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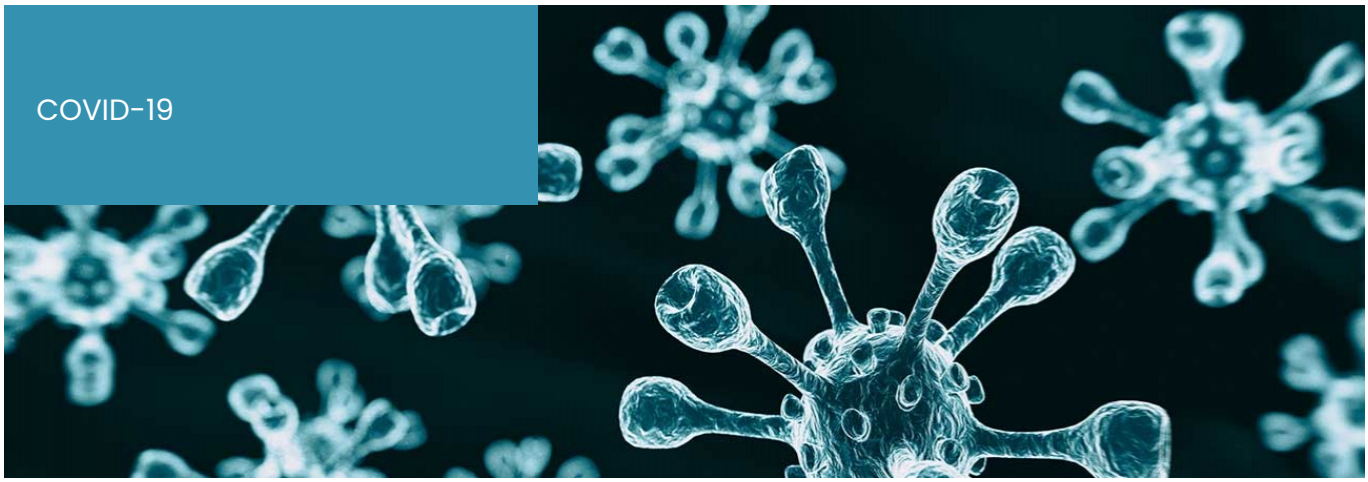

CORONAVIRUS: CMS, INDUSTRY AND PROFESSIONAL GROUPS ISSUE GUIDANCE REGARDING ELECTIVE PROCEDURES — EMERGENT AND URGENT ELECTIVE PROCEDURES MUST CONTINUE

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Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available here.

The Centers for Medicare and Medicaid Services ("CMS") and various industry and professional groups have issued guidance urging hospitals and surgery centers to consider several factors prior to conducting non-urgent elective procedures. Notably, this guidance does not state, however, that hospitals or any other healthcare providers must cease providing any necessary healthcare services or otherwise discontinuing their operations for any services unrelated to the COVID-19 outbreak. While hospitals and other facilities must carefully evaluate what procedures they perform, they should continue operating their hospitals, surgery centers, and clinics, and providing clinical, telemedicine, surgical, and other necessary services to their communities, regardless of whether those services are related to the COVID-19 outbreak.

CMS GUIDANCE

In analyzing the risks and benefits of non-essential surgery (i.e., non-urgent elective surgery), resource conservation and the risk of spreading COVID-19 must be considered. CMS suggests the following factors be considered prior to performing a non-essential procedure:

- Current and projected COVID-19 cases in the facility and region.
- Supply of PPE at the facility and other facilities within the region.
- Staffing availability.

- Bed availability, especially intensive care unit (ICU) beds.
- Ventilator availability.
- Health and age of the patient, especially given the risks of concurrent COVID-19 infection during recovery.
- Urgency of the procedure.

CMS advises that decisions regarding whether to perform a non-essential procedure should be made in consultation with the applicable healthcare facility, surgeon, patient, and other public health professionals. Additionally, a procedure that is non-essential today may become emergent or urgent elective tomorrow. Providers need to continually assess on a patient-by-patient basis and on a day-to-day basis whether the surgery is needed to save the patient's life, preserve organ function, and avoid further harms from the patient's underlying condition or disease.

INDUSTRY AND PROFESSIONAL GROUP GUIDANCE

Several groups in the healthcare industry have also recently issued guidance concerning the performance of non-urgent elective procedures during the COVID-19 outbreak. The American College of Surgeons (ACS) issued guidance encouraging providers to "thoughtfully review" all non-urgent elective procedures that they have scheduled and to institute a plan to "minimize, postpone, or cancel" such procedures until the American healthcare system has passed the inflection point in the COVID-19 exposure graph. The ACS also recommends that, where possible, hospitals shift urgent elective diagnostic and surgical procedures to surgery centers.

The American Hospital Association (AHA) has applauded CMS's framework for non-essential procedures, noting that the American medical community must be prepared to implement measures to cancel or delay such procedures. The AHA noted, however, that certain procedures that fit within the definition of "elective" are life-saving procedures that will need to continue (i.e., urgent elective procedures).

STATE AND LOCAL ACTION

In addition to CMS's guidance, certain states, including Ohio and Texas, have ordered all non-urgent elective procedures be delayed until further notice. As of the date of the publication of this issue alert, Kansas and Missouri have taken no such action.

CARES ACT

It should also be noted that on Friday, March 27, 2020, President Trump signed into law the Collaboration, Accountability, Research, Education, and Support ("CARES") Act. Among other significant measures, the CARES Act sets aside billions for awards, grants, advance payments, and other support for the operations of hospitals and other healthcare providers during the COVID-19 crisis. Foulston will be issuing additional guidance regarding the healthcare changes in the CARES Act and the programs and benefits available to providers under the Act in the coming days.

SUMMARY

CMS' guidance relates solely to the scheduling and performance of non-urgent elective procedures, and it does not require hospitals or other healthcare facilities to suspend other healthcare services. As of the date of this publication, nearly all Kansas and Missouri healthcare providers may continue to operate and perform elective

surgeries and other procedures, but they must determine whether such elective procedures should be performed using the standards set forth in CMS' March 18 guidance. The full text of the CMS guidance may be found here. Please note this is a rapidly evolving issue and applicable federal, state, and local positions on these matters are subject to change at any time. Foulston will issue more alerts in the following days and weeks regarding the legal implications of the COVID-19 outbreak, including the CARES Act.

FOR MORE INFORMATION

If you have questions or want more information regarding elective procedures, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. Foulston's healthcare lawyers maintain a high level of expertise regarding federal and state regulations affecting the healthcare industry. At the same time, our healthcare practice group's relationship with Foulston's other practice groups, including the taxation, general business, labor and employment, and commercial litigation groups, enhances our ability to consider all of the legal ramifications of any situation or strategy. For more information, contact **Alex Schulte** at 913.253.2155 or aschulte@foulston.com, or **Kyle Calvin** at 316.291.9561 or kcalvin@foulston.com. For more information on the firm, please visit our website at **www.foulston.com**.

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