

COVID-19'S IMPLICATIONS FOR EMTALA COMPLIANCE

As COVID-19 continues to spread rapidly across the United States, emergency departments regardless of hospital size or location are being inundated with patients seeking emergency care. Providers have begun to question how they can fulfill their obligations to perform emergency screenings, stabilization and transfers in compliance with the Emergency Medical Treatment and Labor Act ("EMTALA").

In a [Memorandum](#) issued on March 9, 2020, CMS clarified that despite the pandemic's unique circumstances, *all* of EMTALA's requirements continue to apply as intended to every provider participating in Medicare and/or Medicaid programs. However, because the COVID-19 pandemic is a continuously-evolving public health emergency, Alex Azar, Secretary of the Department of Health and Human Services, on [March 13, 2020](#), exercised his authority under Section 1135 of the Social Security Act to waive sanctions imposed for certain violations of EMTALA as they relate to the 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 COVID-19 pandemic. The waiver is retroactive to March 1, 2020 and ongoing through the duration of the declared public health emergency.

Of particular importance, CMS has interpreted EMTALA regulations as they relate to COVID-19 as follows:

Are hospitals required to accept transfers of patients with suspected or confirmed COVID-19 from small or rural hospitals that don't have appropriate or sufficient isolation facilities or equipment to meet public health or CDC recommendations?

Yes. Hospitals with capacity and the specialized capabilities needed for stabilizing treatment are required to accept appropriate transfers from hospitals without the necessary capabilities.

What are the screening sites that may be set up?

- A. *Hospitals may set up alternative screening sites on campus.* Medical screening examinations ("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. The hospital must provide stabilizing treatment (or appropriate transfer) to individuals found to have an emergency medical condition, including moving them as needed from the alternative site to another on-campus department.
- B. *Hospitals may set up screening at off-campus, hospital-controlled sites.* Hospitals and community officials may encourage the public to go to these sites instead of the hospital for screening for COVID-19. However, a hospital may not tell individuals who have already come to its ED to go to the off-site location for the MSE.
- C. *Communities may set up screening clinics at sites not under the control of a hospital.* There is no EMTALA obligation at these sites. Hospitals and community officials may encourage the public to go to these sites instead of the hospital for screening for COVID-19. Communities are encouraged to staff the sites with appropriately trained medical personnel.

EMTALA Obligations when Screening Suggests Possible COVID-19

If an individual comes to an ED of a hospital, as the term "comes to the emergency department" is defined in the regulation at 42 C.F.R. §489.24(b), the hospital must provide the individual with an appropriate MSE. It is an EMTALA violation for a hospital or a critical access hospital with an ED to refuse to conduct an appropriate MSE of individuals with suspected or confirmed COVID-19 or display signage that presents barriers to individuals who are suspected of having COVID-19 from coming to the ED.

PRACTICAL TAKEAWAYS

Despite the national emergency associated with COVID-19, we expect that CMS will continue to enforce other EMTALA regulations. In the near-term, it is likely that CMS will prioritize and investigate complaints for allegations involving egregious violations. With other less egregious violations, CMS will likely consider the alleged violation based on a facts and circumstance-specific analysis. Health care providers should do their best to follow CMS's recommendations by striving to actively comply with EMTALA regulations.

This remains a fluid area with constant changes. The American Hospital Association has already **requested further clarification** from CMS. Expect further clarification from CMS.

Importantly, given the above challenges, providers can take some comfort in a **message** released today by OIG leadership in which OIG acknowledged the challenges facing health care providers and indicated, that to the extent possible, OIG is trying to minimize burdens on providers and be flexible where they can. In doing so, OIG will take into account burdens on providers and the safety of patients and the health care workforce. OIG will evaluate conduct during this emergency that may be subject to OIG administrative enforcement and will carefully consider the context and intent of the parties when assessing whether to proceed with any enforcement action.

If you have any questions about EMTALA or would like further information on this topic, please contact:

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Special thanks to Marina Allen, law clerk, for her assistance in the preparation of this article.