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Client Alert

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EMTALA and Hospital Inpatients: CMS Keeps Status Quo for General Rule, But Asks for Further Comment on Receiving Hospitals with Specialized Capabilities

On February 2, 2012, the Centers for Medicare & Medicaid Services (CMS) published a notice in the Federal Register,[1] indicating that it will maintain the current Emergency Medical Treatment and Labor Act (EMTALA) regulations that provide a hospital's EMTALA obligation ends when it admits, in good faith, an individual with an emergency medical condition (EMC) as an inpatient so as to provide stabilizing treatment. However, while not proposing any changes, CMS stated that it continues to seek comments on the current policy of no EMTALA obligations for hospitals with specialized capabilities that may receive transfers from a hospital that has an individual who presents to its emergency department with an EMC, is admitted as an inpatient, and continues to have an unstable EMC that requires the specialized capabilities at the other hospital. Comments regarding the applicability of EMTALA to hospitals with specialized capabilities are due no later than **April 2, 2012**.

Applicability of EMTALA to Hospital Inpatients Generally

CMS' current position that EMTALA obligations end when an individual is admitted in good faith was initially announced in the 2003 EMTALA final rule. CMS made clear in the 2003 rule that EMTALA is not applicable to any inpatient, even those individuals for whom the hospital had an EMTALA obligation to stabilize an EMC and were ultimately admitted with such unstable EMC. This was a shift from an earlier CMS position set forth in the FY 2003 IPPS proposed rule that called for EMTALA to apply to admitted individuals who were not stabilized and presented under EMTALA. CMS decided to refine the proposed rule and adopted the current/2003 EMTALA rule, which was based in part on a general opinion that other patient safeguards are available to inpatients, specifically a number of the Medicare hospital conditions of participation (42 C.F.R. Part 482), state malpractice laws, and other legal, licensing, and professional obligations regarding proper care and treatment. Federal judicial interpretation and comments regarding EMTALA obligations to inpatients also facilitated the shaping of current policy.

1 77 Fed. Reg. 5,213 (Feb. 2, 2012)

EMTALA Responsibilities of Hospitals with Specialized Capabilities

In an effort to clarify EMTALA applicability to potential receiving hospitals with specialized capabilities, CMS proposed in the FY 2009 IPPS proposed rule that a receiving hospital with specialized capabilities had an EMTALA obligation to accept a request to transfer an individual initially covered by EMTALA who was admitted as an inpatient at the originating hospital but continued to have an unstable EMC, so long as such receiving hospital had the capacity to provide the necessary treatment. After receiving many comments in opposition, CMS backed off that proposal and finalized in the FY 2009 IPPS final rule that if an individual with an unstable EMC is admitted, the EMTALA obligation ends for not only the admitting hospital but also for any potential receiving hospital with needed specialized capabilities, even if the individual with the EMC remains unstable.

Advance Notice of Proposed Rulemaking (ANPRM) and Further Comment Period

There has been a range of federal circuit court opinions regarding EMTALA obligations to inpatients. In 2010, the United States Solicitor General—in response to a petition for a writ of certiorari of the Sixth Circuit decision of *Moses v. Providence Hosp. & Med. Ctrs. Inc.*, 561 F.3d 573 (6th Cir. 2009) *cert. denied*, 130 5. Ct. mem. 3499 (2010) (holding that EMTALA obligations continued until an individual's EMC is stabilized regardless of inpatient or outpatient status)—urged the United States Supreme Court not to accept the case, advising the Court, among other things, that CMS would reconsider the inpatient policies articulated in the current regulations. The Court denied certiorari and as a result, CMS published on December 23, 2010 an ANPRM to solicit comments regarding whether to revisit the existing policies established in the 2003 EMTALA final rule and the FY 2009 IPPS final rule. CMS specifically requested real world examples that would provide insight into the rules' impact on accessibility of care for EMCs.

Over one year later, CMS issued the February 2, 2012 notice discussing the comments received in response to the December 23 ANPRM, and offering its decision in light of such comments—that is, to maintain the current policy that if an individual presents to a hospital's emergency department and "the hospital provides an appropriate medical screening examination and determines that an EMC exists, and then admits the individual in good faith in order to stabilize the EMC, that hospital has satisfied its EMTALA obligation towards the patient." However, for the second issue raised in the December 23 ANPRM regarding hospitals with specialized capabilities, most of the comments supported making no change, and CMS stated that it "will continue to monitor whether it may be appropriate in the future to reconsider" and provided an additional 60-day comment period to allow the public to submit additional data or real world examples regarding this particular issue. As indicated above, the comment period ends at 5:00 pm EST on April 2, 2012.