

# CORONAVIRUS INFORMATION & UPDATES

May 4, 2020

## Illinois Extends and Modifies Its Stay-at-Home Order Through May 30, 2020 and Permits Elective Surgeries and Procedures as of May 11, 2020

On April 30, 2020, Governor Pritzker issued [Executive Order 2020-32](#) and [Executive Order 2020-33](#) (the “May Orders”), which extended and modified the previous stay-at-home orders through May 30, 2020, and extended and modified a number of related executive orders through May 29, 2020. The May Orders and guidance differ from other states in that Governor Pritzker appears to be taking a more cautious approach by allowing only certain businesses to reopen on a limited curbside basis, declaring garden centers, nurseries, and dog grooming “Essential Businesses,” and opening state parks and certain other recreational activities (likely due to the milder weather). Importantly, as of May 11, 2020, hospitals and ambulatory surgical centers (“ASCs”) can restart elective surgeries and procedures according to guidance issued by Illinois Department of Public Health (“IDPH”) on April 24, 2020.

The Governor’s May Orders also impose greater social distancing and personal protective equipment (“PPE”) requirements on businesses and the public to protect against further spread of the virus. Moreover, there are strict capacity, PPE reserve, triage and infection control requirements for hospitals and ASCs seeking to perform elective procedures to ensure that the Illinois health system remains prepared to meet the anticipated mid-May COVID-19 surge.

### Current Crisis in Illinois

Governor Pritzker provided extensive detail in the May Orders and in his April 23, 2020 press conference regarding his office’s modeling of the anticipated peak, the current COVID-19 statistics for Illinois, and the capacity of the Illinois health care system, to support his executive actions. As of April 30, 2020, there were approximately 53,000 confirmed cases of COVID-19 and 2,350 confirmed deaths caused by COVID-19.<sup>1</sup> In reality, in most states, the number of cases is likely higher, as individuals may be asymptomatic or are otherwise not tested. As part of its efforts to determine appropriate actions, Illinois developed models to determine the likely peak in COVID-19 cases with input from prominent local universities, consulting groups, and state agencies. ***The models indicate that the peak of COVID-19 cases in Illinois will likely occur in mid-May and that health care resources will remain limited even after the peak.***<sup>2</sup>

<sup>1</sup> For updated information, see the [IDPH COVID-19 web site](#).

<sup>2</sup> The models also demonstrate the impact of the stay-at-home orders in place to date. Even though Illinois has been under a stay-at-home order since March 20, 2020, the state is currently using a high percentage of available hospital beds, intensive care unit (“ICU”) beds, and ventilators. As of April 30, 2020, only 10,243 (33%) of the state’s 32,010 hospital beds and 907 (25%) of the state’s 3,631 ICU beds remain available; moreover, only 17% of the ICU beds in the Chicago area are currently available. Without a stay-at-home order, the state’s models suggest that more than 100,000 hospital beds, 25,000 ICU beds, and upwards of 20,000 ventilators would be needed (Illinois currently has 3,378 ventilators). Most importantly, the state’s models indicate that the expected number of deaths from COVID-19 would be 10 to 20 times higher than current levels without a stay-at-home order.

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## The May Orders

The May Orders (i) detail new public health requirements for individuals leaving home and for businesses permitted to remain open, (ii) extend<sup>3</sup> and modify the stay-at-home, social distancing, and Essential Business and Operations requirements from the March and April stay-at-home orders, and (iii) amend and reissue prior Executive Orders related to the COVID-19 emergency. The May Orders largely restate the April stay-at-home order; new additions or modifications are highlighted below.

1. Individuals Must Wear Face Coverings in Public Places and When Working. The May Orders require that individuals wear a face covering or mask that covers the mouth and nose when in any public space in which they cannot maintain a six-foot social distance from one another. The face covering requirement applies to any individual over the age of two years old that can medically tolerate wearing a face covering. Face coverings are mandatory in public indoor spaces, such as retail stores and doctors offices.
2. Requirements for All Businesses. All businesses must evaluate which of their employees may work remotely. Businesses are encouraged to facilitate remote work if possible. All businesses that have employees physically reporting for work must post IDPH's [guidance](#) concerning workplace safety during the COVID-19 emergency. All businesses must also follow guidance regarding whether the business qualifies as an essential business, as well as guidance with respect to social distancing requirements, published by a range of state and local agencies.<sup>4</sup>
3. Modification of Social Distancing Requirements. The May Orders clarify that where possible, businesses must also provide employees with face coverings, require employees to wear face coverings when maintaining a six-foot social distance is not possible, and, when work circumstances require, provide employees with other PPE in addition to face coverings.
4. Reissuance and Modifications to Key COVID-19 Executive Orders.
  - a. Modification of Immunity from Civil Liability for Health Care Facilities. Importantly, the May Orders amend [Executive Order 2020-19](#)'s civil liability immunity requirements for hospitals, now requiring that hospitals accept a transfer of a COVID-19 patient from another hospital, including hospital inpatients, and state-operated entities that do not have the capacity and capability necessary to provide treatment for a COVID-19 patient as long as the receiving hospital has sufficient capacity and capability necessary to provide treatment for the COVID-19 patient. The May Orders also expand the definition of "health care facilities" such that civil liability protections are available to (a) supportive living facilities certified by the Illinois Department of Healthcare and Family Services, and (b) assisted living establishments and shared housing establishments licensed by IDPH. With these new revised definitions, we believe that hospitals and ASCs must comply with IDPH's [Elective Surgeries and Procedures](#) guidance to be eligible for liability immunity, but we hope that the Governor's office clarifies this point in the near future. ***For additional guidance on Executive Order 2020-19, see our [prior Alert](#).***

<sup>3</sup> On April 27, 2020, an Illinois Circuit Court [granted](#) plaintiff Illinois state representative Darren Bailey's motion for a temporary restraining order ("TRO") enjoining the state from enforcing the new stay-at-home orders against him individually. The TRO does not currently impact the applicability of the May Orders to Illinois residents generally.

<sup>4</sup> Businesses should look to the Office of the Governor, the Illinois Department of Commerce and Economic Opportunity, and State and local law enforcement for guidance on whether they qualify as an essential business, and to IDPH, local public health departments, and the Workplace Rights Bureau of the Office of the Illinois Attorney General for social distance guidance.

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- b. Executive Orders Reissued in Their Entirety and Extended Through May 29, 2020. [Executive Order 2020-09](#), concerning telehealth, license reinstatement, and temporary practice permits; [Executive Order 2020-12](#), concerning healthcare worker background checks; and [Executive Order 2020-26](#), concerning suspension of certain hospital capacity requirements and the creation of alternate care facilities, are reissued in their entirety and extended through May 29, 2020. ***For guidance concerning the telehealth provisions, see our [prior Alert](#). For guidance concerning reinstatement of Illinois medical and other health care licenses and temporary practice permits, see our [prior Alert](#).***
5. Expanded Definition of “Essential Businesses.” The May Orders expand the definition of “Essential Businesses” from health care and public health operations, human services operations, essential infrastructure, essential government functions, and certain businesses such as grocery stores, gas stations, and financial institutions to include greenhouses, garden centers, nurseries, and animal grooming services.
6. Requirements for Essential Stores. Retail stores that have been designated as Essential Businesses must, to the greatest extent possible, implement the following: (a) employees who are not able to maintain a minimum six-foot social distance at all times must be provided with face coverings; (b) occupancy must be limited to 50% of store capacity or to the limits promulgated by the Illinois Department of Commerce and Economic Opportunity, which are based on store square footage; (c) aisles must be set up to be one-way where practicable, and the one-way aisles must be conspicuously labeled with signs and/or floor markings; (d) customers must be notified of social distancing requirements through in-store signage and public service announcements and advertisements; and (e) use of reusable bags must be discontinued. Customers must limit the number of individuals from their household who enter a store to the minimum necessary.
7. Requirements for Non-Essential Stores. Retail stores not designated as Essential Businesses may re-open for the limited purpose of fulfilling telephone and online orders through delivery and pick-up outside of the store. Employees of non-essential retail stores must observe all social distancing requirements and must wear face coverings within six feet of another employee or customer. Otherwise, all non-essential businesses must cease all activities besides Minimum Basic Operations.
8. Requirements for Manufacturers. Manufacturers must follow all social distancing requirements and must take all appropriate precautions, which may include (a) providing face coverings to employees who are not able to maintain a six-foot social distance at all times; (b) staggering shifts; (c) reducing line speeds, (d) operating only essential product lines; (e) ensuring that all spaces in which employees gather, such as locker rooms and lunchrooms, allow for social distancing; and (f) downsizing operations to the extent necessary to allow for social distancing.
9. Other Material Changes from the May Orders. The May Orders clarify that (a) businesses are prohibited by the Illinois Whistleblower Act from retaliating against an employee for disclosing information where the employee has reasonable cause to believe that the information disclosed concerns a violation of the May Orders, (b) individuals may go to public parks and open outdoor recreation areas designated by the Illinois Department of Natural Resources, and (c) individuals may attend religious gatherings of no more than ten individuals.

## IDPH Elective Surgery Guidance

Beginning May 11, 2020, hospitals and ASCs may begin to perform elective inpatient procedures so long as facilities meet specific requirements, including capacity and PPE reserve requirements. Importantly, facilities performing elective

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pediatric procedures are not subject to the capacity requirements described below for inpatient procedures. Unsurprisingly, IDPH reserves the right to suspend elective procedures in the event of a rapid resurgence or second wave of COVID-19 cases or decrease in statewide testing levels. Accordingly, hospitals and ASCs will need to implement new compliance tracking and oversight procedures in addition to policies and procedures covering elective inpatient and outpatient procedures.

1. **Elective Outpatient Procedures.** An elective outpatient procedure is a procedure in which the likely and expected course for the patient undergoing the procedure is that the patient will enter and leave the facility on the same day that the procedure is to be performed. Elective outpatient procedures may be performed at hospitals or ASCs so long as the following requirements are satisfied:
  - a. **Case Setting and Prioritization.** Each facility must convene a Surgical Review Committee (an “SRC”) comprised of surgery, anesthesiology, and nursing personnel. The SRC must provide defined, transparent, and responsive oversight of the prioritization of elective inpatient cases. The SRC should rely heavily on elective case triage guidelines for surgical care. Finally, the SRC should regularly review previously canceled or postponed cases and prioritize such cases based on clinical considerations and available resources.
  - b. **Preoperative Testing for COVID-19.** Facilities must preoperatively test each patient within 72 hours prior to a scheduled procedure with a molecular swab test<sup>5</sup> and confirm COVID-19 negative status. The patient’s temperature must be taken on the day of arrival, and the patient’s temperature must be below 100.4 degrees to proceed. Facilities are encouraged to use telemedicine for preoperative visits when appropriate. ***This requirement may prove to be difficult for hospitals and ASCs to meet if the availability of testing is limited.***
  - c. **Protective Equipment.** Facilities must ensure that they have sufficient PPE with respect to the number and type of procedures to be performed. Facilities must ensure that they maintain adequate supplies of PPE should COVID-19 activity increase in the community within the next 14 days. IDPH has not provided a formula to calculate what constitutes a sufficient supply of PPE. ***Hospitals should work with industry leaders to propose to IDPH what supply levels would be acceptable to meet this requirement.***
  - d. **Infection Control.** Facilities must implement infection control processes, including facility cleaning policies, non-COVID care zones, minimization of waiting room use, and implementation of social distancing. Importantly, the guidance requires that facilities performing elective outpatient procedures screen all staff who will work in the area through use of COVID-19 molecular swab testing, including physicians, nurses, housekeeping, delivery, and other individuals who will enter patient areas. Any visitors that are necessary for an aspect of patient care or to help a disabled patient must be pre-screened with temperature checks and molecular swab testing.
  - e. **Support Services.** All areas of facilities that support perioperative services must implement heightened infection control practices, including sterile processing, clinical laboratory, and diagnostic imaging.

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<sup>5</sup> A COVID-19 RT-PCR, or reverse transcription polymerase chain reaction, test. Note that all COVID-19 RT-PCR tests are currently being performed pursuant to [FDA emergency use authorizations](#); the FDA has not yet approved a molecular test for COVID-19. For additional guidance, see our [prior Alert](#).

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2. Elective Inpatient Procedures. An elective inpatient procedure is a procedure in which the patient is likely to remain in the hospital for more than 23 hours, starting from the time of registration and ending at the time of departure. Elective inpatient procedures may be performed at hospitals so long as the five requirements (a–e above) described above are met, and the hospital at the time it commences elective inpatient procedures has at least 20% of its (a) operational adult medical/surgical beds available, (b) operational ICU beds available, and (c) total ventilators available. If a hospital fails one of these tests at any time, then it must stop performing elective inpatient procedures until all tests are satisfied. It remains to be seen whether IDPH will limit these requirements to only certain regional hospital systems on a go-forward basis in late May and June given IDPH’s focus on the importance of maintaining regional capacity.

Please feel free to contact us with any questions on the May Orders. We also welcome you to visit the Ropes & Gray [Coronavirus Resource Center](#) for more information and updates regarding COVID-19 developments.