

COVID-19 and EMTALA: Ongoing Requirements and New Waivers

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On March 9, 2020, the Centers for Medicare and Medicaid Services (“CMS”) Quality, Safety and Oversight Group (“QSO”) issued a memorandum, QSO-20-15, providing guidance to health care providers related to the Emergency Medical Treatment and Labor Act (“EMTALA”) implications regarding the COVID-19 pandemic.

EMTALA is a Federal law that requires all Medicare-participating hospitals (including critical access hospitals (“CAHs”)) with dedicated emergency departments (“EDs”) to perform an appropriate medical screening exam (“MSE”) for all individuals who come to their EDs to determine if the individual has an emergency medical condition (“EMC”), regardless of their ability to pay. If there is no EMC, the hospital’s EMTALA obligations end. If there is an EMC, the hospital must treat and stabilize the EMC within its capability or transfer the individual to a hospital that has the capability and capacity to stabilize the EMC. Hospitals with specialized capabilities may not refuse an appropriate transfer under EMTALA if they have the capacity to treat the transferred individual.

In the wake of the COVID-19 pandemic, many hospital EDs are under increased strain due to an influx of patients with suspected or confirmed cases of COVID-19.

Hospitals are concerned not only about their ability to handle this unprecedented increase in ED patients but also about their ability to minimize the risk of exposure of COVID-19 to other ED patients as well as healthcare workers. CMS released their guidance to address these concerns and to remind hospitals of their EMTALA obligations during the COVID-19 pandemic.



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On March 13, 2020, the Secretary of the U.S. Department of Health And Human

Services (“HHS”) waived certain EMTALA requirements following President Trump’s declaration that the COVID-19 pandemic constitutes a national emergency. The HHS waiver specially waives sanctions for the “direction or relocation of an individual to another location to receive medical screening pursuant to an appropriate state emergency preparedness plan or for the 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.”

Below is a FAQ of the guidance for Medicare-participating hospitals (including CAHs) issued by CMS as well as a summary of the EMTALA waivers issued by HHS.

1. What do the screening, stabilization, and transfer requirements for hospitals under EMTALA look like in light of the implications of COVID-19?

Generally speaking, Medicare-participating hospitals must, at a minimum, (1) provide a MSE to every individual who comes to the ED for examination or treatment for a medical condition to determine if they have an EMC (an EMC is present when there are acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in serious impairment or dysfunction); (2) provide necessary stabilizing treatment for individuals with an EMC within the hospital’s capability and capacity; and (3) provide for transfers of individuals with EMCs, when appropriate.

Every hospital with a dedicated ED is required to conduct an appropriate MSE for all individuals who come to the ED, including individuals who are suspected of having COVID-19, regardless of whether they arrive by ambulance or are walk-ins, unless an EMTALA waiver applies (see FAQ #7 below). Every ED is expected to have the capability to apply appropriate COVID-19 screening criteria when applicable, to immediately identify and isolate individuals who meet the screening criteria to be a potential COVID-19 patient, and to contact their state or local public health officials to determine next steps.

2. Is my hospital required to accept transfers of patients with suspected or confirmed cases of COVID-19 from small or rural hospitals that do not have appropriate or sufficient isolation facilities or equipment?

Yes. If your hospital has the capacity and the specialized capabilities needed for stabilizing treatment, then you are required to accept appropriate transfers from hospitals without such capacity and capabilities. Hospitals should continue to coordinate with state and local public health officials regarding placement of individuals who meet COVID-19 assessment criteria and the most current standards of practice for treating COVID-19 as this situation continues to develop.

3. The situation continues to change on a near-hourly basis. How will CMS determine whether an EMTALA violation has occurred?

CMS has stated they will evaluate the capabilities and capacity of both the referring and recipient hospitals to determine whether a violation has occurred. Because of the

dynamic situation, this evaluation would include the recommendations of the Centers for Disease Control and Prevention (“CDC”) at the time the suspected violation occurred. At the time of this writing, the CDC’s recommendations focus on factors such as the individual’s recent travel, exposure history, and presenting signs and symptoms in differentiating the types of capabilities hospitals should have to screen and treat individuals who have or may have COVID-19. See the CDC website for the most current infection prevention and control recommendations for hospital patients with suspected or known cases of COVID-19 (<https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>).

All hospitals are required to accept appropriate transfers of individuals with EMCs if the hospital has the specialized capabilities an individual requires for stabilization and the capacity to treat these individuals. This obligation applies regardless of whether the hospital has a dedicated ED.

4. What are the requirements for alternative screening sites our hospital sets up on campus?

Hospitals may set up alternative screening sites on campus. CMS highlights that the MSE does not have to take place in the ED. A hospital may set up alternative sites on its campus to perform MSEs. Individuals may be redirected to these sites after being logged in. The redirection and logging in can even take place outside the entrance to the ED. The person doing the directing should be qualified (e.g., an RN) to recognize individuals who are in need of immediate treatment in the ED. The content of the MSE varies according to the individual’s presenting signs and symptoms. It can be as simple or as complex, as needed, to determine if an EMC 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. Finally, the hospital must provide stabilizing treatment (or appropriate transfer) to individuals found to have an EMC, including moving them as needed from the alternative site to another on-campus department.

5. What are the requirements for alternative screening sites our hospital sets up off campus?

Hospitals may set up screening at off-campus, hospital-controlled sites. CMS guidance states that hospitals and community officials may encourage the public to go to these sites instead of the hospital for screening for influenza-like illness (“ILI”). However, a hospital may not tell individuals who have already come to its ED to go to the off-site location for the MSE unless it is done pursuant to a state emergency preparedness plan. Unless the off-campus site is already a dedicated ED (“DED”) of the hospital, as defined under EMTALA regulations, EMTALA requirements do not apply.

The hospital should not hold the site out to the public as a place that provides care for EMCs in general on an urgent, unscheduled basis. They can, however, hold it out as an ILI screening center. The off-campus site should be staffed with medical personnel appropriately trained to evaluate individuals with ILIs. If an individual needs additional

medical attention on an emergent basis, the hospital is required, under the Medicare Conditions of Participation, to arrange referral/transfer. Prior coordination with local emergency medical services is advised to develop transport arrangements.

6. What if a screening suggests possible COVID-19?

If an individual “comes to the emergency department” (as defined at 42 C.F.R. § 489.24(b)), the hospital must provide that individual with an appropriate MSE. It is a violation of EMTALA for hospitals with EDs to use signage that presents barriers to individuals suspected of having COVID-19 from coming to the ED. However, use of signage to direct individuals to alternative screening locations on campus would be acceptable.

If, consistent with applicable standards for COVID-19 screening, a hospital determines an individual who has come to the ED may have COVID-19, the hospital is expected to isolate the patient immediately and coordinate with their state or local public health officials. CMS expects all hospitals to, within their capability, provide MSEs and initiate stabilizing treatment while maintaining isolation in accordance with COVID-19 standards of practice.

7. How do the EMTALA waivers relating to the COVID-19 outbreak change my hospital’s obligations under EMTALA?

On March 13, 2020, the Secretary of HHS waived certain EMTALA requirements following the President’s declaration that the COVID-19 pandemic constitutes a national emergency. The HHS waiver specially waives sanctions for the “direction or relocation of an individual to another location to receive medical screening pursuant to an appropriate state emergency preparedness plan or for the 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.”

The new EMTALA waiver permits a hospital to (1) redirect an individual to another location — including another hospital — to receive an MSE without first performing an MSE at the hospital **if it is done pursuant to a state emergency preparedness plan**, or (2) transfer an individual who has not yet been stabilized to another location if such actions are necessary and the result of circumstances due to the COVID-19 pandemic. HHS makes clear that the EMTALA waivers do not apply to any actions taken by a hospital that discriminate against individuals on the basis of their source of payment or ability to pay.

The EMTALA waiver under Section 1135 does not appear to be a blanket waiver, so providers wishing to use the waiver may require “case-by-case” requests and approvals from your CMS Regional Office. “ The waiver is retroactively effective back to March 1, 2020 and will remain in effect for the duration of the national emergency period, unless terminated sooner.