**UPDATED**

Texas Medical Board (TMB) Frequently Asked Questions (FAQs) Regarding Non-Urgent, Elective Surgeries and Procedures During Texas Disaster Declaration for COVID-19 Pandemic

March 25, 2020

*Disclaimer – The COVID-19 Disaster is a fluid and rapidly evolving situation. Please check these FAQs often as events may warrant frequent updates.*

Should I reschedule non-urgent elective in-patient, out-patient, and office-based surgeries and procedures?

Yes, if the non-urgent elective surgery or procedure violates [Executive Order GA 09](https://www.tmb.state.tx.us/factsheets/eo_ga09.pdf), or emergency rule [22 Texas Administrative Code (TAC) §187.57(c)](https://www.tmb.state.tx.us/policies/regulations/22_tac_187_57c). Additionally, Texas Attorney General Ken Paxton issued a [statement](https://www.tmb.state.tx.us/policies/publications/ga09.pdf) on Executive Order GA 09.

What does Executive Order GA 09 prohibit?

Governor Greg Abbott issued [Executive Order GA 09](https://www.tmb.state.tx.us/policies/publications/ga09.pdf) on March 22, 2020. This executive order (EO) states:

> “beginning now and continuing until 11:59 p.m. on April 21, 2020, all licensed health care professionals and all licensed health care facilities shall 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, as determined by the patient’s physician [. However, this] prohibition shall not apply to any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster.”
What is the effect of emergency rule 22 Texas Administrative Code (TAC) §187.57(c)?

The Texas Medical Board (TMB) Executive Committee, during an emergency meeting on March 23, 2020, adopted an emergency rule amendment to 22 TAC §187.57(c). This emergency amendment adds language stating that the performance of a non-urgent elective procedure is considered a continuing threat to the public welfare during the battle against COVID-19, and will be prosecuted by the Board pursuant to this standard.

What was Attorney General Paxton’s statement on Executive Order GA 09?

Texas Attorney General Ken Paxton, on March 23, 2020, issued a statement that Executive Order GA 09’s prohibitions:

“applies throughout the State and to all surgeries and procedures that are not immediately medically necessary, including routine dermatological, ophthalmological, and dental procedures, as well as most scheduled healthcare procedures that are not immediately medically necessary such as orthopedic surgeries or any type of abortion that is not medically necessary to preserve the life or health of the mother.”

Executive Order GA 09 and 22 TAC §187.57(c) provide that this “prohibition shall not apply to a procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the personal protective equipment [PPE] needed to cope with the COVID-19 disaster.” What does this mean?

Executive Order GA 09 stated that PPE and hospital capacity needed to fight COVID-19 should not be depleted. Because PPE and hospital capacity are a critical need, procedures under this section of Executive Order GA 09 and 22 TAC §187.57(c) must still meet the criteria of being medically necessary to prevent “risk for serious adverse medical consequences or death, as determined by the patient’s
physician,” regardless of the office, facility, local, regional, or state availability of PPE and hospital capacity.

Can I still schedule and perform office-based visits for my patients?

Probably, as the prohibition does not apply to office-based visits without surgeries or procedures. However, the office-based visits should be conducted in accordance with standard protocols, including safety measures that prevent the spread of COVID-19.

What is not included in the term “procedure”?

A “procedure” does not include physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests.

What else changed regarding elective surgeries or procedures?

During the emergency meeting of the TMB Executive Committee on March 23, 2020, emergency rule 22 TAC §178.4 was amended to include,

“Pursuant to Executive Order GA 09, and not withstanding any other statute, rule or provision concerning timing or when a report must be made to the Board, any peer review committee, licensee, and other group, entity, or person named in §§160.003, 204.208, 205.304, and 206.159 of the Act shall be immediately required to report any physician scheduling to perform, preparing to perform, performing, or who has performed a non-urgent elective surgery or procedure, as defined in §187.57(c) of this subtitle, while Executive Order GA 09 is in effect, immediately to the board. This duty to report is mandatory whether any type of proceeding, inquiry, investigation, or action of any kind is being considered, has been initiated, or is on-going at a hospital, ambulatory surgical center, or any other facility or medical setting. All reporting under this emergency rule is subject to confidentiality under
§§160.004-160.008 of the Act; immunity for civil liability under §160.010 of the Act; and the prohibitions against discipline and discrimination under §160.012 of the Act.”

If I report a violation, will it be confidential?

Yes. While the law does not allow for the TMB to accept anonymous complaints, a complainant’s identity will remain confidential. This means that the TMB will know the complainant’s identity, but no one else will.

Can I be sued, fired, or otherwise retaliated against for filing a complaint?

All reporting, including reporting under this emergency rule, is subject to confidentiality under §§160.004-160.008 and 164.007(c) of the Act; immunity for civil liability under §160.010 of the Act; and the prohibitions against discipline and discrimination under §160.012 of the Act.

How long will this prohibition on non-urgent elective surgeries last?

Until Executive Order GA 09 expires on April 21, 2020 or, if it is extended by the governor, when that extension expires.

What does the Centers for Disease Control and Prevention (CDC) guidance on non-urgent elective procedures say about this?

Current CDC guidelines include rescheduling elective surgeries at inpatient facilities and rescheduling non-urgent outpatient visits, as necessary. TMB agrees with the intent and interpretation of these guidelines -- for licensees to postpone all non-urgent elective surgeries and procedures in inpatient and outpatient settings to help limit the spread of COVID-19.
Why does the TMB use the phrase “non-urgent elective surgery or procedure”?

Facilities have different levels of need for “elective” surgeries. These levels are often distinguished by the terms “urgent” or “emergent” by facilities. Some facilities or providers may use the term “acuity.” Regardless, the **physician must determine** if these types of procedures are delayed or canceled, will a patient be at risk for serious adverse medical consequences or death.

**Elective, non-urgent** cases are defined as cases where there is no anticipated short-term nor long-term negative impact as a result of delaying a procedure or surgery. Examples are screening for a nonlife-threatening chronic condition or most cosmetic procedures.

“**Urgent or Elective Urgent**” means a surgery or procedure is scheduled where there is a risk of patient deterioration or disease progression that is likely to occur if the procedure or surgery is not undertaken immediately and/or the surgery or procedure is significantly delayed. The resulting decline in the patient’s health could make them more vulnerable to COVID-19 and other issues.

“**Emergent**” means a life-threatening condition in which the surgery or procedure must be undertaken and/or cannot be safely delayed for any significant period of time.

What is a non-urgent elective procedure or surgery?

Non-urgent elective cases are being defined as instances where there is no anticipated short-term nor long-term negative impact on the patient because of delaying a procedure or surgery. Examples include screening for a non-life-threatening chronic condition and most cosmetic procedures.

What should I do if I determine an elective surgery is necessary and will not violate Executive Order GA 09 or TMB rules?

Documentation is key. It is very important that the medical record clearly reflects why the elective surgery or procedure was urgent and necessary to prevent serious
adverse medical consequences or death. This documentation could include information on the patient’s medical history, prescriptions, lab results, imaging, or other relevant factors used to make the determination of the urgent necessity of the elective surgery or procedure.

**If a complaint is received, how will the TMB determine if the surgery or procedure met the requirements of Executive Order GA 09 or TMB rules?**

The TMB can only act on a valid complaint. Complaints cannot be filed anonymously, but the complainant’s identity will remain confidential with TMB. If a complaint is received, then TMB will begin by reviewing the complaint. If there is enough information in the complaint to proceed with an investigation, TMB may request medical records for review.

Depending on the level of urgency to address the alleged violation, TMB may conduct a temporary suspension or restriction hearing with or without notice. If a temporary suspension or restriction hearing is conducted without notice, then a follow up temporary suspension or restriction hearing with notice must be offered at the earliest possible date after 10 days’ notice of the hearing. If the level of urgency does not warrant a temporary suspension or restriction hearing, then TMB will follow the normal investigative process, which would include obtaining expert physician review.

If a temporary suspension or restriction hearing is conducted, then a panel of three board members (one of which must be a physician) will decide if any type of restriction or suspension is warranted, or if no action should be taken. The justification for both the necessity and urgency of the surgery or procedure at issue will be determined by the three-member panel. This would include reviewing the medical records and utilizing applicable guidelines and literature, as appropriate. This was already the process in temporary suspension or restriction hearings before the COVID-19 disaster began.

If a temporary suspension or restriction hearing is not necessary, the normal investigative process will be followed. The justification for the necessity and urgency of the surgery or procedure at issue will be determined by at least two
physicians in the same or similar specialty of the physician under investigation. This would include reviewing the medical records and utilizing applicable guidelines and literature, as appropriate. This was already the process used in normal investigations before the COVID-19 disaster began.

So again, when reviewing the medical records, TMB will determine, based on the medical record documentation, if the surgery or procedure was medically necessary, as defined in GA 09 and TMB rules. Further, TMB will determine whether or not the standard of care (SOC) was met by, in part, consulting applicable guidelines such as the Centers for Disease Control and Prevention (CDC), Centers of Medical and Medicaid Services (CMS), or other medical or specialty guidelines and literature. These guidelines and the medical records will help determine if the SOC was met and if the surgery or procedure was medically necessary as defined in GA 09 and TMB rules.

**What are the benefits to postponing a non-urgent surgery?**

Postponement creates several key benefits, including:

1. It preserves resources such as Personal Protective Equipment (PPE), ventilator availability, and creates a general reduction in the overall use of critical medical resources;

2. It keeps a bed available for treatment of a COVID-19 patient, especially intensive care unit (ICU) beds;

3. It preserves significant healthcare practitioner time and availability which can be devoted to COVID-19 patients; and

4. It limits patients and health care workers’ potential exposure to COVID-19.

**What happens if I violate the Executive Order or Board rules?**

Both the Executive Order GA 09 and Attorney General Paxton’s statement provide that “Failure to comply with an executive order issued by the governor related to the COVID-19 disaster can result in penalties of up to $1,000 or 180 days of jail time.”
Further, under the TMB’s emergency rule 22 TAC § 187.57, performance of a non-urgent elective surgery or procedure is deemed by the Board to be a continuing threat to the public welfare. A complaint of this nature may result in a temporary suspension or restriction hearing with or without notice depending on the circumstances. Any Board action to restrict or suspend a licensee’s license, even if temporary, will trigger a mandatory report to the National Practitioner Data Bank (NPDB).

While the definition of a “continuing threat to the public welfare” is expanded under the emergency rule, the Board will follow all existing disciplinary processes and procedures to ensure due process for licensees.

Finally, the Board has mandated by rule that any peer review committee, licensee, and other group, entity, or person named in §§160.003, 204.208, 205.304, and 206.159 of the Act shall be required to immediately report violations of Executive Order GA 09 or 22 TAC §187.57(c) to the TMB.

What can help me make decisions on whether I should perform a surgery or procedure?

The Texas Medical Board has developed the following questions to help.

1. Does this prohibition apply to me or my practice location?
   The prohibition applies to ALL licensed healthcare providers and their delegates. It also applies to all licensed healthcare facilities. If you are a licensed healthcare professional or delegate, or performing the medical act in a licensed healthcare facility, proceed to #2.

2. Is the medical act a surgery or procedure?
   - Yes, proceed to #3.
   - No, I am performing other medical acts, such as a history, physical exam, non-invasive diagnostics, or ordering/performing lab tests.

   If your answer is no, you may proceed with the medical act.
3. If the medical act is a surgery or procedure, then you must ask the following questions:
   - Is this immediately medically necessary to correct a serious medical condition or to preserve the life of a patient?
   - Would this patient, without immediate performance of the surgery or procedure, be at risk for serious adverse medical consequences or death?

   **If you answer yes to either of the above questions, you can proceed with the medical act.** You should document the medical necessity and serious risk in the patient’s medical record.

   In determining how to answer the above questions, please review the above discussion of urgent vs. nonurgent and elective surgery or procedure. Also note that performance of the following medical acts would generally *not* be considered immediately medically necessary/pose a serious risk:

   - Routine dermatological procedures;
   - Routine ophthalmological procedures;
   - Routine dental procedures;
   - Nonemergent orthopedic surgeries;
   - Cosmetic and plastic surgeries;
   - Nonsurgical cosmetic procedures; and
   - Abortion not medically necessary to preserve the life or health of the mother.