

MEMORANDUM

TO: National Association of Community Health Centers (“NACHC”)

FROM: Molly Evans, Partner
Martin Bree, Of Counsel
Noori Ali, Associate

DATE: May 14, 2020

RE: COVID-19: Re-opening of Dental Practices

This memorandum responds to your request for information regarding dental practice considerations for re-opening during the 2019-2020 novel coronavirus (“COVID-19”) pandemic. Specifically, you requested information on whether a community health center risks its Federal Tort Claims Act (“FTCA”) coverage or other malpractice liability if it begins to provide elective dental services when guidance from the Centers for Disease Control (“CDC”) advises that dental practices should only provide emergency dental services at this time. You also requested information on whether a health center violates Occupational Safety and Health Administration rules if it chooses to reopen and expand services beyond emergency dental care when federal and state guidance are in conflict. This memorandum summarizes the legal background by which these questions can be assessed as well as answers the specific questions posed.

I. EXECUTIVE SUMMARY

After limiting dental practices to emergency procedures as a response to the COVID-19 pandemic, many health centers are considering re-opening their dental practices to provide the full range of in-scope dental services, including elective procedures, like other private dental practices in their states. In fact, as of May 14, 2020, thirty-nine (39) states allow dental practices to offer elective dental procedures despite CDC Guidance to the contrary.¹

Health centers are concerned that there is risk to their FTCA coverage and the coverage of their providers given conflicting state, federal, and professional association guidelines on re-opening dental practices to allow elective dental procedures, specifically including guidance from the CDC that dental practices should only provide emergency services at this time. In addition, health centers are concerned that, when asked: “[W]hat guidance should health centers follow regarding the delivery of in-scope, non-emergency dental services during the re-opening phases of the

¹ COVID-19 State Mandates and Recommendations, May 14, 2020, https://success.ada.org/en/practice-management/patients/covid-19-state-mandates-and-recommendations?utm_source=adaorg&utm_medium=adanews&utm_content=stateaction&utm_campaign=covid-19 (last visited May 14, 2020).

COVID-19 public health emergency?,” the Health Resources and Services Administration (“HRSA”) has stated that “[H]ealth centers should continue to follow all applicable standards of practice, which would include CDC guidance and any additional guidance from state and local public health authorities regarding the delivery of dental services during the COVID-19 public health emergency.”²

To ensure coverage under the FTCA program, health centers must meet all statutory and regulatory requirements of the Federally Supported Health Centers Assistance Act (“FSHCAA”). The FSHCAA requires that health centers must be deemed by the Secretary of DHHS. Individuals must be employees of the deemed entity or eligible independent contractors. Services must be in the scope of project and provided to health center patients (as defined in the FTCA Manual) or non-health center patients in specific situations approved by the Secretary. FTCA coverage for dental services provided during the COVID-19 pandemic, including services provided during a re-opening of dental practices, must meet the above described requirements. Assuming that the health center and its dental staff have followed state and local (if any) laws and regulations regarding the provision of dental care in the health center’s states and all other requirements for FTCA coverage are met, the health center should have FTCA coverage for the provision of dental services, including elective dental care. In other words, a health center’s FTCA coverage should not be affected by a health center’s decision to proceed with the provision of elective dental procedures even if in conflict with CDC guidance.

Even when a health center and its staff members have FTCA coverage for a particular claim, there is still a question of whether there would be an actionable professional liability claim that could proceed against the United States and potentially lead to National Practitioner Databank reporting. As such, whether a claim would be covered by the FTCA is not the only concern for a health center and its staff members. Health centers must also assess whether the care that they are providing meets the “standard of care” for dental care at a health center. In order to reduce the risk of professional liability allegations regarding a breach of the standard of care, health centers must carefully review state and local government regulations and guidance as well as federal agency and state dental association, public health department, and dental board recommendations prior to making determinations regarding re-opening. Such determinations will be fact-specific and depend on the unique circumstances of each health center dental practice such as availability of staff, personal protective equipment (“PPE”), and other supplies and equipment needed to ensure patient safety. While health centers may find guidance related to provision of dental services during the COVID-19 emergency is not consistent, the decision to re-open and perform the full range (or even a more expanded range) of in-scope dental services must be based on the health center’s ability to provide a safe and secure environment for both patients and staff. Should a health center conclude that it does not have the ability to provide a safe environment for patients and staff, the health center should strongly consider delaying or otherwise modifying re-opening to only provide those services it determines are necessary and can be provided safely. Health center dental practices that choose to open to provide elective dental procedures should carefully develop and

² Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions, Bureau of Primary Health Care (2020), <https://bphc.hrsa.gov/emergency-response/coronavirus-frequently-asked-questions.html> (last visited May 14, 2020).

document a written plan and related policies for re-opening that demonstrates the precautions taken for patient and staff safety.

Further, the liability issues in re-opening dental practices are broader than FTCA and professional liability-related issues and require analysis of federal direction regarding workplace safety and Occupational Safety and Health Administration (“OSHA”) guidance. A detailed review and analysis of guidance for dental practices follows below.

II. LEGAL BACKGROUND

With the persistence of the COVID-19 pandemic, many health center dental practices must face the difficult task of resuming day-to-day operations and providing high quality care while ensuring adequate protections for employees and patients and limiting liability risks. Prior to re-opening, health center dental practices should carefully review relevant federal, state, and local laws and regulations, as well as federal agency and state dental association, public health department, professional association, and dental board guidance to determine applicable standards and requirements.

State and Local Governments

On April 16, 2020, the Trump administration released its federal guidelines for re-opening America, providing guidance to assist states in making decisions regarding re-opening.³ Because COVID-19 conditions vary significantly across the United States, states have taken different approaches to re-opening various businesses, including dental practices. While many states and localities have begun to permit dental practices to resume normal operations, including elective dental procedures, others have extended shelter in place rules and continue to allow emergency dental care only.

The American Dental Association (“ADA”) website provides a state-by-state summary of COVID-19-related re-opening measures titled *State Mandates and Recommendations on COVID-19*, which is updated daily.⁴ These state and local re-opening measures are constantly changing as the COVID-19 pandemic continues to unfold. As such, health centers should continue to carefully monitor changing requirements regarding the provision of dental services in their respective states. Health centers should also note that state and local government rules supersede federal agency and dental association guidance and contact an attorney if they have any questions or concerns regarding their obligations.

³ Opening Up America Again, The White House, <https://www.whitehouse.gov/openingamerica/> (last visited May 7, 2020).

⁴ COVID-19 State Mandates and Recommendations, American Dental Association, https://success.ada.org/en/practice-management/patients/covid-19-state-mandates-and-recommendations?utm_source=adaorg&utm_medium=covid-resources-lp&utm_content=stateaction&utm_campaign=covid-19 (last visited May 7, 2020).

FTCA Program Coverage

Section 224(a) of the Public Health Service (PHS) Act provides liability protection for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions by PHS employees while acting within the scope of such employment. This protection is exclusive of any other civil action or proceeding. Coverage extends to deemed entities, such as Section 330 funded health centers that have applied for and been deemed, and their (1) officers; (2) governing board members; (3) full and part-time employees; and (4) contractors who are licensed or certified individual health care practitioners providing full-time services (i.e., on average at least 32½ hours per week for the entity for the period of the contract), or, if providing an average of less than 32½ hours per week of such service, are licensed or certified providers in the fields of family practice, general internal medicine, general pediatrics, or obstetrics/gynecology.

The FTCA program malpractice liability coverage is limited to functions related to the grant supported activities, that are within the scope of employment for eligible grantees funded through Section 330 of the Public Health Service Act.⁵ HRSA noted in its COVID-19 FAQ that such eligible grantees must comply with state and local laws and regulations to obtain FTCA coverage.

States regulate the practice of medicine and other health professions as part of their authority to establish laws and regulations to protect the health, safety, and general welfare of their citizens. Each health center is therefore responsible for maintaining its operations, including developing and implementing its own operating procedures, in compliance with all Health Center Program requirements and all other applicable federal, state, and local laws and regulations (42 CFR 51c.304(d)(3)(v)).⁶

Health centers should continue to follow all applicable standards of practice, which would include CDC guidance and any additional guidance from state and local public health authorities regarding the delivery of dental services during the COVID-19 public health emergency.⁷

These FAQ answers are subject to change at any time. As such, grantees should carefully monitor the HRSA website for updates and contact an attorney with any questions.

The Occupational Safety and Health Act of 1970 (“OSHA”)

OSHA requires employers to maintain a safe workplace for employees, including allowing employees to exercise their legal right to refuse to work in a situation in which they would be

⁵ 45 CFR Part 6 and 42 USC 233(a).

⁶ Coronavirus Disease 2019 (COVID-19) Frequently Asked Questions, Bureau of Primary Health Care (2020), <https://bphc.hrsa.gov/emergency-response/coronavirus-frequently-asked-questions.html> (last visited May 12, 2020).

⁷ Id.

exposed to a health hazard without experiencing retaliation or discrimination.⁸ Under this statute, employers are required to conduct hazard assessments for potential harmful exposures, such as exposure to COVID-19, and develop actions plans to identify, prevent, and prepare for such exposures.⁹ In addition, under OSHA, employees are entitled to refuse to attend work in limited circumstances if they objectively and reasonably believe that they are in imminent danger of seriously injury or death .¹⁰ However, prior to voicing refusal to attend work under this statute, the employee must (1) present their concern to their employer and seek a correction; and (2) if the employer refuses to take any corrective action, the employee must report the condition to OSHA and ask OSHA to investigate.¹¹ OSHA determinations regarding the risk of exposure to COVID-19 in the workplace will be largely fact and situation dependent.

Currently, OSHA’s *COVID-19 - Control and Prevention Guidance for Dentistry Workers and Employers* recommends that dental offices remain closed to all but urgent and emergency procedures.¹² This guidance also categorizes emergency dental work tasks by exposure risk levels and provides recommendations for safety measures for each exposure risk level.¹³ Finally, the guidance states that “[e]mployers of dentistry workers are responsible for following applicable OSHA requirements, including OSHA’s Bloodborne Pathogens (29 CFR 1910.1030), Personal Protective Equipment (29 CFR 1910.132), and Respiratory Protection (29 CFR 1910.134) standards.”¹⁴

CDC Guidance

The CDC’s *Interim Infection Prevention and Control Guidance for Dental Settings During the COVID-19 Response* recommends that dental practices postpone elective procedures, surgeries, and non-urgent dental visits until further notice.¹⁵ The guidance also recommends that dental practices implement flexible, non-punitive sick leave policies that allow employees to stay home if they have respiratory symptoms. Further, the guidance directs dental practices to screen all patients for signs or symptoms of respiratory illness both by telephone before making a dental appointment and in-person immediately before an appointment, and to avoid dental care if such symptoms are present. Finally, the CDC provides guidance on the provision of emergency care to

⁸ Occupational Safety and Health Administration, United States Department of Labor, <https://www.osha.gov/workers/> (last visited Mar 19, 2020).

⁹ Guidance on Preparing Workplaces for an Influenza Pandemic, United States Department of Labor , https://www.osha.gov/Publications/influenza_pandemic.html (last visited Mar 19, 2020).

¹⁰ Occupational Safety and Health Administration, United States Department of Labor, <https://www.osha.gov/workers/> (last visited Mar 19, 2020).

¹¹ *Id.*

¹² UNITED STATES DEPARTMENT OF LABOR, COVID-19 - Control and Prevention | Dentistry Workers and Employers | Occupational Safety and Health Administration, <https://www.osha.gov/SLTC/covid-19/dentistry.html> (last visited May 7, 2020).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Dental Settings, Centers for Disease Control and Prevention (2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/dental-settings.html> (last visited May 7, 2020).

patients without COVID-19 in a dental clinic, potential exposure guidance, and contingency and crisis planning.

On Tuesday May 12, 2020, during a US Senate Health Committee hearing, Senator Susan Collins asked CDC Director Robert Redfield about updates to these CDC guidelines. Director Redfield replied that the CDC is reconsidering its current position and plans to update its guidance on re-opening dental practices soon. The Director did not comment on when the new guidance would be released. As such, dental practices should continue to monitor the CDC guidance for changes and consult an attorney with any questions or concerns.

ADA Guidance

The ADA has released a toolkit titled *Return to Work Interim Guidance Toolkit*.¹⁶ This toolkit provides guidance on the short-term management of dental practices during the COVID-19 pandemic.¹⁷ Toolkit items include a welcome back sample letter, sample pre-appointment screening processes and in-office registration procedures, reception area preparation strategies, a chairside checklist, staff protection strategies, and a shopping list.¹⁸

The ADA has also published a COVID-19 FAQ.¹⁹ This FAQ addresses a situation in which a dental office refuses to close per ADA or state guidance.²⁰ In this case, the ADA advises that opening offices contrary to ADA or state guidance could lead to loss of licensure for dentists and increased risk to the safety of patients, providers, and the public.²¹

State Dental Associations, State Health Departments, and State Boards of Dentistry

Dental practices should make sure to check the websites of their state dental associations, health departments, and boards of dentistry for updates regarding COVID-19. Dentists should note that state legislatures usually grant state dental boards the authority to establish qualifications for dental licensure, issue dental licenses, establish standards of practice and conduct, and take disciplinary action against those who engage in misconduct.²² Therefore, failure to comply with direction from a state board of dentistry could result in an adverse action against a dentist's license.

¹⁶ Return to Work Toolkit, American Dental Association, https://success.ada.org/~media/CPS/Files/OpenFiles/ADA_Return_to_Work_Toolkit.pdf (last visited May 7, 2020).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ COVID-19 Frequently Asked Questions, https://success.ada.org/en/practice-management/patients/coronavirus-frequently-asked-questions?utm_source=cpsorg&utm_medium=covid-nav&utm_content=nav-faq&utm_campaign=covid-19 (last visited May 7, 2020).

²⁰ *Id.*

²¹ *Id.*

²² Licensure, American Dental Association, <https://www.ada.org/en/education-careers/licensure> (last visited May 7, 2020).

III. ANALYSIS

Before re-opening a dental practice and expanding services beyond emergency dental care, health centers should first review state and local government guidance (if any) to ensure that re-opening is permissible. If the health center determines that it is permissible to resume normal business, it must take measures to ensure that it has the capacity to do so. Major considerations include ensuring a safe environment for employees and patients, mitigating risks associated with re-opening dental practices during the pandemic, and ensuring FTCA coverage is available.

Ensuring a Safe Environment

It is important to note that, because COVID-19 is an unprecedented global pandemic, there is a significant lack of knowledge regarding the incubation period and contagiousness of the disease.

CDC recommends that dental practices should take measures to create a safe work environment such as providing appropriate PPE to employees, training employees on proper use of PPE and measures to prevent COVID-19, encouraging good hygiene, and ensuring that all common areas are clean and sanitized.²³ Dental practices should create an open line of communication to address employees' potential concerns regarding re-opening. Further, CDC recommends that dental practices send employees and patients who are exhibiting symptoms of COVID-19 home and take reasonable precautions to ensure safety for employees by increasing opportunities for employees to work remotely if possible or take sick leave, particularly those who are high-risk individuals and individuals with disabilities.²⁴

A situation that would warrant an otherwise healthy employee to avoid coming to work due to COVID-19 risks could arise if the outbreak worsens or if there are confirmed COVID-19 cases in the area surrounding the workplace. If a situation arises in which an employee voices a reasonable OSHA-protected concern that coming into work would put them in danger of contracting COVID-19, dental practices should take steps to mitigate the dangers to ensure workplace safety and avoid penalties under OSHA. If it becomes untenable to maintain a safe workplace, employees should be placed on telework or leave.

Mitigating Risk

Health center dental practices must ensure that, in addition to instituting measures for the safety of employees and patients, they mitigate their own liability risks by maintaining eligibility for FTCA coverage. To maintain such eligibility for FTCA coverage for in-scope dental services provided, dental practices must comply with all FTCA program requirements as well as with state and local laws and regulations.

²³ Dental Settings, Centers for Disease Control and Prevention (2020), <https://www.cdc.gov/coronavirus/2019-ncov/hcp/dental-settings.html> (last visited May 7, 2020).

²⁴ *Id.*

Dental practices should also note that federal agencies and states may release conflicting guidance regarding re-opening. For example, CDC guidance may conflict with a governor's state re-opening plan. Such conflicting guidance should not impact FTCA coverage, provided that all requirements of the FSHCAA are met, but may play a role in establishing underlying malpractice liability on the part of the United States in a malpractice trial. Currently, there is no national standard for reconciling conflicting recommendations for the COVID-19 pandemic. Dental practices should use their best judgement, make a good faith effort to comply with all recommendations, and maintain written documentation regarding rationales for re-opening.

IV. CONCLUSION

Health centers preparing to re-open dental services must be mindful of the many laws, regulations, and guidelines that impact the provision of dental services during the COVID-19 pandemic. Many guidelines are subject to change with the CDC stating they it is reconsidering its position and plans to update its current guidance on dental practices. The professional liability protection afforded by the FTCA program for non-emergency dental services is available if all statutory and regulatory requirements of the FTCA program are met and should not be affected by a decision to operate, even if inconsistent with current CDC guidance. While OSHA references the CDC guidance limiting practices to urgent and emergency dental services, OSHA also expects employers to be alert to changing conditions including the spread of the virus in the community in order to be able to adapt their guidance to better suit evolving risks. Finally, health centers that are re-opening dental practices must develop policies and procedures that create a safe environment for patients and staff while at the same time providing high quality services.

Please contact Molly Evans (mevans@feldesmantucker.com), Martin Bree (mbree@feldesmantucker.com) or Noori Ali (nali@feldesmantucker.com) if you need any additional information.