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Final Changes to EMTALA Regulations

The Centers for Medicare & Medicaid Services (“CMS”) issued a final rule on August 29, 2003 clarifying hospital obligations to patients who request treatment for emergency medical conditions under the Emergency Medical Treatment and Labor Act (“EMTALA”). The final rule becomes effective on November 10, 2003.

According to CMS, the revisions provide clear, common sense rules for responding to people who come to a hospital for treatment of an emergency condition. The revisions are designed to ensure that people will receive appropriate screening and emergency treatment, regardless of their ability to pay, while removing barriers to the efficient operation of hospital emergency departments.

1. EMTALA Basics

Under EMTALA, a hospital is required to provide an appropriate medical screening examination to any person who comes to the hospital emergency department and requests treatment or an examination for a medical condition. If the screening exam reveals an emergency medical condition, the hospital must also provide either necessary stabilizing treatment or an appropriate transfer to another medical facility.

Stabilized means, with respect to an emergency medical condition, that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from the facility, or with respect to labor, that the patient has delivered the child and the placenta. A transfer is generally inappropriate until the person is stabilized, unless the individual requests the transfer in writing after being fully informed of the hospital’s obligations and the medical risks or a physician certifies that the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual or, in the case of labor, to the woman or unborn child. An appropriate transfer must be to a receiving facility that has agreed to accept the patient with space and qualified personnel, transportation is effected through use of necessary and appropriate medical means, and all medical records are sent to the receiving hospital.

EMTALA applies to all hospitals that participate in the federal Medicare program and offer emergency services. If EMTALA is applicable, it covers all patients treated at the hospitals and not just those who receive Medicare benefits.

Violations of EMTALA may result in the loss of Medicare participation for the hospitals and may subject the hospital to civil money penalties of up to \$50,000 per violation. In addition, individuals who have suffered personal harm and hospitals to which a patient has been improperly transferred and that have suffered financial loss as a result of the transfer are also provided a private right of action against hospitals that violate EMTALA.

2. Application of EMTALA

A. Person Who Presents to a Dedicated Emergency Department

The final rule applies EMTALA obligations to any person, not a patient (as defined in the rule), who presents at a “dedicated emergency department” of a hospital and requests examination or treatment for a medical condition or such a request is made on his or her behalf. In the absence of a specific request for examination or treatment, a request will be deemed to have been made if a prudent layperson observer, based on the presenting person’s behavior or actions, believes that the person needs examination or treatment for a medical condition.

CMS has enlarged and clarified the definition of hospital emergency room to that of a “dedicated emergency department”. A “dedicated emergency department” is defined as any department or facility of the hospital, regardless of whether it is located on or off the main hospital campus, that meets at least one of the following requirements: (1) a facility licensed by the State as an emergency department; (2) a facility that is held out to the public (by name, advertising or other means) as a place that provides care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment; or (3) a department or facility that provides at least one-third of its entire outpatient visits (during the immediately preceding calendar year based on a representative sample of patient visits) for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment. Thus, whether a facility or department meets the definition of a dedicated emergency department depends on both objective and subjective criteria. Hospital administrators or employees may not think that a facility or department is being held out to the public as a place that provides treatment for emergency medical conditions, but the public perception of that facility or department may indicate otherwise. Whether a facility is held out to the public as a place that provides treatment for emergency medical conditions, and subject to EMTALA, becomes a question determined by the facts on a case-by-case basis.

In the preamble, CMS notes that the definition of dedicated emergency department includes not only what is generally considered to be a hospital's traditional emergency room, but also other hospital departments, such as a labor and delivery unit. CMS states that any area of the hospital that offers medical services to treat individuals in labor to at least one-third of the ambulatory individuals who present to the area for care, even if the hospital’s practice is to admit such individuals as inpatients rather than listing them on an outpatient basis, would be considered a dedicated emergency department. In its comments, CMS also specifically rejects a request to exclude hospital urgent care centers from the EMTALA requirements finding that it would be very difficult for any individual in need of emergency care to distinguish between a hospital department that provides care for an urgent need and one that provides care for an emergency medical condition. Thus, an urgent care center, whether located off-campus or on-campus, will be deemed to be a dedicated emergency department of a hospital. This seems to imply that if the public perceives a facility or department to be one that provides emergency care, it will be deemed to be a dedicated emergency department. Based on the nature of the care provided by various departments or the public perception, a hospital may have several departments or facilities that qualify as dedicated emergency departments subject to EMTALA.

B. Person Who Presents on the Hospital's Main Campus Other Than a Dedicated Emergency Department

CMS states that EMTALA does not apply elsewhere on on-campus hospital property other than a dedicated emergency department unless an examination and treatment is requested for what may be an emergency medical condition. Thus, EMTALA applies to a person who has presented on hospital property, other than a dedicated emergency department, and requests examination or treatment for what may be an emergency medical condition or such a request has been made on his or her behalf. In addition, in the absence of a specific request, EMTALA will also apply if a prudent layperson observer would believe, based on the person's appearance or behavior, that the individual needs emergency examination or treatment. For the purpose of determining whether EMTALA obligations are triggered, hospital property continues to be defined by the 250-yard test (*i.e.*, within 250 yards of the main hospital building) for describing the hospital-campus (including parking lots, sidewalks and driveways). CMS has removed the specific language describing the 250-yard test from the final rule, but incorporates it by reference to 42 CFR 413.65(b). Importantly, however, CMS clarifies that hospital property does not include physician offices, rural health clinics, skilled nursing facilities, other entities that participate separately under Medicare, or restaurants, shops and other nonmedical activities.

C. Inpatients

The final rule specifies that EMTALA obligations are terminated once an individual is admitted for inpatient care. CMS states that inpatients will continue to be subject to the standards and protections of the Medicare hospital conditions of participation and state negligence, malpractice and patient abandonment laws. However, EMTALA will continue to apply after admission if a hospital does not admit an emergency patient in good faith (*i.e.*, to avoid EMTALA requirements), and then inappropriately transfers or discharges the individual without meeting the stabilization requirement.

D. Outpatients

The final rule provides that the EMTALA obligations do not apply to an individual who, before coming to the emergency department, has begun to receive outpatient services as part of an encounter other than an encounter that is required under EMTALA. The new rule applies to any person who comes to a hospital department for non-emergency services (such as physical therapy) and has begun to receive those services. In the event the patient develops an emergency condition during the outpatient encounter, the hospital's response will be governed under the Medicare hospital conditions of participation, not EMTALA (even if the patient is moved to the dedicated emergency department for follow-up examination and stabilizing treatment). However, EMTALA will apply to individuals on hospital property for reasons other than outpatient services (such as hospital visitors) who request an examination or treatment for what may be an emergency medical condition. It is unclear, based on a reading of the final rule, whether EMTALA would apply to a person who comes to a hospital department for outpatient services, but develops an emergency medical condition prior to receiving the specific outpatient services.

E. Person Who Presents to the Dedicated Emergency Department for Non-Emergency Services

CMS reaffirms its view that a hospital has an EMTALA obligation to provide an appropriate screening examination with respect to any person who comes to a dedicated emergency department seeking examination or treatment for a medical condition, even if the treatment sought is not for an emergency medical condition. Importantly, the final regulations distinguish between individuals presenting to a dedicated emergency department for emergency services as opposed to nonemergency services. Under the final rule, if an individual comes to a dedicated emergency department and a request is made for an examination or treatment for a medical condition but the nature of the request makes it clear that there is no emergency medical condition, the hospital is required to perform a medical screening that is appropriate for any individual presenting in such manner to determine whether the individual has an emergency medical condition. The examination, sufficient for EMTALA, may be limited to (i) the individual's statement that he or she is not seeking emergency care, and (ii) brief questioning by a qualified medical person, as defined in the rule, that is sufficient to establish that there is no emergency condition. CMS reiterates that EMTALA does not create a federal medical malpractice statute and does not define what type of screening must be performed. The screening must be adequate to determine if an emergency medical condition exists. It should be noted, that if it is later found that the individual who was previously determined not to have a medical emergency did, in fact, have an emergency medical condition, the extent and quality of the screening by the qualified medical person would be subject to review to determine whether the medical screening was adequate. Thus, it becomes a subjective determination either by a surveyor or trier of fact in an EMTALA violation case, whether the screening examination was adequate.

Additionally, if a person presents at the dedicated emergency department and makes a request for a service that is not an examination or treatment for a medical condition, such as for preventative care services, EMTALA does not apply and a medical screening is not required. While CMS makes such an affirmative statement in its comments, it does not specify with detail the types of services which, if requested, would not be considered to be an examination or treatment for a medical condition (except using preventative care services as an example). In fact, CMS indicates that pharmaceutical services may be for medical conditions and therefore subject to EMTALA. Thus, hospital personnel in the dedicated emergency room must recognize what types of requests are not requests for examination and treatment for medical conditions and therefore do not trigger EMTALA. It would appear that if the request is specifically for an examination or treatment of a medical condition, or the service requested can reasonably be due to the existence of a medical condition, EMTALA will be triggered. The determination of whether the person is requesting treatment and examination for a medical condition or not is subject to interpretation.

F. Person Who Presents to an Off-Campus Department or Facility

The final rule applies EMTALA to off-site departments or facilities that are deemed to be dedicated emergency departments of a hospital (*i.e.*, provider-based entities), and eliminates the extension of EMTALA to all other off-campus departments. Emergency services provided at an off-campus department (other than a dedicated emergency department) must be in accordance

with written policies and procedures adopted by the hospital governing body for appraisal of emergencies and referral when appropriate, as specified in the Medicare hospital conditions of participation. In the preamble to the final rule, CMS states that it will clarify in the interpretive guidelines or training materials that the policies and procedures for appraisal and referral will apply only within the hours of operation and normal staffing capability of the facility.

An off-campus dedicated emergency department that participates in Medicare through a hospital's provider number and which operates as a satellite facility of the main hospital is allowed to transfer a patient in an unstable condition. The transfer to an affiliated hospital is permitted if the off-campus facility has screened the individual and determined that treatment of the individual's condition is not within the capability or capacity of the facility and thus the medical benefit of the transfer outweighs the risk. The facility must, however, stabilize the person if it is within its capacity and capabilities. The final rule clarifies that the transfer of a patient in an unstable condition to a non-affiliated hospital is permitted if the hospital determines that the benefits of transfer exceed the risks (*i.e.*, a lengthy ambulance ride to an affiliated hospital would present an unacceptable risk to the individual) and the other requirements for an appropriate transfer are met.

G. Person In Hospital–Owned Ambulance

EMTALA applies to a person in a hospital-owned air or ground ambulance, whether or not on hospital property. The final rule provides that EMTALA does not apply to hospital-owned air or ground ambulances if (i) the ambulance is operated under communitywide emergency medical service protocols that direct it to transport the individual to a hospital other than the hospital that owns the ambulance (for example, the closest available hospital), or (ii) the ambulance is operated at the direction of a physician who is not employed or otherwise affiliated with the hospital that owns the ambulance. If the hospital is in diversionary status (*i.e.*, it does not have the staff or facilities to accept any additional emergency patients) and the patient nevertheless comes to the hospital property, EMTALA applies.

3. Registration and Prior Authorization

The final rule allows hospitals to follow reasonable registration processes for patients coming to the emergency department, including questions regarding insurance status and personal information so long as the inquiry does not delay the required medical screening or treatment. The final regulations prohibit a hospital from seeking prior authorization, or directing any other individual to seek prior authorization, for screening or stabilization services until after the hospital has provided the medical screening and initiated stabilization treatment. The final rule clarifies that the prior authorization prohibition does not preclude the treating physician (or other qualified medical personnel) from seeking advice or consultation on the patient's medical history and needs, so long as the consultation does not inappropriately delay required emergency services.

Whether the examination or treatment is delayed is subject to interpretation based on the facts and circumstances of the situation. To avoid any possibility of delay, a hospital may want to develop policies and procedures alerting administrative staff to obtain payment information only after a medical screening examination and stabilizing treatment has occurred. Importantly,

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even if the approving insurer denies authorization for the stabilizing treatment, the hospital remains obligated under EMTALA to provide the necessary stabilizing treatment within the hospital's capacity and capabilities. CMS clarified that the prior authorization policies apply to services furnished by a hospital, a physician, or a non-physician practitioner (*i.e.*, physician assistants and nurse practitioners).

4. EMTALA On-Call Obligations

EMTALA requires hospitals to maintain a list of physicians who are on-call to assist, if necessary, in the medical screening and stabilization of an individual with an emergency medical condition. The final rule provides that hospitals have the discretion to maintain the on-call list in a manner best suited to meet the needs of persons who receive EMTALA services in accordance with resources that are available to the hospital, including the availability of on-call physicians. CMS stated that in its view, the services offered to the public by a hospital should be available through on-call coverage of the emergency department. In response to a comment, however, CMS stated that it declined to adopt such a standard in the regulations because it may establish an unrealistically high standard that not all hospitals could meet.

In the preamble, CMS reaffirms that there is no requirement under EMTALA for full-time on-call coverage by a specialty or any predetermined ratio that is used to identify how many days a hospital must provide on-call coverage based on the number of physicians on staff for that particular specialty. According to CMS, it will consider all relevant factors, including the number of physicians for a particular specialty on staff, other demands on the physicians, the frequency with which the hospital's emergency patients typically require services of on-call physicians, and the provisions the hospital has made for situations in which a physician in the specialty is not available or is unable to respond in determining whether a hospital has met its EMTALA obligations. Thus, whether a hospital has met its on-call obligation is subject to interpretation.

In recognition of the practical relationship between hospitals and physicians, CMS specifically permits the hospital to have on-call physicians schedule elective surgery during the time that they are on-call and also permits on-call physicians to have simultaneous on-call duties at other area hospitals. Hospitals must have written policies and procedures to respond to situations when a particular specialty is not available or the on-call physician cannot respond due to circumstances beyond his/her control. Hospitals must also have written policies and procedures to provide that emergency services are available to meet the needs of patients with emergency medical conditions if it elects to permit on-call physicians to schedule elective surgery when they are on call or have simultaneous on-call duties for two or more hospitals. All hospitals that share an on-call physician must be aware of that on-call physician's schedule.

5. EMTALA in National Emergencies

CMS has adopted a new regulation providing that the sanctions under EMTALA for an inappropriate transfer during a national emergency (such as a bioterrorist attack or epidemic outbreak) do not apply to a transfer made by a hospital with a dedicated emergency department located in an emergency area.