



Complying with EMTALA During Flu Season: Waivers and Other Options for Hospitals with Dedicated Emergency Departments

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Summary and Practical Tips

- The federal government can waive certain EMTALA requirements during a flu pandemic.
- Federal and state governments and the hospital must take specific formal actions before these requirements are waived.
- The Secretary of HHS may only waive the sanctions associated with redirecting individuals for their medical screening exam and for transfer that would otherwise be inappropriate under EMTALA.
- If an individual is redirected for a medical screening exam or is inappropriately transferred under a waiver, then the redirection or transfer must not have been made for a discriminatory purpose.
- A hospital must continue to meet all other EMTALA obligations.
- The hospital remains liable in legal actions by individuals who are harmed by redirection or transfers made under a waiver.
- A hospital can request a waiver from CMS if one has not been granted.
- Without a waiver, a hospital may redirect patients for an influenza-like illness screening to an alternative on-campus location so long as the hospital's EMTALA obligations continue to be met.
- Without a waiver, a hospital may make off-campus locations available for influenza-like illness screening so long as the location is under the control of the hospital and individuals who come to the emergency department are not redirected to these locations.

As flu season begins, emergency department directors are starting to prepare for an influx of patients with flu-like symptoms (sometimes called influenza-like illness or “ILI”). In order to responsibly allocate hospital resources and protect others in the emergency department from infection, some hospitals look for ways to keep patients with ILIs and who may not need emergency services, out of the emergency department. While it is possible for a hospital to direct individuals with an ILI away from the emergency department, federal law makes doing so a risky proposition. The federal law we are referring to, of course, is the Emergency Medical Treatment and Labor Act (EMTALA). In the event of a public health emergency, such as a flu pandemic, EMTALA's requirements may be formally suspended by the federal government. In the absence of a formal suspension, hospitals may be sanctioned for any violations of EMTALA. However, the Centers for Medicare and Medicaid Services (CMS) has made recommendations regarding the ways in which a hospital may reduce the number of individuals with ILIs in the emergency department while complying with EMTALA in the absence of a formal suspension.

What is EMTALA?¹

EMTALA is a federal law that requires all Medicare-participating hospitals with a dedicated emergency department to take certain actions when any individual comes to the emergency department and requests an examination or treatment of a medical condition, or when such a request is made on the individual's behalf, regardless of the individual's ability to pay. EMTALA

¹ 42 U.S. Code § 1395dd.

was enacted to prevent hospitals from “dumping” patients because the patients could not pay for treatment or for other discriminatory purposes.² If a hospital is subject to EMTALA, then it must perform an appropriate medical screening exam (“MSE”) on the individual to determine if an emergency medical condition (“EMC”) exists. The content of the MSE may vary based on the individual’s presenting signs and symptoms, so long as the MSE is sufficient to rule out that an EMC exists.³ The MSE must be performed by qualified personnel, including a physician, physician assistant, nurse practitioner, or registered nurse who is trained to perform MSEs and who is acting within their state’s scope of practice. If an EMC does exist, then the hospital must treat and stabilize the EMC within its capabilities to do so or transfer the individual to a hospital that has the capability and capacity to stabilize the EMC. If an EMC does not exist, then the hospital’s obligations with regard to EMTALA end.

When Are a Hospital’s EMTALA Obligations Suspended During a Pandemic Flu?

It seems to be a common misconception that when a state’s governor has declared a state of emergency in response to a flu outbreak, a hospital’s MSE and stabilization obligations under EMTALA have been suspended. However, in such situations, a well-meaning hospital can find itself in violation of EMTALA.

In order for a hospital’s MSE and stabilization obligations to be suspended, the federal government must first take four formal actions under Section 1135 of the Social Security Act (“Section 1135”):⁴

1. The President, and not the state’s governor, must have declared an emergency or a disaster under either the Stafford Act or the National Emergencies Act;
2. The Secretary of Health and Human Services (the “Secretary”) must have declared a public health emergency;
3. The Secretary must have invoked his or her waiver authority, which includes giving Congress 48 hours’ advance notice; and
4. The Secretary must issue a waiver that would cover the hospital and includes a specific waiver of the EMTALA requirements.

Then, the hospital’s state must have formally activated its emergency or pandemic preparedness plan and any redirection or transfer of individuals must be consistent with this plan. Additionally, the EMTALA waiver will not apply to a hospital that has not activated its own disaster protocol.⁵

When such a waiver is issued, CMS is to provide notice to covered hospitals through its Regional Offices or State Survey Agencies.⁶ When an EMTALA waiver is issued for a public health emergency caused by a pandemic infectious disease, such as the flu, the EMTALA waiver remains in place until the Secretary terminates the declaration of the public health emergency.⁷

What Obligations Under EMTALA May be Suspended by a Waiver?

As alluded to above, Section 1135 allows the Secretary to waive the sanctions associated with a hospital for redirecting an individual to an alternative location for the MSE pursuant to a state emergency or pandemic preparedness plan that would otherwise not be allowed under EMTALA. The Secretary may also waive sanctions for a hospital’s inappropriate transfer if the transfer was necessitated by the circumstances of the declared emergency.⁸ This typically allows a hospital to avoid sanctions when it transfers a patient before the EMC is stabilized. However, a hospital may not discriminate

² Zuabi N, Weiss LD, Langdorf MI. Emergency Medical Treatment and Labor Act (EMTALA) 2002-15: Review of Office of Inspector General Patient Dumping Settlements. *West J Emerg Med.* 2016;17(3):245-51.

³ U.S. Department of Health and Human Services (2009). *Revisions to Appendix V, “Emergency Medical Treatment and Labor Act (EMTALA) Interpretive Guidelines”*. Pub. 100-07 (May 29, 2009).

⁴ 42 U.S.C. 1320b-5.

⁵ U.S. Department of Health and Human Services (May 29, 2009). *Revisions to Appendix V, “Emergency Medical Treatment and Labor Act (EMTALA) Interpretive Guidelines”*. Pub. 100-07.

⁶ S. Department of Health and Human Services (August 14, 2009). *Emergency Medical Treatment and Labor Act (EMTALA) Requirements and Options for Hospitals in a Disaster*. Ref: S&C-09-52.

⁷ 42 U.S.C. 1320b-5(e).

⁸ 42 U.S.C. 1320b-5(b).

among individuals based on their ability to pay or their payor source while under a waiver. Sanctions for all other EMTALA requirements may not be waived. It is also important to note that a Section 1135 waiver does not, in and of itself, relieve the hospital from any obligations under state or local laws. Note that if a waiver is issued, it only waives the sanctions applicable to the hospital under EMTALA. Therefore, if an individual is harmed by a hospital's negligent transfer or redirection performed under a waiver, then the hospital may be liable to the individual for that harm.

Can a Hospital Request a Waiver if One Has Not Been Issued?

Yes. If an EMTALA waiver has not yet been issued that covers a hospital, then the hospital may request a waiver under Section 1135. Before CMS will consider a waiver request, the federal government must have performed the first three formal actions outlined above. Furthermore, the Secretary must have delegated his or her decision-making regarding EMTALA to CMS.⁹ The hospital, or the hospital's representative, typically makes the waiver request to the CMS Regional Office for the region in which the hospital is located.

What are a Hospital's Options if a Waiver is Not Granted?

If a waiver is not granted, hospitals have a couple of options to separate patients with an ILI from other patients in the emergency department while continuing to meet their obligations under EMTALA.¹⁰

Option 1: Set Up On-Campus Alternative Screening Sites. A hospital is not required to perform the MSE within the emergency department itself. A hospital could instead set up alternative sites on its campus to perform certain MSEs. The patient would need to be logged into the emergency department before being redirected to the alternative site, but this process could take place outside of the entrance to emergency department. CMS recommends that if a hospital implements such a process, then the person that redirects the patient should be a person (such as a registered nurse) that is qualified to recognize individuals who are obviously in need of emergency treatment. The MSEs performed at the alternative site must meet all the requirements for all MSEs required by law.

Option 2: Set Up Off-Campus Alternative Screening Sites. A hospital may set up a screening site that is not on its campus, as long as the location is under the hospital's control. This arrangement makes compliance with EMTALA a little riskier than the first option. The hospital could not, for instance, redirect individuals who have already come to the emergency department to the off-campus location. The hospital could prospectively encourage the general public to go to the off-campus location for ILI screening and could publically hold the location out as an ILI screening center. However, the hospital could not hold the location out as a place that provides care or screening for EMCs in general on an urgent, unscheduled basis. As long as the off-campus site is not itself a dedicated emergency department, then EMTALA does not apply to the visit. However, the site should still be staffed by medical personnel qualified to evaluate individuals with an ILI.

Conclusion

Certain EMTALA obligations may be waived during a flu pandemic when the federal government takes formal actions specified in the Social Security Act. This waiver only applies to hospitals that (1) are located in states that have formally activated their emergency or pandemic preparedness plan and (2) have activated their own disaster protocol. Even under a waiver, hospitals must continue to meet all non-waived EMTALA obligations. If a waiver has not been issued, then a hospital may apply to CMS for a waiver. If a waiver is not granted, then the hospital may redirect individuals with an ILI to an alternative screening site located on the hospital's campus so long as all EMTALA requirements are met. A hospital may also set up alternative screening sites off of its campus; however, patients who have already presented to the emergency department may not be redirected to these sites.

If you have any questions about whether your emergency department's operational plan or disaster protocol is compliant
⁹ U.S. Department of Health and Human Services (May 29, 2009). *Revisions to Appendix V, "Emergency Medical Treatment and Labor Act (EMTALA) Interpretive Guidelines"*. Pub. 100-07.

¹⁰ U.S. Department of Health and Human Services (August 14, 2009). *Emergency Medical Treatment and Labor Act (EMTALA) Requirements and Options for Hospitals in a Disaster*. Ref: S&C-09-52.

with EMTALA or would like assistance requesting a Section 1135 waiver, please contact Jenny Burgar or Ryan Kerr.

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