

COVID-19

## **CORONAVIRUS: SOME GOOD NEWS (FINALLY) – CMS ISSUES GUIDANCE AIMED AT RESUMING NON-EMERGENT HEALTHCARE SERVICES**

April 22, 2020

By: Brooke Bennett Aziere, Alex W. Schulte, and Kyle E. Calvin

*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](#).*

On Sunday, April 19, the Centers for Medicare and Medicaid Services (CMS) issued guidance regarding the performance of non-emergent services and procedures for patients without symptoms of COVID-19. The CMS guidance modifies and supplements previous CMS recommendations (summarized in our prior issue alert available [here](#)), which encouraged providers to delay elective and non-essential services during the COVID-19 crisis.

In the April 19 guidance, CMS advised that healthcare facilities located in regions with low and stable incidence of COVID-19 should consider resuming non-emergent, non-COVID-19 services after evaluating a number of factors, including facility and workforce readiness and the availability of personal protective equipment (PPE) and other necessary supplies. Healthcare providers located in areas that have been less impacted by the outbreak should carefully review the guidance and consider recommencing elective and non-urgent services in accordance with CMS' recommendations.

### **PROVIDERS MUST EVALUATE A NUMBER OF FACTORS BEFORE RESUMING NON-EMERGENT CARE**

In the guidance, CMS acknowledged that many areas in the United States have “low, or relatively low and stable incidence” of the virus and recognized the importance of giving facilities in those less-affected areas flexibility to provide care for patients who require non-emergent services that are unrelated to the virus. CMS expressed a desire to see providers in low-risk areas resume care that has been postponed during the crisis period, particularly surgeries and procedures, care for chronic diseases, and preventative care, while maintaining the capacity to handle a potential “surge in COVID-19 cases.”

# FOULSTON

ATTORNEYS AT LAW

In its guidance, CMS continued to “strongly encourage” the maximum possible use of telehealth, but recognizes that telehealth is not always a viable option. For services that require an in-person setting, CMS has provided a number of recommendations. First, providers should coordinate with state and local officials to make decisions regarding what services are offered based on the best public health information available, and they should focus on performing the most necessary care. CMS instructs providers to prioritize “surgical/procedural care and high-complexity chronic disease management” in performing non-emergent, non-COVID-19 services, but it also acknowledges that preventative care may also be highly necessary in certain circumstances.

Additionally, CMS directed providers to assess whether they have access to adequate “facilities, workforce, testing, and supplies” to provide a particular non-essential service, given the potential for a quick surge in COVID-19 cases. CMS instructed providers in low COVID-19 incidence areas that choose to provide non-emergent care to establish non-COVID-19 care zones in their facilities and to prohibit staff from working in both the COVID-19 and non-COVID-19 care zones. Providers should also make adjustments necessary to facilitate social distancing at their facilities, such as minimizing time in waiting areas and taking steps to reduce patient volumes. CMS further recommended that providers screen all patients and staff for signs and symptoms on a regular basis and that patients be prohibited from bringing unnecessary visitors to a facility.

CMS also issued additional instructions concerning the use of PPE and other necessary supplies. Under the new guidance, before non-emergent, non-COVID-19 services are performed at a facility, PPE and other supplies must be available in an amount sufficient for the facility to provide such care without jeopardizing the facility’s COVID-19 surge capacity. CMS believes that all hospital staff must wear surgical masks, at a minimum, at all times and that patients who do not have access to surgical masks must wear cloth masks. CMS directs providers to make “every effort” to conserve PPE.

Finally, CMS noted that providers must “continually evaluate” the incidence of COVID-19 in their regions and must “cease non-essential procedures” as soon as a surge of COVID-19 cases occurs. This will require providers to closely monitor the spread of the outbreak in their regions and to maintain flexibility to alter the services offered at their facilities if necessary.

CMS’ guidance to providers on resuming non-emergent healthcare services can be found [here](#).

## **PART OF THE TRUMP ADMINISTRATION’S “GUIDELINES FOR OPENING UP AMERICA AGAIN”**

The April 19 CMS guidance is part of Phase 1 of the Trump Administration’s Guidelines for Opening Up America Again. Under these Guidelines, the Administration proposes a three-phase approach to reopening state and local economies. A state or local region may proceed to Phase 1 if certain “Gating Criteria” are met. The Gating Criteria require a 14-day downward trajectory of both symptoms and cases within the area and sufficient hospital capacity to treat patients without crisis care. The Guidelines for Opening Up America Again are available for review [here](#).

## **SUMMARY**

Fortunately, many areas within Kansas, Missouri, and other parts of the country are experiencing a relatively low rate of COVID-19 infection, and this new CMS guidance gives providers located within those areas increased flexibility to perform procedures that were discouraged in previous recommendations. Providers must, however, carefully assess and continually monitor a number of factors before resuming non-emergent services, particularly the severity of the spread of the virus in their communities, the preparedness of their facilities for handling both COVID-19 and non-COVID-19 patients, the availability of PPE and other necessary supplies, and their capacity to handle a sudden influx of new COVID-19 patients.

We recommend that providers document this ongoing assessment process, educate their staff, and be ready to modify patient scheduling and procedures should their area see a surge in COVID-19 cases. Providers should

# FOULSTON

ATTORNEYS AT LAW

inventory their PPE and maintain documentation that they have sufficient supply to meet their COVID-19 surge capacity. Floor plans ought to clearly designate COVID-19 and non-COVID-19 care zones. An assessment of a facility's healthcare workforce includes the types of staff needed across the spectrum of care, the number of available staff to provide care, and the staffing needs in the event of a COVID-19 surge. Staff schedules should be maintained demarcating which staff work in the COVID-19 zones and which work in the non-COVID-19 zones.

Providers also need to educate patients regarding social distancing and implement strategies to force social distancing (e.g., removing chairs from waiting areas, placing chairs six feet apart, making adjustments in scheduling to reduce the number of patients, asking patients to remain in their vehicles until the providers are ready to treat them, etc.). Facility staff need to be vigilant and remind patients of the need to follow social distancing protocols.

This guidance serves as good news for providers. It offers a roadmap for returning to the new "normal" in facility operations that all providers will face in light of COVID-19. We encourage providers to embrace this guidance, resume non-emergent services in accordance with the guidance and any state requirements, and document the decision-making process, implementation, and monitoring as part of their overall COVID-19 emergency preparedness and response plans. CMS is helping providers get back to what they do best — providing all types of care and services to patients. Foulston Siefkin is proud to support you in your efforts to respond to and conquer this challenging situation. Thank you.

## FOR MORE INFORMATION

If you have questions or want more information regarding CMS guidance on the performance of non-emergent services and procedures for patients without symptoms of COVID-19, 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 **Brooke Bennett Aziere** at 316.291.9768 or [baziere@foulston.com](mailto:baziere@foulston.com), **Alex W. Schulte** at 913.253.2155 or [aschulte@foulston.com](mailto:aschulte@foulston.com), or **Kyle E. Calvin** at 316.291.9561 or [kcalvin@foulston.com](mailto:kcalvin@foulston.com). For more information on the firm, please visit our website at [www.foulston.com](http://www.foulston.com).

Established in 1919, Foulston Siefkin is the largest law firm in Kansas. With offices in Wichita, Kansas City, and Topeka, Foulston provides a full range of legal services to clients in the areas of administrative & regulatory; antitrust & trade regulation; appellate law; banking & financial services; business & corporate; construction; creditors' rights & bankruptcy; e-commerce; education & public entity; elder law; emerging small business; employee benefits & ERISA; employment & labor; energy; environmental; ERISA litigation; estate planning & probate; family business enterprise; franchise & distribution; government investigations & white collar defense; governmental liability; government relations & public policy; healthcare; immigration; insurance regulatory; intellectual property; litigation & disputes; long-term care; mediation/dispute resolution; mergers & acquisitions; Native American law; oil, gas & minerals; OSHA; privacy & data security; private equity & venture capital; product liability; professional malpractice; real estate; securities & corporate finance; supply chain management; tax exempt organizations; taxation; trade secret & noncompete litigation; water rights; and wind & solar energy.

## HEALTH LAW RESOURCES

Sign up to receive these issue alerts straight to your inbox here.

---

# FOULSTON

ATTORNEYS AT LAW

*This update has been prepared by Foulston Siefkin LLP for informational purposes only. It is not a legal opinion; it does not provide legal advice for any purpose; and it neither creates nor constitutes evidence of an attorney-client relationship.*

## PRACTICE AREAS

---

- Healthcare