

## COVID-19: Michigan Medical Practices Resuming Non-Essential Encounters and Procedures

*By Patrick J. Haddad, JD, and Kathleen A. Westfall, JD, Kerr, Russell and Weber, PLC, MSMS Legal Counsel*

**M**any medical practices are seeking guidance on how they should prepare to resume operations beginning on May 29, 2020 when Executive Order 2020-17 (postponement of certain non-essential medical procedures and encounters) is rescinded. The following guidance is intended to assist physicians in understanding their obligations and options to resume non-essential patient encounters and procedures furnished by their medical practices. It will be necessary for medical practices to monitor for changes to Executive Orders issued by Michigan's Governor, any Emergency Orders issued by county and local authorities, CDC guidelines, and related developments, including the status of the states of emergency and disaster re-declared by Governor Whitmer on May 22, 2020, which may impact the medical practice's responsibilities and obligations for resuming non-essential encounters, procedures, and general operations.

### General Guidance

Medical practices should implement the following precautions in their workplaces.

### Providing a Comprehensive COVID-19 Preparedness and Response Plan

- Under Executive Order 2020-97, medical practices are required to prepare and implement a COVID-19 preparedness and response plan identifying all the protective measures that will be taken to ensure COVID-19 does not spread within the workplace. These protective measures include daily screenings, proper cleaning protocols, responses to a COVID-19 patient or staff member, and other protective actions to be taken by the practice in accordance with Executive Order 2020-97.
- A sample COVID-19 preparedness and response plan, which medical practices may use and modify to incorporate any additional policies, procedures and protective measures specific to that medical practice, accompanies this publication. Medical practices should monitor when the declared national and Michigan public health emergencies are ended, and monitor CDC guidance to determine whether modifications to any employment-related policies, procedures or protective measures may be necessary (e.g., modifications to staff member screenings and testing, which are subject to the Americans with Disabilities Act ("ADA") standards).

(CONTINUED)

*This publication is furnished for informational purposes only. It does not communicate legal advice by the Michigan State Medical Society or Kerr, Russell and Weber, PLC. Receipt of this publication does not establish an attorney/client relationship. © 2020 Michigan State Medical Society and Kerr, Russell and Weber, PLC.*

## Implementing Daily Screening Forms

- Clinical and non-clinical staff members should be evaluated daily to ensure they are not exhibiting any of the principal symptoms of COVID-19.
- Medical practices should take staff member temperatures only if they have a touchless thermometer. If a touchless thermometer is unavailable, medical practices may accept a staff member's verbal confirmation that he or she does or does not have a fever.
- If a touchless thermometer is available, medical practices should:
  - » Designate one individual to take temperatures and perform screening of staff members and other individuals entering the medical practice;
  - » Supply the designated individual with appropriate personal protective equipment, including face masks, gloves, and even goggles; and
  - » Provide cleaning solutions such as hand sanitizer and household cleaner.
- Ensure all individuals waiting to be evaluated are waiting outside the medical practice and standing at least 6 feet apart from one another.
- To comply with the ADA, staff members should be evaluated out of sight from other staff members. Any medical information acquired by the medical practice related to any screening or testing activities should be kept confidential by the medical practice and not disclosed to staff members outside of management or Human Resources.
- Staff members exhibiting symptoms of COVID-19 should be sent home immediately. Once they are out of the medical practice facility, they should call and report the areas they visited within the facility and who they had close contact with so the medical practice may respond appropriately.
- A sample screening form which medical practices may use to document staff member screenings accompanies this publication.

## Ensuring Daily CDC-Compliant Cleanings

- Practice routine cleaning and disinfecting of frequently touched surfaces.
- Encourage staff members to routinely clean their own workspaces first using soap and water and then using a disinfectant.
- Clean and disinfect all areas used by a person who is ill, such as offices, bathrooms, common areas, shared electronic equipment like tablets, touch screens, keyboards, remote controls, etc. If more than 7 days have passed since a person who is sick visited or used the facility, additional cleaning and disinfection is not necessary under current CDC guidelines.

## Encouraging Social Distancing

- Continue social distancing measures as recommended by the CDC.
- Individuals should remain, to the extent feasible, six feet apart from each other at all times.
- Group meetings should be postponed or held via telephone or video conference.
- Physical contact should be avoided where it is not necessary for patient care or medical practice operations.

## Frequently Asked Questions

### *When will my medical practice be allowed to lawfully resume non-essential encounters and procedures?*

Physicians, their medical practices and other health care providers may resume furnishing non-essential procedures beginning on May 29, 2020. Executive Order 2020-17 continues through May 28, 2020 at 11:59 p.m. and then is rescinded. However, all health care providers must continue to follow other Executive Orders which remain in effect.

Presently, Executive Order 2020-96 prohibits in-person work that is not necessary to sustain or protect life or to conduct basic operations or resumed activities through June 12, 2020 at 11:59 p.m. The Executive Order designates "health care workers" as "critical infrastructure workers," or those necessary to sustain and protect life. Thus, medical practices have been permitted to remain open, provided that they comply with all requirements imposed by Executive Orders that apply to medical practices, including limiting in-person staff to only those necessary to sustain and protect life (e.g., healthcare workers) or to conduct basic operations (e.g., employee benefits, billing, etc.), postponing non-essential medical procedures, conducting screenings of all staff members and patients, implementing social distancing measures to the extent feasible, etc.

Although Executive Order 2020-17 becomes moot beginning on May 29, 2020, the following description is furnished a reminder of its requirements while in effect and in the event that the Governor issues a new Executive Order with similar requirements in the future. Executive Order 2020-17 imposes temporary restrictions on non-essential medical and dental procedures that are not necessary to address a medical emergency or to preserve the health and safety of a patient. In accordance with

(CONTINUED)

Executive Order 2020-96, this Executive Order is effective through May 28, 2020 at 11:59 p.m., after which time it is rescinded. Importantly, Executive Order 2020-17 does not explicitly state that it applies to physician practices and clinics and does not explicitly require the postponement of all non-essential medical procedures. However, it should be treated as applicable, given its broad scope and the State's position that Executive Order 2020-7 (predecessor to Executive Order 2020-37 and Executive Order 2020-72) applies to medical practices.

Given that the purpose of the Executive Order is to minimize patient and healthcare worker exposure to COVID-19 and to reduce the overall demand on personal protective equipment (PPE) supplies, even in the absence of Executive Order 2020-17, medical practices should continue to adhere to guidance issued by the CDC and other medical associations and organizations for which medical procedures may resume and when they may resume. This may include resuming certain office visits and medical procedures in phases (as opposed to immediate business-as-usual) based on factors such as community progress towards reducing the incident of COVID-19, availability of staff and PPE supplies, protocols established by inpatient or outpatient facilities, and the overall necessity of the medical visit and procedure. In addition, medical practices should continue to consider using telemedicine where appropriate as an option for patient visits that do not have to be conducted in-person. Medical practices should refer to guidance and notices that may have been issued by Medicare, Medicaid and other third-party payors concerning any modifications to reimbursement guidelines for telemedicine services.

On May 3, 2020, Michigan's Chief Medical Executive, Joneigh Khaldun, MD, MPH, FACEP, sent a letter to Michigan clinicians providing further guidance related to Executive Order 2020-17, including what is allowable under the Executive Order, how to start to re-engage with patient for important care, and determining the timeliness and necessity of care for individual patients. In addition, the CDC recently issued guidance for re-opening facilities to provide non-essential, non-COVID-19 healthcare under Phase One of President Trump's Guidelines for Opening Up America Again. The CDC's guidelines are available at <https://www.cms.gov/files/document/covid-flexibility-reopen-essential-non-covid-services.pdf>. The Guidelines for Opening Up America Again can be found at: <https://www.whitehouse.gov/openingamerica/#criteria>.

### ***Can I require my staff members to get tested for COVID-19 before returning to work?***

Yes. On April 23, 2020, the Equal Employment Opportunity Commission ("EEOC") issued guidance authorizing employers, including medical practices, to administer a COVID-19 test before allowing staff members to enter the workplace, confirming that such activities do not violate the ADA. The results from any staff member's COVID-19 test should be kept confidential by the medical practice, unless the staff member voluntarily authorizes the release of his or her medical diagnosis. Consistent with staff member screenings, a medical practice's ability to require staff members to undergo COVID-19 testing may depend on the continued declaration of national and Michigan state of emergencies and/or any future guidance by state or federal public health authorities.

### ***Does my medical practice have to screen staff members for COVID-19 risks?***

Yes, for as long as Executive Order 2020-72, Executive Order 2020-96, Executive Order 2020-97 and any county Emergency Order requiring medical practices within that county to screen staff members remain effective. Even in the absence of such Executive Orders, medical practices should continue to follow CDC and CMS guidance on screening of staff members.

### ***Can my practice take staff members' temperatures?***

Yes. Generally, the ADA prohibits medical inquiries and examinations unless they are job-related and consistent with business necessity. One manner in which medical practices can show this necessity is by demonstrating that a direct threat is present, meaning that there is a significant risk of substantial harm to the health or safety of the individual or others. The EEOC has recently released guidance elaborating on the types of medical inquiries and examinations employers may require during this pandemic. The CDC and other public health authorities have acknowledged that the community spread of COVID-19 currently supports the finding that a significant risk of substantial harm exists. Accordingly, to the extent the national and Michigan state of emergencies remain in effect, and subject to additional guidance or other changes, the ADA's direct threat standard is met by the COVID-19 pandemic, entitling medical practices to take staff member temperatures.

(CONTINUED)

### ***What information can I share with other staff members if a staff member tests positive for COVID-19 or is quarantined?***

Medical practices should inform their staff members of any potential exposure in the workplace. However, medical practices may not disclose the name of a staff member who has tested positive for COVID-19 unless the medical practice receives a signed, voluntary authorization from such staff member. If any staff members have had close contact with a staff member who has a confirmed COVID-19 diagnosis, the medical practice may, but is not required to ask the potentially exposed staff members to self-quarantine for up to 14 days.

### ***Does my medical practice have to screen patients for COVID-19 risks?***

Patients presenting to a medical practice for treatment may be considered “under the care of the facility” and therefore are not subject to the screening requirements under Executive Order 2020-72. However, medical practices should follow CDC and CMS guidelines on the screening of patients. For example, the CDC has issued guidance called “Get Your Clinic Ready for Coronavirus Disease 2019” which provides helpful tips on protecting patients and healthcare workers, including screening patients during reminder calls before they arrive to the practice and handling patients who present with symptoms and still need to be treated in-person. CMS has also provided additional guidance for medical practices re-opening and resuming non-emergent, non-COVID-19 healthcare, including the screening of patients. Both the CDC’s guidance for clinic preparedness and CMS’s guidance for re-opening facilities recommend that patients be screened prior to entering the clinic or facility.

### ***Does my medical practice have to limit visitors to the medical practice? What about spouses/partners?***

Until the expiration or rescinding of Executive Order 2020-72, which is effective until 11:59 p.m. on May 31, 2020, medical practices will continue to be required to prohibit the following individuals from entering the medical practice:

- Persons who are not necessary for the provision of medical care, the support of activities of daily living, or the exercise of power of attorney or court-appointed guardianship for an individual under the facility’s care;
- Persons who are not a parent, foster parent, or guardian of an individual who is 21 years of age or under and who is under the facility’s care;
- Persons who are not visiting an individual under the facility’s care that is in serious or critical condition or in hospice care; and
- Persons who are not visiting under exigent circumstances or for the purpose of performing official governmental functions.

Under Executive Order 2020-72, spouses or partners who do not meet one of the above criteria may not accompany a patient to an in-person appointment.

Even following the expiration of Executive Order 2020-72, in order to continue to mitigate the potential exposure and risk to healthcare workers and patients, medical practices should continue to consider limiting the individuals who may enter healthcare facilities or accompany patients to medical visits and procedures. For example, the CDC reopening guidelines suggest that visitors should still be prohibited unless they are necessary for an aspect of patient care (e.g., mobilization, interpretation, confirming treatment of care provided, if they are the patient’s parent/guardian, etc.). Visitors should also continue to be screened consistent with Executive Order 2020-72 and CDC guidelines.



*This publication is furnished for informational purposes only. It does not communicate legal advice by the Michigan State Medical Society or Kerr, Russell and Weber, PLC. Receipt of this publication does not establish an attorney/client relationship. © 2020 Michigan State Medical Society and Kerr, Russell and Weber, PLC.*