



## COVID-19 Health Care Update: CMS Guidance on EMTALA

By Sarah Swank and Joanna Cohen

The Centers for Medicare & Medicaid Services (CMS) issued a memorandum, in response to inquiries from hospitals and critical access hospitals (CAHs), regarding the Emergency Medical Treatment and Labor Act (EMTALA) requirements and implementations related to COVID-19. CMS reiterated that hospitals and CAHs with a *dedicated emergency department* (ED) are required to conduct an appropriate *medical screening examination* (MSE) of individuals who *come to the ED*, including individuals with COVID-19, regardless of whether they arrive by ambulance or walk-in. EDs are expected to have the capability to apply an appropriate COVID-19 screening, to immediately identify and isolate individuals who meet the screening criteria to be potential COVID-19 patients, and to contact their state or local public health officials to determine next steps.

### Alternative screening sites and screening of patients who come to the ED

CMS advised that **hospitals** may:

- Set up screening sites on-campus as an alternative to the ED for the performance of MSEs.
- Redirect individuals to such screening sites after they are logged in, which redirection and logging may occur outside of the ED entrance. Such directing must be done by an individual who is qualified to recognize individuals in need of treatment in the ED (for example, an RN).
- Encourage the public to go to off-campus, hospital-controlled sites instead of the hospital for COVID-19 screening. NOTE: Hospitals may not tell individuals who have already come to their ED to go to the off-site location.
- Not hold alternative sites for COVID-19 screenings out to the public as a place that provides care for *emergency medical condition* (EMC) in general on an urgent, unscheduled basis. Hospitals may hold such a site out as an influenza-like illness (ILI) screening center.
- Arrange for the referral or transfer of such individuals. Prior coordination with local emergency medical services is recommended if an individual at the ILI screening center needs additional medical care on an emergent basis.

CMS further advised that **communities** may establish screening clinics at sites not under the control of a hospital, at which there are no EMTALA obligations.

- Hospitals may encourage the public to go to these sites for the screening of an ILI.

- Hospitals may not tell individuals who have come to the ED to instead go to these off-site locations for the MSE.

## **Hospital EMTALA obligations—screen, stabilization, and transfer**

EMTALA requires Medicare-participating hospitals and CAHs that have a dedicated ED to, at a minimum:

- Provide an MSE to every individual who comes to the ED for examination or treatment for a medical condition to determine if he or she has an EMC.
- Provide necessary stabilizing treatment for individuals with an EMC within the hospital's capability and capacity.
- Provide for the transfer of individuals with EMCs, when appropriate.

Hospitals and CAHs are expected to consider the current guidance of the Centers for Disease Control and Prevention (CDC) and public health officials in determining whether they have the capability to provide appropriate isolation required for stabilizing treatment and/or to accept appropriate transfers. In the event of an EMTALA complaint alleging inappropriate transfers or refusal to accept appropriate transfers, CMS will consider the CDC recommendations and other public health guidance in effect at the time. CMS would also evaluate the capabilities and capacity of both the referring and recipient hospitals in order to determine if a violation has occurred. CMS noted that the presence or absence of an airborne infection isolation room (AIIR) would not be the sole factor related to transferring patients from one setting to another when in some cases, all that would be required is a private room.

## **1135 Waivers**

On Friday, March 13, 2020, President Donald J. Trump issued a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (National Emergency Proclamation) under the National Emergencies Act (50 U.S.C. § 1601 et seq.). The National Emergency Proclamation opens the door for the United States Health and Human Services (HHS) to offer health care providers relief through waivers under Section 1135 of the Social Security Act (Section 1135 waivers). Following the National Emergency Proclamation, CMS issued several Section 1135 waivers for health care providers. Specifically, EMTALA sanctions can be waived for hospitals that:

- Direct or relocate an individual to another location to receive medical screening under a state emergency preparedness plan.
- Transfer of an individual who has not been stabilized if the transfer is necessitated by the circumstances of the declared federal public health emergency for the COVID-19 pandemic.

In addition, health care providers may now submit provider-specific requests for Section 1135 waivers.

## **Conclusion**

As part of every hospital's response planning, they should understand their current EMTALA requirements and seek Section 1135 waivers, as appropriate. Specific Section 1135 waivers could relate to EMTALA screening, stabilization, and/or transfer requirements to facilitate serving patients and the community during the COVID-19 pandemic. Statewide emergency declarations from our governors and state licensure laws should be reviewed, as well as any Section 1135 waivers

obtained by a state itself. Hospitals should coordinate with their state or local public health officials regarding the placement of individuals meeting the COVID-19 assessment criteria.

## **Resources**

- [Emergency Medical Treatment and Labor Act \(EMTALA\) Requirements and Implications Related to Coronavirus Disease 2019 \(COVID-19\)](#), Centers for Medicare & Medicaid Services, Ref: QSO-20-15 Hospital/CAH/EMTALA, March 9, 2020.

For more information on the content of this alert, please contact our [Coronavirus Response Team](#), your regular Nixon Peabody attorney, or:

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