery or procedure on the mucous membranes, including the respiratory tract, with a high risk of aerosol transmission. TMB's FAQ No. 12 also states that, for these types of surgeries or procedures, the physician should wear appropriate personal protective equipment, "as stated in [Centers for Disease Control and Prevention (CDC)] guidelines." It is not clear whether TMB's use of the word "should" means that it is mandatory or suggested. However, FAQ No. 20 states that an N95 mask (or equivalent) and a face shield *must* be worn in this instance. **To be cautious, the physician and physician's delegate should treat the language as a requirement until clarification from the board.**

TMB recognizes exceptions to the mask requirement. FAQ No. 15 states that there may be circumstances where the patient "cannot wear a mask or is incapable of donning a mask, but is in need of medical assistance." There may also be times when the use of a mask would impede the medical act or procedure being performed. TMB gives the following nonexclusive examples: treating an infant, head and neck trauma, and examination of the mouth.

In these situations, the board expressly permits a physician to use his or her own professional judgment, "utilizing all possible safety means" while also taking into account the needs of the patient and safety of the health care professionals and other patients. If the physician ultimately chooses to render care to the patient and the patient cannot wear a mask or other face covering, **TMB states the physician "should" document the circumstances surrounding the decision to provide care to the patient without a face covering for the patient. The language "should" is unclear as to whether it is a recommendation or requirement. Regardless, it is good risk management practice for the physician to document the circumstances in the medical record in case a complaint is filed.**

Also note that for children, in addition to the exception for infants, FAQ No. 13 states: “the American Academy of Pediatrics does not recommend children younger than age 2 to wear masks.” Otherwise, the board “would urge physicians to follow CDC guidelines and require most children to wear masks who visit their practice to protect themselves and others.” The language “would urge” is not a clear mandate. However, to be cautious, it is best that the physician comply with the CDC guidelines and the American Academy of Pediatrics recommendations.

Both guidelines state cloth face coverings or masks should not be placed on young children under age 2. The American Academy of Pediatrics guidance also states 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.

FAQ No. 11: TMB allows a physician to refuse treatment to a patient who is physically and mentally able to wear a mask but refuses to do so. **However, the physician or practice may still be subject to liability (i.e., a lawsuit) for failing to provide care in certain situations, such as care for an emergency or urgent 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 the 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 questions seeking specific legal advice on potential liability, a physician or practice should contact retained legal counsel. **A physician may also contact his or her medical professional liability insurance carrier and ask for a risk assessment.**

FAQ Nos. 16-17: There are no restrictions on access to medical care in Texas. There are minimum safety standards required by the board’s rule. All licensees, permit holders, and certificate holders subject to TMB’s jurisdiction must follow the minimum safety requirements.

TMB does not have enforcement authority over nonmedical acts in medspas, and TMB cannot direct or advise businesses as to when they can or cannot open. Licensees regulated by other state agencies who are considering providing nonmedical services should refer to their own licensing boards for guidance, rules, laws, and direction as to when or if they may reopen.

III. ADDITIONAL INFORMATION

A. Documentation

The board stresses that documentation in the patient's medical record is "key" to show compliance with the emergency rule. TMB does not mandate documenting compliance with the emergency rule; however, it states in FAQ No. 20 that a physician should consider documenting in the medical record "that [he or she] informed the patient of safe practice measures [being] tak[en]. . . . Or indicate [the patient was] provided a copy of office protocols standings, orders, or policies regarding the minimum standards for safe practice." It appears "standings, orders" may be a typo and instead means "standing orders." **Please remember though, the board states that a physician "should" document the reason why he or she rendered care to a patient without a mask or other face covering. Because it is unclear whether this is mandatory or permissive, TMA recommends that the physician document the circumstances in the medical record.**

Note too that the board may continue to update its FAQs or release other guidance as it obtains new information. It is good risk management practice to retain a copy of each FAQ or other guidance. Each FAQ and other guidance is generally dated. This is important, because a physician may have made a decision on a date an earlier FAQ was in place that may or may not be permissible under a new FAQ.

Maintaining a copy of each update, as well as a copy of each executive order and any related press releases by TMB, the governor's office, and the Office of the Attorney General is a good risk management practice during this ever-changing time.

B. Final Thoughts

Please remember that the board's FAQ is intended to provide guidance – the FAQ is not law; however, it reflects the board's view on its enforcement authority and how it intends to apply its rules. But remember that TMB's FAQ and emergency rule do not govern how the attorney general will enforce the governor's order (there is no additional information from the Office of the Attorney General at this time on enforcement).

Also, TMB's enforcement authority and rulemaking power is separate and independent from a physician's civil liability. A physician should be aware that other duties may apply even though the board may not exercise enforcement authority over certain actions. For example, the board states in FAQ No. 11 that physicians are permitted to refuse treatment to a patient who refuses to wear a mask if the patient is physically and mentally capable of wearing a mask. However, there may be other duties to consider, such as whether the patient needs care for an emergency or urgent condition. TMA is advocating for broad liability protection from the governor during the state-declared COVID-19 disaster; however, the governor has not issued an order to the effect at this time.

For a specific fact analysis under the new emergency rule and order, or for a liability risk assessment, please contact your retained attorney for legal advice. For general questions on the rule and order, please contact the TMA Knowledge Center by email at knowledge@texmed.org or by phone at (800) 880-7955.

TMA will continue to update you on developments from TMB regarding its rule and guidance.

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