

Health Law Bulletin

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EMTALA and Pandemics

The possibility of an H1N1 flu outbreak that would overwhelm emergency rooms has prompted the Centers for Medicare and Medicaid Services to issue guidelines on how hospitals may maintain compliance with the Emergency Medical Treatment and Labor Act (EMTALA) when faced with a surge of flu patients. The federal EMTALA law requires all Medicare-participating hospitals with dedicated emergency departments to provide appropriate medical screening exams to all individuals who come to the emergency room, regardless of the individual's ability to pay. If the individual has an emergency medical condition, then the hospital must treat and stabilize within its capabilities or transfer the patient to a hospital that has the capability and capacity to stabilize. "Emergency medical condition" is defined to mean one manifesting itself by acute symptoms of sufficient severity (including pain, psychiatric disturbances and/or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected to result in serious jeopardy to health, serious impairment to bodily functions, or serious dysfunction of any organ or body part. With respect to pregnant women who are having contractions, "emergency medical condition" also means there is inadequate time to transfer the woman to another hospital before delivery or that the transfer may pose a threat to the health or safety of the woman or unborn child.

In specific extreme circumstances, the law permits a waiver of a hospital's EMTALA obligations. However, the recent statements from CMS make it clear that even without a waiver, there are EMTALA-appropriate measures hospitals can use to deal with an extraordinary surge of patients. It is permissible for hospitals to set up alternative screening sites, either on the hospital campus or elsewhere, with certain restrictions. CMS states that the medical screening exam "does not need to be an extensive work-up in every case" and that it does not have to be done in the emergency department. Individuals coming to the emergency room may be logged in and seen at the alternative on-campus site by qualified physicians, physician's assistants, nurse practitioners or RNs who are trained to perform the exams. For those patients with an emergency medical condition, the hospital must provide stabilizing treatment or appropriate transfer, including moving them as needed from the alternative site to another on-campus department. Hospitals may also set up off-campus, hospital-controlled sites only to screen for influenza-like illness. (The hospital should not hold the site out to the public as a place that provides care for any other type of emergency.) If a person at the off-campus site does need emergency medical attention, transfer or referral must be arranged. Hospitals may **not** tell patients who have already come to the hospital emergency department that they have to go to the off-campus site for a medical screening exam.

An EMTALA waiver would permit hospitals to direct or relocate persons who come to the emergency department to an alternative off-campus site, in accordance with a state emergency preparedness plan, for the medical screening exam. The waiver also allows hospitals to effect transfers

that are normally illegal under EMTALA, such as transfers of persons with unstable emergency medical conditions, as long as the transfer is necessitated by the circumstances of the declared emergency. However, the waiver protects the hospital for such transfers only if the hospital's actions do not discriminate among individuals based on their source of payment or ability to pay.

The medical screening exam and stabilization requirements of EMTALA can be waived **only if**:

- The President has declared an emergency or disaster under the Stafford Act or the National Emergencies Act; and
- The Secretary of Health and Human Services has declared a Public Health Emergency; and
- The Secretary invokes her/his waiver authority (which may be retroactive), including notifying Congress at least 48 hours in advance; and
- The waiver includes waiver of EMTALA requirements and the hospital is covered by the waiver.

Notice of an EMTALA waiver would be provided to covered hospitals through CMS's Regional Offices and/or State Survey Agencies. A waiver based on a public health emergency that involved a pandemic infectious disease would remain in effect until the termination of the declaration of emergency. In all other cases, the waiver lasts for 72 hours after a hospital has activated its disaster plan. In order for the waiver to apply, the hospital must be located in the "emergency area", which is the geographic area of the officially declared emergency or disaster. In the past, 72-hour waivers have been issued for Hurricanes Katrina, Rita, Gustav and Ike and for the 2008 flooding in Iowa and Indiana.

If you have questions about how an EMTALA waiver would apply to you or your facility, consult your attorney.