COVID-19: Newly Released Guidance from CMS on EMTALA Obligations

Jennifer D. Burgar, Ryan Kerr, and Nirouz Elhammali

On March 9, 2020, CMS issued a memorandum to State Survey Agency Directors regarding the implications of COVID-19 on providers’ EMTALA obligations. In addition to confirming the recommendations in our March 6 Client Alert below, the CMS memorandum provides further guidance that hospitals with dedicated emergency departments should review. We highlight a few notable items below.

Hospital Signage: CMS emphasized that it is a violation of EMTALA for hospitals to use signage that presents barriers to individuals who are suspected of having COVID-19 from coming to the emergency room. However, use of signage designed to help direct individuals to various locations on the hospital property for their Medical Screening Exam – such as an alternative screening location – would be acceptable.

What if an individual who meets the screening criteria for suspected COVID-19 wants to leave the hospital against medical advice? Hospitals cannot prevent the individual from leaving against medical advice. However, State or local public health authorities may have such authority under State or local law. Hospitals should coordinate with their local authorities on the appropriate way to handle such situations.

How will CMS handle complaints about violations of EMTALA in connection with individuals presenting with symptoms of COVID-19? CMS states that it will consider the following (along with other factors) when making a determination of whether violations of EMTALA have occurred:

- The individual’s clinical condition at the time of presentation to the referring hospital and at the time of the transfer request;
- The capabilities of the referring hospital;
- The screening and treatment activities performed by the referring hospital for the individual;
- Whether the request for transfer was consistent with any nationally recognized guidelines in effect at the time of the transfer request for COVID-19 screening, assessment, including guidance about transfer for further assessment or treatment of suspected or confirmed COVID-19; and
- The capabilities of the recipient hospital and the recipient hospital’s capacity at the time of the transfer request.

What will CMS do if a hospital is not following nationally recognized guidelines regarding COVID-19 infection control processes? While EMTALA does not establish requirements for infection control practices, hospitals are expected to adhere to accepted standards of infection control practice and as part of the conditions of participation for Federal health care programs. CMS cautions that hospitals may be cited for deficiencies related to failure to follow accepted infection prevention and control standards of practice. As such, CMS strongly urges hospitals to follow CDC guidance related to COVID-19 infection control procedures. Hospitals should regularly check the official CDC website and consider signing up for the newsletter to receive weekly emails about COVID-19

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Novel coronavirus ("2019-nCoV", also known as "SARS-CoV-2") and the disease it causes - "coronavirus disease 2019" (abbreviated as "COVID-19") has garnered significant public attention since being declared a Public Health Emergency of International Concern by the World Health Organization, and a public health emergency in the United States by the Department of Health and Human Services ("HHS"). Of particular significance to healthcare providers’ compliance efforts is whether the President’s observation and monitoring of the situation will culminate in a declaration by the President of a national emergency in connection with the incidences of novel coronavirus.

In the event of a declaration of a national emergency by the President, the requirements of the Emergency Medical Treatment and Labor Act ("EMTALA") may be formally suspended. However, in the absence of such a declaration by the President and a formal suspension of EMTALA, hospitals are required to comply with EMTALA provisions and may be sanctioned for non-compliance. The Centers for Medicare and Medicaid Services ("CMS") has made recommendations regarding the ways in which hospital emergency departments may take adequate precautions in circumstances like these, while also complying with EMTALA mandates in the absence of a formal suspension. We outline these frameworks in further detail below.

What is EMTALA?²

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 was enacted to prevent hospitals from “dumping” patients because the patients could not pay for treatment, or because of other discriminatory purposes.³ 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.⁴ 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. 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 alternatively, 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.

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¹ Notably, the Centers for Medicare and Medicaid Services issued a guidance memorandum to State Survey Agency Directors on March 4, 2020 with the subject “Guidance for Infection Control and Prevention Concerning Coronavirus Disease (COVID-19): FAQs and Considerations for Patient Triage, Placement and Hospital Discharge.” While the memorandum does not address EMTALA issues directly, the memorandum provides important information regarding recommended measures by hospitals to address potential and confirmed novel coronavirus cases and mitigate transmission. The memorandum is available at the following link: https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and/guidance-infection-control-and-prevention-concerning-coronavirus-disease-covid-19-faqs-and.
² 42 U.S. Code § 1395dd.
When Are a Hospital’s EMTALA Obligations Suspended During a National Emergency?

It seems to be a common misconception that when a state’s governor has declared a state of emergency in response to a disease outbreak (whether COVID-19, the flu, or otherwise), 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”):5

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.6

When such a waiver is issued, CMS is to provide notice to covered hospitals through its Regional Offices or State Survey Agencies.7 When an EMTALA waiver is issued for a public health emergency caused by a pandemic infectious disease, such as novel coronavirus, the EMTALA waiver remains in place until the Secretary terminates the declaration of the public health emergency.8

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.9 This typically allows a hospital to avoid sanctions when it transfers a patient before the EMC is stabilized. However, a hospital may not discriminate 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

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8 42 U.S.C. 1320b–5(e)
EMTALA to CMS. 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 presenting with symptoms of COVID-19 in the emergency department, while continuing to meet EMTALA mandates.

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 the emergency department. CMS recommends that if a hospital implements such a process, then the persons redirecting patients to the alternative site should be qualified to recognize patients who are obviously in need of emergency treatment (for example, a registered nurse). The MSEs performed at the alternative site must meet all the requirements for 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 remains under the hospital’s control. This arrangement makes compliance with EMTALA somewhat 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 screenings related to COVID-19 and/or influenza, and could publically hold out that the location serves a screening center for that specific purpose. In doing so, 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. Significantly, the site should still be staffed by medical personnel qualified to evaluate individuals presenting with symptoms of COVID-19 and/or flu-like symptoms.

Conclusion

Certain EMTALA obligations may be waived during a national emergency 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 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 with EMTALA or would like assistance requesting a Section 1135 waiver, please contact Jennifer Burgar, Ryan Kerr or Nirouz Elhammali.

Summary and Practical Tips for EMTALA Compliance

- The federal government can waive certain EMTALA requirements during a declared public health emergency.
- Federal and state governments and the hospital must take specific formal actions before these requirements are waived.

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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 a COVID-19 or other 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 such illness screenings 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.
not if, but how.

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Atlanta Office
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Suite 2100
Atlanta, GA 30363

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Suite 1000
Washington, DC 20006

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