STATE OF MINNESOTA
Executive Department

Governor Tim Walz

Emergency Executive Order 20-51

Requiring Facilities to Prioritize Surgeries and Procedures and Provide Safe Environment during COVID-19 Peacetime Emergency

I, Tim Walz, Governor of the State of Minnesota, by the authority vested in me by the Constitution and applicable statutes, issue the following Executive Order:

The COVID-19 pandemic presents an unprecedented challenge to our State. Minnesota has taken proactive steps to ensure that we are ahead of the curve on COVID-19 prevention and response. On March 13, 2020, I issued Executive Order 20-01 and declared a peacetime emergency because this pandemic, an act of nature, threatens the lives of Minnesotans, and local resources are inadequate to address the threat. On April 13, 2020, after notifying the Legislature, I issued Executive Order 20-35, extending the peacetime emergency declared in Executive Order 20-01.

The spread of COVID-19 has placed significant strain on Minnesota's healthcare system, necessitating aggressive measures to preserve adequate staffing in healthcare facilities and conserve critical resources such as ventilators and personal protective equipment ("PPE"). On March 17, 2020, the Centers for Disease Control and Prevention ("CDC") recommended delaying elective inpatient and outpatient medical and dental procedures. On March 18, 2020, the Centers for Medicare and Medicaid Services ("CMS") issued similar guidance, also noting that non-essential or elective procedures increase patient and provider contact, which could elevate the risk of COVID-19 transmission. Consistent with this federal guidance, in Executive Order 20-09, I directed Minnesotans to delay all non-essential or elective procedures that utilize PPE or ventilators, including dental care. On March 23, 2020, I issued Executive Orders 20-16 and 20-17, directing Minnesota businesses, nonprofits, and non-hospital entities to conserve PPE, ventilators, respirators, and anesthesia machines for essential healthcare services, and further clarifying the application of Executive Order 20-09 to non-essential or elective veterinary procedures.

Although postponement of non-essential or elective procedures has proven to be an effective means of preserving essential healthcare resources for the COVID-19 response, Minnesota Department of Health ("MDH") guidance released along with this Executive Order also recognizes that extended delays in the provision of certain care may pose substantial risks to patients. Non-essential or elective procedures are often clinically necessary, for example, to treat

chronic pain and conditions or to prevent, cure, or slow the progression of diseases. On April 19, 2020, CMS issued "Phase I" guidance encouraging states to resume the provision of non-essential, non-COVID-19 care to patients as clinically appropriate and within states, localities, or facilities that have the resources to provide such care and the ability to quickly respond to a surge in COVID-19 cases, if necessary. The guidance recommends careful planning and preparation, including ongoing monitoring of state and regional COVID-19 cases and symptoms and ensuring adequate availability of healthcare facilities, workforces, testing, and supplies.

Since the issuance of Executive Orders 20-09, 20-16, and 20-17, Minnesota has made and continues to make significant headway in securing additional PPE and improving testing and hospital surge capacity, which now allows our healthcare facilities to take important steps toward providing a wider range of clinically necessary care. This Executive Order is designed to allow hospitals, ambulatory surgical centers, and clinics (collectively, "facilities" or "healthcare facilities")—whether veterinary, medical, or dental—to resume the provision of many currently-delayed procedures once facilities have adequately planned to prioritize the ongoing COVID-19 response; develop criteria for determining which procedures should proceed during the COVID-19 pandemic; and provide a safe environment for facility staff, patients, and visitors.

In Minnesota Statutes 2019, section 12.02, subdivision 1, the Minnesota Legislature recognized the "existing and increasing possibility of the occurrence of natural and other disasters of major size and destructiveness" and conferred upon the Governor the emergency and disaster powers provided in Chapter 12 to "ensure the preparations of this state will be adequate to deal with disasters," to "generally protect the public peace, health, and safety," and to "preserve the lives and property of the people of the state." Pursuant to Minnesota Statutes 2019, section 12.21, subdivision 1, the Governor has general authority to control the State's emergency management as well as carry out the provisions of Minnesota's Emergency Management Act. Pursuant to subdivision 3 of that same section, the Governor may "make, amend, and rescind the necessary orders and rules to carry out the provisions" of Minnesota Statutes 2019, Chapter 12. When approved by the Executive Council and filed in the Office of the Secretary of State, such orders and rules have the force and effect of law during the pendency of a peacetime emergency. Any inconsistent rules or ordinances of any agency or political subdivision of the State are suspended during the pendency of the emergency.

For these reasons, I order as follows:

1. Beginning on May 10, 2020 at 11:59 p.m., healthcare facilities providing procedures that utilize PPE or ventilators—whether veterinary, medical, or dental—must complete the requirements set forth in this Executive Order.

2. Pursuant to Minnesota Statutes 2019, section 12.21, subdivision 3, Executive Orders 20-09 and 20-17 are rescinded as of May 10, 2020 at 11:59 p.m.

3. Effective May 10, 2020 at 11:59 p.m., paragraph 3 of Executive Order 20-16 is amended by the following deletions (indicated by strikethroughs):

   ~~Any Minnesota business, nonprofit, or non-hospital health care facility must refrain from using any such consumable equipment other than for use in delivering critical~~

~~health care services or essential services requiring such equipment, and must either donate it to a local coordinating entity or prepare for the possibility of being asked to donate or sell it for use by critical health care workers.~~

4. Paragraph 5 of Executive Order 20-16 is amended by the following additions (indicated by underlined text) and deletions (indicated by strikethroughs):

   ~~Notwithstanding any statute or rule to the contrary, information supplied under this Executive Order will be classified as nonpublic data and remain classified as such until the end of the peacetime emergency declared in Executive Order 20-01.~~ Pursuant to the Minnesota Government Data Practices Act, Minnesota Statutes 2019, section 13.37, information supplied under this Executive Order is classified as nonpublic security information.

5. This Executive Order does not restrict telehealth services. The use of telehealth service options is strongly encouraged whenever possible.

6. **Requirement for facilities that offer procedures that utilize PPE or ventilators.** Any facility that offers procedures that utilize PPE or ventilators must develop and implement an internal oversight structure and written plan (collectively, "Plan") establishing criteria for determining whether a procedure should proceed during the COVID-19 pandemic, for prioritizing procedures, and for ensuring a safe environment for staff, patients, and visitors. Detailed Plan requirements are set forth in the MDH guidance *Requiring Facilities to Prioritize Surgeries and Procedures and Provide Safe Environment during COVID-19 Peacetime Emergency* ("Plan Guidance"), available at: https://www.health.state.mn.us/diseases/coronavirus/hcp/guidesurgery.pdf

   a. **Plan contents.** As set forth in the Plan Guidance, at a minimum, each Plan must adequately address the following areas:

      i. **Prioritization of procedures.** The Plan must require, for each procedure, an assessment of the risks and benefits of conducting the procedure during the COVID-19 pandemic. Any decisions regarding whether to proceed with the procedure must be based on professional medical, veterinary, or dental judgment; must prioritize cases that pose a high risk to the patient if the procedure is delayed; and must consider the need for pre- and post-operative care, including the availability of related resources and care and associated risks of COVID-19 transmission. The Plan must incorporate criteria and guidance from MDH, CDC, CMS, and professional licensing boards regarding appropriate prioritization of procedures, as detailed in the Plan Guidance.

      ii. **Community considerations.** The facility must collaborate with other stakeholders and facilities in the same community—including the applicable regional health care coalition—to ensure adequate supplies

and capacity are available to respond to a potential surge in COVID-19 cases without resorting to crisis standards of care. The Plan must address the reduction or cessation of low- and medium-priority procedures in the event of a surge in COVID-19 cases.

iii. **Adequate screening and testing.** The facility must develop protocols to screen all staff, patients, and visitors for symptoms of COVID-19. Except for patients seeking care on an emergency basis or for COVID-19, the facility must not allow symptomatic patients, staff, and visitors into the facility or to remain in the facility once such symptoms are detected. Staff must be screened at the beginning of each shift. Additionally, a facility must either develop a protocol for testing patients prior to conducting a procedure or assume that all patients are potentially COVID-19 positive and take all attendant precautions. Any testing protocols must be developed in accordance with the considerations outlined in the Plan Guidance.

iv. **Use and supply of PPE.** The facility must follow and ensure professionals and staff are trained on up-to-date MDH, CDC, and professional licensing board recommendations for the use of PPE and conduct routine compliance audits. Procedures on the mucous membranes that carry a high risk of aerosol transmission must be performed with great caution and utilize appropriate respiratory protection (*i.e.*, a face shield and a N95 or higher-level respirator). The facility must also develop PPE conservation methods consistent with MDH and CDC guidance.

v. **Commercial sources of PPE.** The facility must ensure that PPE supply reserves and commercial (non-public) PPE supply chains are adequate to meet the facility's non-COVID-19-related PPE needs, taking into account the possibility of a surge in COVID-19 cases. This requirement means the facility is not permitted to seek additional PPE from public reserves for use in non-COVID-19 procedures performed as a result of this Executive Order. Moreover, the facility's commercial PPE supply chain should be open and continuous to the extent practicable, and the facility must have a sufficient number of days' supply in the facility's own reserves to account for potential commercial supply shortages and COVID-19 surges.

vi. **Social distancing and other infection prevention measures.** As detailed in the Plan Guidance, the facility must implement protocols and physical measures to provide for social distancing; separate and minimize crossover between COVID-19 and non-COVID-19 areas and units to the extent possible; reduce unnecessary contact and interactions between staff, patients, and visitors; clean and disinfect spaces; and require facility patients and visitors to wear source-control facemasks, which the facility must be prepared to provide when

necessary. The protocols and measures must include evidence-based standards for the control and prevention of infection, and the facility must train staff on the protocols and measures and conduct regular audits to ensure compliance.

vii. **Patient consultation.** Before undergoing a procedure, each patient (or, in the case of veterinary procedures, each patient's owner) must be informed of the risks of COVID-19 transmission that are associated with the procedure, and the possibility that the procedure may be cancelled on short notice if the patient tests positive for or experiences symptoms of COVID-19, or if the facility or service area requires additional capacity to address COVID-19.

b. **Availability to regulatory authorities.** Upon request, the facility must make its Plan available to MDH or the facility's licensing authority. In the event of a complaint or dispute related to a facility's Plan, MDH, in consultation with applicable professional licensing authorities, is authorized to determine whether the Plan adequately implements the Plan Guidance.

c. **Worker Protections.** Existing federal and Minnesota laws, including Minnesota Statutes 2019, Chapter 182, provide the following protections to workers in facilities:

i. Pursuant to Minnesota Statutes 2019, section 182.654, subdivision 9, and Code of Federal Regulations, title 29, section 1977.9(c), no employer may discriminate or retaliate in any way against a worker communicating orally or in writing with management personnel about occupational safety or health matters related to COVID-19, including asking questions or expressing concerns.

ii. Pursuant to Minnesota Statutes 2019, section 182.654, subdivision 11, workers have the right to refuse to work under conditions that they, in good faith, reasonably believe present an imminent danger of death or serious physical harm. This includes a reasonable belief that they have been assigned to work in an unsafe or unhealthful manner with an infectious agent such as COVID-19. No employer may discriminate or retaliate in any way against a worker for their good faith refusal to perform assigned tasks if the worker has asked the employer to correct the hazardous conditions but they remain uncorrected. These situations should be immediately reported to the Minnesota Department of Labor and Industry ("DLI").

iii. Pursuant to Minnesota Statutes 2019, section 182.654, subdivisions 8 and 9, workers and authorized representatives of workers have the right to request that DLI conduct an inspection of their workplace if they believe that a violation of a safety or health standard that threatens physical harm exists or that an imminent danger exists. No

employer may discriminate or retaliate in any way against a worker because such worker has requested an inspection or exercised any other right under Minnesota Statutes 2019, Chapter 182.

iv. DLI has authority to receive complaints about violations of paragraphs 6.c.i to 6.c.iii and enforce these provisions using the procedures contained in Minnesota Statutes 2019, section 182.669, including awards of backpay and compensatory damages.

d. **Enforcement.** Under existing law and authority, MDH, applicable professional licensing authorities, or any other state facility regulatory or licensing authorities may enforce this order against a facility or provider that fails to implement the Plan Guidance, fails to adhere to the facility's Plan, or that retaliates against patients, visitors, or staff who raise safety and health concerns that relate to the Plan Guidance. DLI may issue citations, civil penalties, or closure orders to places of employment with unsafe or unhealthy conditions, and DLI may penalize employers that retaliate against workers who raise safety and health concerns.

e. **Penalties.** The regulatory and licensing actions authorized under paragraphs 6.b to 6.d supersede the penalties prescribed by Minnesota Statutes 2019, section 12.45.

Pursuant to Minnesota Statutes 2019, section 4.035, subdivision 2, and section 12.32, this Executive Order is effective immediately upon approval by the Executive Council. It remains in effect until the peacetime emergency declared in Executive Order 20-01 is terminated or until it is rescinded by proper authority.

A determination that any provision of this Executive Order is invalid will not affect the enforceability of any other provision of this Executive Order. Rather, the invalid provision will be modified to the extent necessary so that it is enforceable.

Signed on May 5, 2020.

Tim Walz
Governor

Filed According to Law:

Steve Simon
Secretary of State

Approved by the Executive Council on May 6, 2020:

_____

Alice Roberts-Davis
Secretary, Executive Council