

## **Straight Talk: Understanding Florida Executive Order 20-72 Prohibition on Performing Elective, Non-Urgent/Emergency Office Procedures**

Gov. DeSantis' Exec Order contains several terms, phrases and recommendations that were borrowed from a Centers for Medicare and Medicaid Services (CMS) guidance report released on March 18, 2020. These terms and phrases need to be first clarified to understand the Order's full meaning and effect. Let's look at "medically unnecessary," "non-urgent and non-emergency procedures."

The language in the Executive Order is a little complicated and made harder to understand, because it contains words and phrases described in the NEGATIVE, i.e., medically unnecessary, non-urgent and non-emergency procedures. To better understand the meaning of these terms, it is helpful to first define them in the affirmative, and then apply an "absence of" standard to determine their negative meaning and implication.

The meaning of "medically unnecessary" is better understood as medical services that are not considered a "medical necessity." CMS defines "medical necessity" to mean, health care services or supplies needed to diagnose or treat an illness, injury, condition, disease, or its symptom that:

- (1) meet accepted standards of medicine; and,
- (2) excludes experimental, investigational and research related care.

The phrase or term "medical necessity" does not describe treatment or services needed to treat a problem. It does not refer to a health care practitioner's judgement about what is needed to treat a patient's health complaint.

Acupuncture is approved under certain Medicare and Medicaid plans as medically necessary for treatment of migraine, chronic tension-type headache, osteoarthritis of knee, pain in shoulder, other dorsopathies, excessive vomiting in pregnancy, nausea and other vomiting. CMS does require members to have a PCP referral from their Medicare or Medicaid provider of record before receiving Acupuncture care covered under federal and state public insurance plans.

Source: Sunshine Health / Florida Medicaid

CMS policies and recommendations do not typically address the behavior and decision-making of health care practitioners. Instead CMS provides compliance requirements that Medicare and Medicaid providers must meet to receive payment for providing CMS medical services. CMS released recommendations on March 18, 2020 to inform CMS providers that CMS would be screening and denying claims for elective procedures and non-emergency surgeries billed by health care providers during this state of emergency. CMS was simply telling its health care providers that CMS was not going to pay for non-emergency procedures and surgeries currently. This would effectively get HCPs attention and guarantee compliance.

Gov. DeSantis’ borrowed language from the CMS COVID-19 guidance resource to create Exec Order 20-72. That’s how the specific mandates and language were selected and incorporated into Gov. DeSantis’ plan and Exec Order about ceasing procedures and ordering offices closed.

Florida Reference: Chapter 440.13 Medical services...

(k) “Medically necessary” or “medical necessity” means any medical service or medical supply which is used to identify or treat an illness or injury, is appropriate to the patient’s diagnosis and status of recovery, and is consistent with the location of service, the level of care provided, and applicable practice parameters. *The service should be widely accepted among practicing health care providers, based on scientific criteria, and determined to be reasonably safe. The service must not be of an experimental, investigative, or research nature.*

### Understanding Urgent vs Emergency Conditions requiring Procedures / Surgeries

Urgent care Treatment needed within 24 to 48 hours	Emergency care Treatment needed right away to prevent serious jeopardy to health
Minor injuries and cuts	Severe, persistent bleeding
Backaches	Major broken bones and head injuries
Sore throats and earaches	Severe fever, violent vomiting

Urgent: A care need that isn’t an emergency but requires prompt medical attention, usually within 24 to 48 hours.

- Minor injuries and cuts
- Sore throats and earaches
- Frequent or severe coughs
- Frequent urination or a burning sensation when urinating

Emergency care: A medical or psychiatric condition that requires immediate medical attention to prevent serious jeopardy to your health. Emergency conditions CANNOT be delayed.

- Chest pain or pressure
- Severe stomach pain that comes on suddenly
- Decrease in or loss of consciousness
- Severe shortness of breath
- Severe headache that comes on suddenly or is accompanied by nausea
- Sudden numbness, tingling, weakness, or loss of movement in your face, arm, or leg, especially on only one side of your body

Sections 1 (B) (C) of Gov. DeSantis’ Exec Order 20-72, provide examples of the medically necessary, but non-urgent and non-emergency procedures based on the CMS guidance.

Here again understanding if, when and which procedures are permitted under the Exec Order requires practitioners to consider patients' condition, treatment options including temporarily withholding certain care, consequences of failing to act and their scope of practice.

Practitioners must question whether, if treatment is delayed will the patient's immediate health, safety or well-being be at risk, and will a delay in treatment contribute to worsening of a life-threatening condition.

If the answer is, "No," then postpone the treatment and reassess the patient later.

If the answer is, "Yes," then consider your scope, ability, infection control plan and capacity. If you have any reason to doubt that you are fully complying under the Order, the CDC best-practices guidelines, able to protect the safety of your patient, staff and yourself, then you must refer the patient to a higher echelon of care. Any clinical decision to delay or postpone care can be revisited and revised minute-by-minute, week-to-week, or longer.

Licensed Acupuncturists are "health care practitioners" under FS 456 and "primary health care providers" under FS 457. Florida's Executive Order 20-72 states that all licensed health care practitioners are prohibited from providing or performing in-office patient procedures and surgeries, which can otherwise be delayed without irreparably worsening a patient's life-threatening condition, health, safety or well-being.

The term procedure can be modified to have many meanings, but the Exec Order provides no expanded or limited definition for procedure, and as such it is taken to mean, "any act performed to repair, remove or otherwise heal a health concern." Performing acupuncture certainly meets that standard and definition.

If any Florida Licensed Acupuncturist assumes an exemption from complying with the office closure guidance described in Exec Order 20-72, then they should, if asked, be fully prepared to substantiate how the Governor's Order failed to cover their licensure and failed to cover their in-person patient treatments and services. They should also carefully consider their ability to ensure and document compliance with CDC and FL DOH guidance for infection control, patient management and infection reporting. Please refer to the CDC and FL DOH websites for details. <https://www.cdc.gov/coronavirus/2019-nCoV/hcp/index.html>

**Treating patients remotely with face-to-face telemedicine provides continuity of care and complies with all CMS/CDC, federal, state and local recommendations for conserving PPE supplies and safeguarding patients, providers and others from contracting and transmitting COVID-19.**

CMS' entire March 18, 2020, statement and recommendations can be found here:

<https://www.cms.gov/newsroom/press-releases/cms-releases-recommendations-adult-elective-surgeries-non-essential-medical-surgical-and-dental>

*FSOMA does not provide legal advice and urges its members and others to consult with an attorney for legal advice, answers and clarification about compliance with Florida law.*