

CMS Provides Additional COVID-19 EMTALA Guidance for Hospitals

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On March 9, 2020, the Centers for Medicare and Medicaid Services (“CMS”) issued a memorandum describing hospitals’ continuing obligations with respect to the Emergency Medical Treatment and Labor Act (“EMTALA”) during the COVID-19 public health emergency (“PHE”). Check out our previous blog post on this topic [here](#).

Last week, in response to a growing number of questions from hospitals and critical access hospitals (“CAHs”), CMS released additional guidance in the form of frequently asked questions (“FAQs”) concerning the implications of COVID-19 on EMTALA compliance. The FAQs address questions CMS has received on a variety of topics, including patient presentation to the emergency department (“ED”), the applicability of EMTALA in different facilities, determining who is a qualified medical professional, as well as information on medical screening exams, patient stabilization, transfers, and other EMTALA-related topics.

Below, we set forth a sampling of some of those questions and answers. A full list of the FAQs, covering all of the EMTALA topics CMS addressed in its FAQs, including topics not covered in this blog, can be found [here](#).

Patients Presenting to the Emergency Department

Q. May hospitals place a sign outside an ED stating “COVID-19 testing is not being offered to asymptomatic patients”?

A. Yes. In general, signage may be used to inform individuals about the availability of COVID-19 testing or to provide direction to alternative sites on the hospital’s campus

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where medical screening examinations (“MSE”) are available; for example, directing the patient to a parking lot test site for COVID-19.

CMS emphasized, however, that it is a violation of EMTALA for hospitals to use signage that presents a barrier to individuals, including potential COVID-19 patients, from coming to the ED or for hospitals to otherwise refuse to provide a MSE to anyone who comes to the ED for examination or treatment.

Hospitals may encourage the public to go to off-campus sites to be screened for COVID-19 instead of to the hospital. Normally, a hospital may not tell individuals who have already entered an ED to go to the off-site location for the MSE—such a redirection usually may only be to an on-campus alternative site. However, CMS has approved via a section 1135 waiver for the COVID-19 public health emergency (“PHE”) the ability to re-direct patients to an offsite location for screening, in accordance with a state emergency preparedness or pandemic plan.

Q. Is a hospital’s ability to refer an individual to an alternative off-campus screening site limited strictly to those individuals with COVID-19 symptoms?

A. No. CMS clarified that any patients may be redirected to an off-campus screening location to receive an MSE under the section 1135 waivers regardless of the presence of COVID-19 symptoms. For example, ambulance patients may be referred off-campus (i.e., without any off-loading or any evaluation before the referral). Public health officials, emergency medical services (“EMS”) systems, and hospitals may develop protocols, including COVID-19 protocols, governing where EMS should transport individuals for emergency care.

As a reminder, for a hospital owned-and-operated ambulance operating in accordance with community-wide EMS protocols that directs the transport of individuals to a hospital other than the hospital that owns the ambulance (for example, to the closest appropriate hospital), the presenting individual is considered to have come to the ED of the hospital to which the individual is transported. The receiving hospital is subject to EMTALA at the time the individual is brought onto hospital property.

Where Does EMTALA Apply?

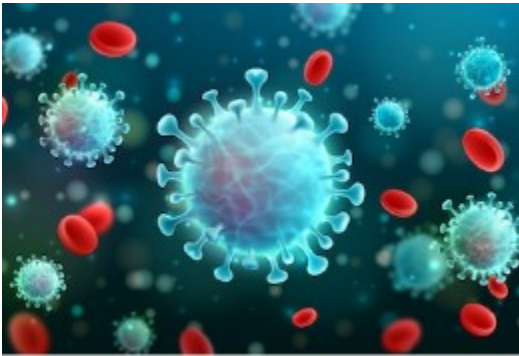
Q. Can EMTALA be relaxed to allow hospitals to refer patients to urgent care facilities?

A. Hospitals may encourage the public to go to off-campus sites for COVID-19 screening instead of the hospital so long as those sites are operating in accordance with the state or local pandemic plan, are identified specifically by the hospital as the place to receive an MSE, and have the capability to provide that MSE. Additionally, CMS has approved a section 1135 waiver for the duration of the public health emergency granting hospitals the ability to re-direct patients to an off-site location.

Q. What is the definition of “on campus”?

A. The definition of campus can be found at 42 C.F.R. § 413.65(a)(2) and means the physical area immediately adjacent to the provider's main buildings, other areas and structures that are not strictly contiguous to the main buildings but are located within 250 yards of the main buildings and any other areas determined on a case-by-case basis.

Per 42 C.F.R. § 489.24(b), “Hospital property” means the entire main hospital campus, including the parking lot, sidewalk, and driveway, but excluding other areas or structures of the hospital's main building that are not part of the hospital, such as physician offices, rural health centers, skilled nursing facilities, or other entities that participate separately under Medicare, or restaurants, shops, or other nonmedical facilities.



During the COVID-19 PHE, non-hospital properties, such as hotels, dormitories, and field hospitals at places like parks, are becoming extensions of hospitals, otherwise known as temporary expansion sites. This is permissible under the section 1135 waiver of the provider-based regulations at 42 C.F.R. § 413.65 and certain requirements under the Medicare conditions of participation at 42 C.F.R. §

482.41 and § 485.623.

For the duration of the COVID-19 PHE, these waivers allow a hospital to establish and operate as part of the hospital any location meeting the Conditions of Participation (CoPs) for hospitals that continue to apply during the PHE. These waivers also allow a hospital to change the status of its current provider-based department locations to the extent necessary to address the needs of hospital patients as part of the state or local pandemic plan. As such, it is acceptable to triage and treat patients in these temporary expansion sites.

Q: Can multiple hospitals with different Medicare provider numbers join together to establish the off-site location in accordance with the state emergency plan? If so, what EMTALA implications would result for each hospital involved?

A: Yes. Temporary expansion sites may serve multiple hospitals if it is consistent with their state emergency plan. Unless the off-campus site is already a dedicated emergency department (“DED”) of a hospital, as defined under EMTALA regulations at 42 C.F.R. § 489.24(b), EMTALA requirements do not apply. If an individual being treated at a temporary expansion site needs additional medical attention on an emergent basis, the site is required, under the Medicare CoPs, to arrange referral/transfer. When multiple hospitals join to establish an off-site location, the hospitals should operate in distinct clinical spaces within the location or designate one facility that will assume responsibility for ensuring compliance with the CoPs including EMTALA requirements (if applicable). If the space is shared across multiple hospitals, CMS notes that noncompliance problems

at a temporary expansion sites may implicate associated certified hospitals depending upon the type of noncompliance.

Q: How does EMTALA apply if a community has exhausted its supply of beds and/or ventilators and a patient presents with an emergent condition that needs these resources for stabilization?

A: Hospitals are required to provide stabilizing treatment to individuals determined to have an emergency medical condition within the hospital's capability prior to arranging an appropriate transfer. In situations where facilities may not have the necessary services or equipment, they should provide stabilizing interventions within their capability until the individual can be transferred. For example, in cases where the hospital does not have available ventilators, establishing an advanced airway and providing manual ventilation can assist in stabilizing the individual until an appropriate transfer can be arranged.

Q: If a hospital sets up an alternative off-campus testing site, is that site regulated by the hospital conditions of participation?

A: Yes. Alternative care sites and temporary extension sites that are established by the hospital are still required to follow the applicable hospital CoPs to the extent not waived under the blanket waivers issued by CMS. Community testing centers established by the state would be under the state emergency and pandemic plan and are not required to meet the hospital CoPs.

Qualified Medical Professionals (QMPs)

Q: Has CMS removed the requirement to have a QMP, approved by the governing body, perform the MSE?

A: No. QMPs responsible for performing MSEs must still be approved by the hospital's governing body. Hospitals may request a case-by-case section 1135 waiver to allow MSEs to be performed by qualified medical staff authorized by the hospital, who are acting within their scope of practice and licensure, but are not designated in the hospital bylaws to perform the MSEs.

Medical Screening Exams

CMS has received a number of questions from providers regarding how MSEs may be performed in light of the COVID-19 pandemic.

Q: Can emergency physicians and other health care practitioners conduct medical screening exams (MSEs) under EMTALA via telehealth?

A: Yes. QMPs, including emergency physicians, can perform MSEs using telehealth equipment. The QMP may be on-campus and using technology to self-contain or offsite due to staffing shortages. The MSE may be performed solely via telehealth if clinically

appropriate. If the patient is seen by a QMP located on campus via electronic two-way technology, the service would not be considered a telehealth visit. Regardless of location, the QMP must be performing within the scope of his/her state practice act and approved by the hospital's governing body to perform MSEs.

Q: Can CMS waive certain elements of EMTALA to allow for more flexibility in meeting the current medical screening exam (MSE)?

A: CMS has temporarily waived some EMTALA requirements to allow screening for patients at a location offsite from the hospital's campus to prevent the spread of COVID-19, so long as it is not inconsistent with a state's emergency preparedness or pandemic plan.

Under the waiver, hospital EDs may redirect incoming patients to alternative screening sites staffed by QMPs, to ensure symptomatic or COVID-19-positive patients are directed to appropriate settings of care.

Q: Can emergency physicians perform medical screening exams outside of the ED, such as in tents in the parking lot, under EMTALA?

A: Yes. A hospital may set up alternative sites on its campus to perform MSEs.

Individuals may be redirected to these sites. Whether the individual is seen at the alternate on-campus site or in the ED, they should be logged in where they are seen. Individuals do not need to present to the ED, first, and if they do present to the ED, they may still be redirected to the on-campus alternative screening location for logging and subsequent screening.



This is a triage function, and the person providing the redirection from the ED should be qualified to recognize individuals who are obviously in need of immediate treatment in the ED. Hospital non-clinical staff stationed at other entrances to the hospital may provide redirection to the on-campus alternative screening location for individuals seeking COVID-19 testing.

Q: Can the MSE be conducted by a Registered Nurse (RN)?

A: Yes. MSEs must be conducted by qualified personnel, which may include physicians, nurse practitioners, physician's assistants, or RNs trained to perform MSEs, acting within the scope of their state licensure law, and as approved by the hospital's governing body. Hospitals may request a waiver to allow MSEs to be performed by other personnel, including trained RNs not previously approved by the governing body to perform MSEs.

Q: If there is an on-site COVID-19 testing location (e.g., tent outside main ED),

would EMTALA apply if individuals are only requesting COVID-19 testing? Would a MSE be required?

A: EMTALA would apply if a patient who was solely seeking COVID-19 testing made a request for medical treatment while on the hospital campus or demonstrated a medical condition that a prudent layperson would believe, based on the individual's appearance or behavior, indicated that the individual needed examination or treatment of a medical condition. However, patients who present solely for the purpose of COVID-19 testing and are not making a request for treatment of a medical condition, do not necessarily require a MSE. If the person complains of or exhibits any symptoms of a medical condition, then that person should receive an appropriate MSE to determine whether an emergency medical condition ("EMC") exists. The EMTALA obligation is satisfied if the MSE determines no EMC exists.

Q: Can a hospital conduct an MSE if the patient remains in an automobile and meet its EMTALA obligations?

A: It depends. The MSE does not have to take place in the ED to satisfy EMTALA. The content of the MSE varies according to the individual's presenting signs and symptoms, and it can be as simple or as complex, as needed, to determine if an emergency medical condition exists. MSEs must be conducted by qualified personnel, which may include physicians, nurse practitioners, physician's assistants, or RNs trained to perform MSEs and acting within the scope of their state practice act. If a clinically-appropriate MSE can be performed in an automobile to determine whether or not an emergency medical condition exists, that MSE would be permissible under EMTALA.

Q: For off-campus, hospital-controlled sites, can a person first presenting to the ED be redirected from the ED to the off-campus site where the MSE will be completed?

A: Yes. Hospitals may redirect patients presenting to the ED to an off-campus site where an MSE will be completed. Normally, a hospital may not tell individuals who have already entered an ED to go to the off-site location for the MSE, such a redirection usually only occurs to an on-campus alternative site. However, CMS has issued a blanket section 1135 waiver for the duration of the COVID-19 PHE the ability to re-direct patients to an offsite location for screening, in accordance with a state emergency preparedness or pandemic plan. Hospitals are generally able to manage the separation and flow of potentially infectious patients through alternate screening locations on the hospital campus during the COVID-19 PHE.

Q: Is there a specific time frame in which the MSE has to take place if a patient is referred to an off-campus site? Would it have to happen that same day?

A: There is no specified time frame in which the MSE has to occur after the referral from the hospital to an off-campus site. However, triage entails the clinical assessment of the individual's presenting signs and symptoms at the time of arrival at the hospital, in order to prioritize when the individual will be seen by a physician or other QMP. Individuals

presenting must be provided an MSE appropriate to the individuals' presenting signs and symptoms, as well as the capability and capacity of the hospital. The MSE must be the same MSE that the hospital would perform on any individual coming to the hospital's dedicated emergency department with those signs and symptoms, regardless of the individual's ability to pay for medical care. If a hospital applies a nondiscriminatory screening process that is reasonably calculated to determine whether an EMC exists, it has met its obligations under EMTALA. The required MSE and stabilizing treatment should not be delayed. If the MSE is appropriate and does not reveal an EMC, the hospital has no further obligation.

Q: If a hospital set up a COVID-19 testing location offsite, and patients only present to the hospital for testing without requesting additional services, do those patients need an MSE before we refer them offsite?

A: Those patients would not be subject to an MSE in this case unless they are requesting examination or treatment for a medical condition or demonstrate a medical condition for which a MSE is necessary. EMTALA requires that all persons who present to the hospital or ED for a medical condition be provided an MSE to determine whether they have an EMC.

Transfer and Stabilization of Patients

Q: Has CMS waived elements of EMTALA to allow for more flexibility in the transfer and stabilization requirements?

A: No. CMS has not waived EMTALA transfer or stabilization requirements. Hospitals are expected to provide stabilizing treatment within their capabilities and capacity prior to the initiation of a transfer to another hospital. However, when a section 1135 waiver has been issued, sanctions for an inappropriate transfer of a patient or for the direction or relocation of a patient to receive a MSE at an alternate location do not apply if certain conditions are met, as enumerated at 42 C.F.R. §489.24(a)(2)(i)(A)-(E).

Q: Is transfer to a designated facility permissible regardless of COVID-19 status, as long as positives go to designated positive facilities and negatives go to designated negative facilities?

A: Yes. A patient transfer under the state emergency and pandemic plan would apply to all patients regardless of COVID-19 status following an appropriate MSE and

determination that patient is stable for an appropriate transfer.



Q: When could a hospital refer a patient who comes to the ED for medical treatment to an urgent care center?

A: Hospitals must provide a MSE to

all patients who come to the ED requesting treatment for a medical condition or where the individual is demonstrating presence of a medical condition to determine if an EMC exists. The content of the MSE varies according to the individual's presenting signs and symptoms, but should be provided within the capabilities of the hospital's ED, including ancillary services routinely available to the hospital. Once the MSE is complete and if the patient is determined not to have an EMC, the hospital's EMTALA obligation ends and the patient may be referred to an urgent care center for continued care of non-emergency illnesses or injuries. However, a section 1135 waiver gives the ability for hospitals to re-direct patients that have presented to the ED to an offsite location for the MSE in accordance with a state emergency preparedness or pandemic plan. Under the section 1135 waiver, hospital EDs may redirect incoming patients to alternative screening sites staffed by qualified medical personnel, to ensure that symptomatic or COVID-19-positive patients are directed to appropriate settings of care.

Waivers Under Section 1135 of the Social Security Act

Q: Has EMTALA been broadly waived?

A: No. CMS has approved a section 1135 waiver for the COVID-19 PHE, which temporarily includes the ability to re-direct patients to an offsite location for screening in accordance with a state emergency preparedness or pandemic plan. Hospitals are still expected to provide an MSE to any individual who comes to the emergency department and requests examination or treatment, or has a request for examination or treatment made on their behalf. The purpose of the MSE is to determine if an emergency medical condition exists. If an EMC is determined to exist, the hospital must provide stabilizing treatment within the hospital capabilities or an appropriate transfer per 42 C.F.R. § 489.24.

While certain aspects of EMTALA may be waived under the section 1135 waiver, federal civil rights laws have not been waived. Hospitals that receive federal financial assistance are still obligated to comply with federal civil rights laws, including Section 504 of the Rehabilitation Act, Title VI of the Civil Rights Act of 1964, Section 1557 of the Affordable Care Act and the Hill-Burton Act.

Hospitals do not have to initiate a disaster plan before the section 1135 waiver becomes effective and hospitals are not required to provide notification to CMS upon initiation of the disaster plan. The flexibilities and blanket waivers released by CMS are retroactive to March 1, 2020. The waivers will end no later than the termination of the COVID-19 PHE, or 60 days from the date the waiver or modification is first published, unless the Secretary of HHS extends the waiver by notice for additional periods of up to 60 days, up to the end of the emergency period.

Any additional formal guidance, revisions to existing guidance, or additional clarifications will be released via a QSO memorandum or other CMS approved communication.

We at Dorsey are continuing to monitor the developments related to COVID-19. If you have any questions about the issues addressed in this blog, please contact the authors

or your regular Dorsey attorney. You can access Dorsey's coronavirus resource center, which contains a wide variety of legal resources related to the coronavirus outbreak, available [here](#). You can also access Dorsey's health law blog related to health law updates, available [here](#).