CMS PROVIDES NEW AVENUES FOR FREESTANDING EDS TO PARTICIPATE IN MEDICARE AND MEDICAID

On April 21, 2020, CMS issued a Memorandum identifying state-licensed freestanding independent emergency departments ("Freestanding EDs") as a critical resource in expanding capacity for hospitals during the COVID-19 public health emergency ("PHE") and detailing how Freestanding EDs may begin to participate in the Medicare and Medicaid programs during the PHE. The Memo comes shortly after the CMS blanket waiver providing hospital affiliated EDs with additional regulatory flexibilities. The new guidance supplements the additional flexibilities issued in the blanket waiver with the intent to help alleviate some of the stress on hospitals caused by the PHE by increasing overall hospital capacity and providing new facilities in which Medicare and Medicaid beneficiaries can receive care. Currently, only Colorado, Delaware, Rhode Island and Texas license Freestanding EDs without any hospital affiliation. The CMS Memo outlined three mechanisms by which state-licensed Freestanding EDs can gain certification to participate in either the Medicare or Medicaid programs:

1) LICENSED INDEPENDENT FREESTANDING HOSPITAL-AFFILIATED EMERGENCY DEPARTMENTS

If a Freestanding ED wishes to participate in both the Medicare and Medicaid programs, CMS permits the Freestanding ED to become affiliated with a Medicare and/or Medicaid certified hospital as an outpatient department. The Freestanding ED must first properly receive state approval to operate as a hospital's outpatient department then it can begin receiving Medicare and/or Medicaid payments without submitting a separate enrollment application. However, the Freestanding ED will be obligated to follow all Medicare CoPs and other laws that currently govern hospitals participating in the Medicare and/or Medicaid programs.

2) LICENSED INDEPENDENT FREESTANDING EMERGENCY DEPARTMENTS ENROLLING AS A MEDICAID CLINIC

If a Freestanding ED wishes to participate in a state Medicaid program without becoming affiliated with a Medicaid participating hospital, then CMS permits such a Freestanding ED to participate in the Medicaid program through the Medicaid clinic benefit. In order for this to occur, the state in which the Freestanding ED is licensed is required to add these types of Freestanding ED facilities under their Medicaid reimbursable program as a type of clinic that can provide ED services. A state could make this change by submitting an Emergency State Plan Amendment to CMS which helps states to quickly revise Medicaid policies during a PHE. If a state elects to do this, then a Freestanding ED would be required to work with the State Medicaid Agency to enroll as a Medicaid-certified clinic. However, it is likely the Freestanding ED would not receive the same payment rates as Medicaid certified hospitals.

3) LICENSED INDEPENDENT FREESTANDING EMERGENCY DEPARTMENTS BECOMING A HOSPITAL

If a licensed Freestanding ED wishes to participate in the Medicare program without becoming affiliated with a Medicare participating hospital, then CMS is permitting those Freestanding EDs to temporarily enroll under the Medicare program as a hospital for the duration of the PHE. In order to qualify for this temporary certification, a Freestanding ED must contact their jurisdiction's Medicare Administrative Contractor ("MAC") and submit its intent to apply for temporary participation in the Medicare program. The Freestanding ED will be required to follow the instructions noted in the COVID-19 Medicare Provider Enrollment FAQs and submit a signed attestation statement to the MAC stating that the Freestanding ED meets all Medicare CoPs for hospitals (a link to the attestation document can be found at the end of the Memo). After review, the MAC will forward the attestation to the CMS Regional Office for review. It is important to note that CMS is not currently requiring an onsite survey for approval, but the CMS Regional Office may authorize a survey by the State Survey Agency at a later date to ensure the Freestanding ED meets the appropriate quality and safety standards. If approved by the CMS Regional Office, a temporary new facility profile and certification kit in the Automated Survey Process Environment will be created for the Freestanding ED which will be assigned a trackable hospital CMS Certification Number. Then the CMS Regional Office will send a tie-in notice to the MAC granting the Freestanding ED the ability to temporarily participate in the Medicare program.

Once approved, the Freestanding ED will be permitted to provide and be reimbursed for both inpatient and outpatient services provided to Medicare beneficiaries during the PHE. While participating in the Medicare program, the Freestanding ED must continually meet all Medicare hospital CoPs and, when applicable, provide a Medicare Outpatient Observation Notice to all Medicare beneficiaries informing them that they are receiving outpatient observation services and are not inpatients. The Freestanding ED's temporary participation will be terminated at the conclusion of the PHE, after which the Freestanding ED will be required to reapply for hospital certification if it wishes to participate again as

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a hospital in the Medicare program.

If you need assistance in becoming Medicare or Medicaid certified in your State or have additional questions about this topic, please contact:

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- Regan Tankersley at (317) 977-1445 or rtankersley@hallrender.com; or
- Your regular Hall Render attorney.

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