



## **FAQs on Providing Essential Services During the COVID-19 Emergency**

### ***Clarifications for Governor Abbott's Executive Order GA 15***

The Texas Hospital Association offers answers to member hospitals' questions about Gov. Greg Abbott's Executive Order GA 15, issued April 17, related to the permissibility of performing certain surgeries and procedures during the COVID-19 pandemic.

**1. Where can I find GA 15?**

GA 15 can be accessed [here](#).

**2. When does GA 15 take effect?**

GA 15 takes effect on April 21 at 11:59 p.m.

**3. Does GA 15 supersede GA 09?**

Not explicitly, but as a practical matter it takes the place of GA 09, which expired at 11:59 p.m. CDT on April 21, along with the related emergency rules promulgated by the Texas Medical Board.

**4. How long will GA 15 remain in effect?**

GA 15 remains in effect until 11:59 p.m. CDT on May 8, unless it is modified, amended, rescinded, or superseded by the governor.

**5. Who does GA 15 apply to?**

GA 15 applies to all licensed health care professionals and all licensed health care facilities.

**6. What are the penalties for violating GA 15?**

GA 15 states that "failure to comply with any executive order issued during the COVID-19 disaster is an offense punishable by a fine not to exceed \$1,000, confinement in jail for a term not to exceed 180 days, or both fine and confinement" in accordance with [state statute](#). There may also be disciplinary implications, as explained further below.

**7. Why are limits being placed on surgeries and procedures?**

According to GA 15, hospital capacity and personal protective equipment "were being depleted by surgeries and procedures that were not medically necessary to correct a serious medical condition or to preserve the life of a patient..."

**8. What does GA 15 require?**

GA 15 requires all licensed health care professionals and all licensed health care facilities to postpone all surgeries and procedures that are not medically necessary to diagnose or correct a serious medical condition of, or to preserve the life of, a patient who without timely performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.

**9. What surgeries and procedures may proceed under GA 15?**

Surgeries and procedures that are medically necessary to diagnose or correct a serious medical condition of, or to preserve the life of, a patient who without timely performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician.

**10. Does GA 15 contain any exceptions to this requirement?**

Yes, by its explicit terms, GA 15 does not prohibit:

1. 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, **OR**
2. any surgery or procedure performed in a licensed health care facility that has certified in writing to the Texas Health and Human Services Commission **BOTH**:
  - a. that it will reserve at least 25% of its hospital capacity for treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patients; **AND**
  - b. that it will not request any personal protective equipment from any public source, whether federal, state, or local, for the duration of the COVID 19 disaster.

**11. How is GA 15 different from GA 09?**

Both GA 15 and GA 09 contain the exception to allow any procedure that, if performed in accordance with the commonly accepted standard of clinical practice, would not deplete the hospital capacity or the PPE needed to cope with the COVID-19 disaster.

GA 15 contains a second exception: permitting any surgery or procedure performed in a licensed health care facility that has certified in writing to HHSC both: (1) that it will reserve at least 25% of its hospital capacity for treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patients; and (2) that it will not request any PPE from any public source, whether federal, state, or local, for the duration of the COVID 19 disaster.

[Note: The second, "certification" exception applies to both a surgery and a procedure; the "non-depletion" exception applies only to procedures.]

GA 15 additionally expands the language from GA 09 related to permitted surgeries and procedures required to diagnose or correct a serious condition or preserve the life of a patient when timely performance is necessary, as determined by the patient's physician.

**12. What is the process for filing the certification described in the new certification exception under GA 15?**

The process established by HHSC is described [here](#).

Hospitals can use [HHSC's online option](#) to complete the certification requirement. Use of the online form will create an automatic verification and confirmation if completed correctly. The online form will accommodate one verification for multiple hospitals in a system.

Submission of your own form will require confirmation by HHSC staff.

**13. Has HHSC issued any guidance related to their process?**

Yes, information may be found in HHSC's FAQ, found [here](#).

**14. Why does the HHSC process only apply to the certification exception?**

In GA 15, the certification only applies to that one exception, and not to the non-depletion exception. HHSC is only managing the certification portion of the exception and indicates any potential penalties are set forth in GA 15 (as outlined in #6 above).

**15. Is there a required process to follow for complying with the "non-depletion" exception?**

The TMB has [issued guidance related to GA 15](#) and indicated that "documentation is key" to ensure that a surgery or procedure does not violate GA 15, and that 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." It is reasonable to assume that the TMB would expect to see documentation supporting a decision to proceed with a procedure under the non-depletion exception. HHSC does not have a role in implementing this exemption.

**16. Does "personal protective equipment" include testing equipment?**

PPE is not defined; however, the plain meaning of PPE does not include testing equipment.

**17. Do current COVID-19 patients count in the 25% of reserved capacity requirement under the certification exception?**

THA believes so, under a plain reading of GA 15.

**18. Is the 25% capacity on a per-hospital basis, or can it be across a hospital system?**

While not explicit in GA 15, the Office of the Governor has clarified that it applies on a per-hospital basis. The language of GA 15 supports this interpretation, by requiring "a licensed healthcare facility" to make the certification. However, HHSC will allow one submission on behalf of multiple facilities, if signed by an individual with authority to bind each of the facilities and the facilities are individually identified.

**19. With regard to the requirement that a facility must certify that it will reserve 25% of its capacity for COVID-19 patients, some hospital units, e.g., licensed psychiatric beds, labor and delivery/post-partum beds, would not be utilized for treatment of COVID-19 patients. Can those beds be excluded from total bed count for purposes of calculating the hospital's reserve capacity to treat COVID-19 patients?**

GA 15 requires reserving 25% of "hospital capacity". HHSC's [FAQ](#) indicates that GA 15 "does not qualify or limit the term 'hospital capacity,' or distinguish between types of hospital beds." Each licensed facility filing a certification will therefore have to determine what its capacity for treating COVID-19 patients is and apply the 25% standard contained in the exception to that capacity.

**20. What does it mean for a hospital to "reserve at least 25% of its hospital capacity"?**

This is not specified in GA 15. Logically, a hospital's utilization of its capacity to treat COVID 19 patients will change frequently as COVID-19 patients come into and leave the facility. THA believes the most reasonable interpretation is that the hospital is certifying that at all times, at least 25% of its capacity to treat COVID-19 patients is actually available to treat COVID-19 patients, either as being actually used to treat COVID-19 or available to treat an influx of patients.

**21. Does the certification exception apply to outpatient surgery? How do you make a certification for outpatient surgeries to occur?**

There is no distinction in GA 15 or HHSC's process between inpatient and outpatient surgeries or procedures, and we believe the certification exception applies to either or both without the need to make a distinction when filing the certification.

**22. Can an ambulatory surgery center file a certification and resume surgeries and procedures?**

The certification exception applies to a surgery or procedure performed in "a licensed health care facility," and ASCs are licensed health care facilities. However, one of the certifications that must be made is that the licensed facility "will reserve at least 25% of *its hospital capacity* for treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patient," so it is unclear how non-hospital health care facilities would account for that portion of the exemption.

**23. The non-depletion exception applies to procedures, but the certification exception applies to procedures and surgeries. How are those defined?**

The terms "procedure" and "surgery" are not defined in GA 15. The only guidance THA is aware of is in the TMB's [FAQs](#), wherein it indicates that "[a] 'procedure' does not include physical examinations, non-invasive diagnostic tests, the performing of lab tests, or obtaining specimens to perform laboratory tests."

**24. How long does the capacity and PPE certification apply?**

By its explicit terms, the certification related to not requesting PPE is for "the duration the COVID-19 disaster." Otherwise, the duration of the certification is not specified. However, a hospital filing a certification should expect that the certification will be in effect for at least as long as GA 15 is in effect, including any extensions of GA 15, and potentially through the extent of the Governor's disaster declaration, if not longer.

**25. If I want to file a certification and I have a pending State of Texas Assistance Request for PPE, should I withdraw the STAR request? Is that even permitted?**

This is not discussed either in GA 15, or in HHSC's published certification process.

However, THA received guidance from DSHS that an existing STAR will not be fulfilled if a certification has been filed.

**26. If I file a certification, am I barred from requesting PPE if the situation at my facility unexpectedly becomes critical?**

Eligibility for PPE distribution in the future is not addressed in either GA 15 or HHSC's process.

**27. Would an unsolicited donation of PPE from a federal, state or local government entity, violate the certification that the hospital will not request PPE from any public source, whether federal, state, or local, for the duration of the COVID 19 disaster?**

The certification addresses requests for PPE from a public source, whether federal, state, or local. Based on a plain reading of GA 15, THA believes accepting a donation of PPE from a public source would not violate the certification and would be permissible.

**28. Does the TMB have rules implementing GA 15?**

The TMB adopted an emergency rule on April 21, which adds the following to the definition of "Unprofessional and Dishonorable Conduct" to existing [TMB Rule 190.8\(2\)\(U\)](#):

a violation of Texas Executive Order GA-15, issued April 17, which states: "All licensed health care professionals and all licensed health care facilities shall postpone all surgeries and procedures that are not medically necessary to diagnose or correct a serious medical condition of, or to preserve the life of, a patient who without timely performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician; provided, however, that this prohibition shall not apply to either of the following:

(i) 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; or

(ii) any surgery or procedure performed in a licensed health care facility that has certified in writing to the Texas Health and Human Services Commission both:

(1) that it will reserve at least 25% of its hospital capacity for treatment of COVID-19 patients, accounting for the range of clinical severity of COVID-19 patients; and

(2) that it will not request any personal protective equipment from any public source, whether federal, state, or local, for the duration of the COVID-19 disaster."

The significance of this rule is that a violation of GA 15 is considered unprofessional conduct, and not a continuing threat to the public (of which reporting is mandatory), as was the case in the rules accompanying GA 09. Violations of GA 15 can still be reported to the TMB under existing TMB rules.

**29. Will the TMB's Rule 178.4, requiring immediate reporting to the TMB of non-urgent elective surgery or procedures scheduled or performed, remain in place for GA 15?**

No. The emergency rules related to GA 09 have been withdrawn. However, a violation of GA 15 may still be reported to the TMB for investigation.

**30. Can't a doctor/hospital use the non-depletion exception instead of the certification exception to resume procedures?**

Yes, the non-depletion exception is also contained in GA 15. However, the TMB will still investigate complaints about procedures that may not meet GA 15's requirements. TMB will review the relevant medical record and documentation showing compliance with GA 15, as well as the applicable standard of care (in part by reviewing CDC and CMS guidance).

**31. How do I know if a surgery or procedure may proceed?**

THA developed the following as a tool to assist decision-making, and reminds members that judgment may be used in making a determination:

1. Acts such as acquiring a patient's history, a physical exam, non-invasive diagnostic, lab test, or other procedure that does not require PPE should be permissible under GA 15.
2. A surgery or procedure medically necessary to diagnose or correct a serious medical condition, or to preserve the life of a patient who without the surgery or procedure would be at risk for serious adverse medical consequences or death should be permissible under GA 15. The medical necessity and serious risk should be documented in the medical record.
3. If the hospital certified with HHSC that the hospital will (1) reserve at least 25% of its capacity for treatment of COVID-19 patients, accounting for the range of clinical severity, **and** (2) not request any PPE from any public source (federal, state, or local) during the duration of the COVID-19 disaster, the surgery or procedure should be permissible under GA 15.
4. If the procedure is being performed in accordance with the commonly accepted standard of clinical practice and would not deplete the hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster, the procedure should be permissible under GA 15.

**Contact a member of THA's advocacy and legal teams for additional information:**

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