



Re-Opening Medical Practices Following COVID-19 Outbreak

Over the last couple of weeks, a great deal has been written about the steps hospitals should take as they begin to provide elective procedures again as the COVID-19 outbreak slowly subsides in some parts of the US. Lurking in the shadow of this issue is the question of what steps medical practices and outpatient clinics (“Medical Practices”) should take as they begin the process of returning to normal operations.

Fortunately, much of the same federal and state guidance used to guide hospitals in their decision making on these issues can also be used by Medical Practices. At the same time, as Medical Practices operate similarly to many traditional retail businesses, Medical Practices should supplement the healthcare specific guidance on this issue with general guidance provided by federal and state government to businesses as they consider re-opening.

From a healthcare standpoint, the baseline guidance to be used by Medical Practices in making these decisions is the “Centers for Medicare & Medicaid Services (CMS) Recommendations Re-opening Facilities to Provide Non-emergent Non-COVID-19 Healthcare: Phase I”.^[1] Under this guidance, CMS recommends eight (8) steps Medical Practices should take as they begin the process of returning to normal operations after their community meets the White House’s “Gating Criteria”^[2] for “re-opening.”^[3] These steps are:

1. establish a methodology for determining which patients need to receive in-person care and which patients can continue to receive remote care (e.g., telephonic consultation, telehealth, etc.);

2. establish a process for screening patients for potential COVID-19 symptoms before they are permitted to enter the Medical Practice;
3. prohibit patients receiving in-person care from bringing a guest, unless the guest is actively involved in the patient's care and is screened for potential COVID-19 symptoms in the same manner as the patient;
4. implement a policy requiring all healthcare providers and staff to wear surgical masks at all times and requiring patients to wear cloth masks;
5. implement a process for requiring all staff to be regularly screened for COVID-19 and requiring staff who test positive to quarantine;
6. if you anticipate regularly treating patients with COVID-19, segregate patients with COVID-19 to a separate part of the clinic (including a separate waiting area (if possible)) and segregating staff treating patients with COVID-19 from treating other patients;
7. establish a process for thoroughly cleaning and disinfecting patient treatment areas following the use of such areas by a patient; and
8. confirm the availability of an adequate supply of masks, other personal protective equipment, cleaning supplies and other supplies necessary to implement the policies and procedures adopted by the Medical Practice to prevent the spread of COVID-19.

Please recall, each of these steps is a recommendation from CMS, not a mandate. As a result, a Medical Practice is free to alter or eliminate any step. Before doing so, however, the Medical Practice should consider the potential risks of altering or eliminating the step and its justification for doing so.

Regardless of whether the Medical Practice takes these steps in their entirety or alters or eliminates one or more of them, the Medical Practice should document the steps taken and its rationale for doing so. The Medical Practice should also be prepared to consistently enforce each of these steps against its staff, its patients and its visitors.[\[4\]](#)

Separate from the healthcare specific guidance, Medical Practices should also consider federal and state guidance to businesses considering re-opening. Although there is federal guidance on the re-opening of businesses, the state and local guidance on this topic tends to be more specific. As a result, Medical Practices should be familiar with the general business re-opening guidance in their state,

county and city.[\[5\]](#)

The state and local “re-opening” guidance tends to focus on the possibility that direct human interaction or contact in a retail, business, or social setting will hasten the spread of COVID-19. As a result, this general “re-opening” guidance focuses on the use of masks, the implementation of social distancing and the constraint of large gatherings.

In the Medical Practice context, the “re-opening” guidance would cause the Medical Practice to consider the implementation of social distancing in the Medical Practice between members of the staff and each other, between members of the staff and patients (except as needed for patient treatment) and between patients and each other. Further, some state and local “re-opening” guidance focuses on the use of waiting rooms, suggesting that patients wait in their cars until they are called into the office by staff, as opposed to waiting in the waiting room. In any event, Medical Practices should be familiar with and consider the implications of the state and local general “re-opening” guidance as they consider returning to normal operations.

In closing, most of the guidance available to Medical Practices as they consider returning to normal operations is in the form of voluntary recommendations, not legal mandates. As a result, a Medical Practice has the ability to tailor its approach to returning to normal operations to its specific setting and context.

At the same time, this guidance represents the government’s current thoughts on generally appropriate measures to be implemented by a Medical Practice as it returns to normal operations. As a result, Medical Practices should fully consider this guidance as they create their own plans for returning to normal operations. Further, if Medical Practices hope to reduce the risks and liabilities associated with returning to normal operations by considering and implementing protective measures like those outlined in the guidance, their best hope of doing so is to fully document the process used to make such decisions and the actual implementation of such decisions. Absent governmentally-mandated protective measures, the ultimate test used to evaluate a Medical Practice’s actions will be whether the actions taken were reasonable under the circumstances.

We hope this information is helpful. If you have any questions, please feel free to contact us.

This blog post was drafted by [Donn Herring](#), an attorney in the Spencer Fane LLP St. Louis office. For more information, visit www.spencerfane.com.

[1] <https://www.cms.gov/files/document/covid-flexibility-reopen-essential-non-covid-services.pdf>

[2] The Gating Criteria focus on three (3) sets of factors to determine whether a community has passed the peak of the COVID-19 infection and is ready to safely return to normal activities. These factors include (1) a downward trajectory of influenza and COVID-like symptoms within a fourteen (14) day period, (2) a downward trajectory of documented COVID-19 cases and positive test results within a fourteen (14) day period, and (3) the ability of hospitals in the community to treat all patients within the normal standard of care and to provide COVID-19 testing for at risk healthcare workers.

[3] In many communities it is difficult (if not impossible) to find information as to whether the community meets the “Gating Criteria”. Given this fact, most Medical Practices are forced to rely on public directives from the Governor, County Executive, or Mayor regarding whether the community has met the “Gating Criteria”. In some cases, Governors, County Executives and Mayors have decided to “re-open” their community and authorize hospitals to begin to provide elective procedures while acknowledging that their community does not yet meet the “Gating Criteria.” Unfortunately, in those situations, Medical Practices are left with the difficult choice of following the path laid out by local leaders and following the federal recommendations.

[4] Some states have offered their own healthcare specific guidance for Medical Practices considering returning to normal operations. To the extent that the guidance is mandatory, Medical Practices in that state are required to comply with such guidance. To the extent the guidance is merely recommendations, Medical Practices are free to utilize, alter, or ignore such guidance in the same manner as the CMS guidance. In addition, some private organizations have offered their own healthcare specific recommendations for Medical Practices considering returning to normal operations. Obviously, Medical Practice are free to consider, adopt, alter, or ignore these recommendations as they see fit.

[5] See e.g., <https://governor.mo.gov/sites/gov/files/media/pdf/2020/04/Economic-Reopening-Phase-1.pdf>.