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Navigating the Uncertainty of State Abortion Laws: Suggestions for Hospitals Amid the Rise of Federal Investigations

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The uncertainty in state abortion laws has placed hospitals and physicians in an untenable position, one that could subject them to federal enforcement actions if, in compliance with state law banning or limiting abortions, they deny abortion services as emergency care treatment. In the wake of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[1] which overruled *Roe v. Wade*,[2] many states have responded by implementing restrictions on the administration of and access to reproductive care. This change is causing confusion for hospitals concerning compliance obligations under the Emergency Medical Treatment and Labor Act (EMTALA)[3] because the availability of abortion care in emergency situations is now limited.

The Patient Safety and Quality Improvement Act of 2005 (PSQIA)[4] establishes a medical error reporting system designed to assess and resolve issues related to patient safety and health care quality by identifying adverse events resulting from systemic failures.[5] The PSQIA and many parallel state statutes encourage medical professionals to engage in self-critical analysis and peer evaluation in a non-punitive, collegial setting to foster a culture intended to improve the processes rather than assigning blame. Its overarching goal is to promote patient safety. To prevent adverse events, particularly those resulting from inaction caused by uncertainty about the law, hospitals must stay abreast of federal law and understand how to navigate compliance if and when federal laws and state laws conflict.

To focus on the process, hospitals can prevent performance issues that negatively impact patient safety by utilizing a well-designed Ongoing Professional Practice Evaluation (OPPE) program. The Joint Commission launched the concept of the OPPE in 2007.[6] Intended for the purpose of improving performance and identifying trends and issues that could adversely affect patient outcomes, the OPPE process includes both qualitative and quantitative data to support re-privileging decisions. Qualitative data may include a description of procedures performed, types of patient complaints, code of conduct infractions, review of charting with consideration to quality and accuracy of documentation, relevance of tests ordered and procedures performed, and patient outcomes. Quantitative data reflects some type of unit of measure. Possible content within the quantitative category might include trends in length of stay, rates of post-procedure infection, frequency of missing information in charts, and noncompliance to rules, regulations, policies, or core measures.[7]

In situations where EMTALA creates a conflict between federal and state law, using an OPPE is an effective tool to preemptively avoid a violation. Said differently, providing medical staff with periodic education and review of federal standards in conjunction with state requirements would not only save the putative patient from an adverse

event following a medical emergency, but it would simultaneously avoid a federal investigation into whether emergency care was denied inappropriately.

What Is EMTALA

EMTALA requires Medicare-participating hospitals with emergency departments to screen for and treat an emergency medical condition (EMC) in a non-discriminatory manner regardless of the patient's ability to pay.[8] An EMC includes medical conditions with acute symptoms of sufficient severity that could place the patient's health or bodily functions in serious jeopardy in the absence of immediate medical attention.[9] An EMC also exists when there is insufficient time to transfer the patient to another facility, or if the transfer might threaten the patient's safety.[10]

Under EMTALA, the examining physician(s) or other qualified medical personnel at the hospital have an obligation upon presentation to use clinical judgment to screen patients to determine whether an EMC exists.[11] In addition, EMTALA requires medical professionals to either provide necessary stabilizing care[12] or to facilitate an appropriate transfer if the hospital does not have the capacity to stabilize the EMC.[13]

Hospitals have a continuing professional and legal duty to provide all medically necessary stabilizing treatment. This means that hospitals and medical professionals must act before the patient's condition declines. This continuing obligation ends only when (1) the EMC no longer exists, (2) the patient is appropriately transferred to another facility, or (3) the patient is stabilized or admitted for further stabilizing treatment.[14] The hospital's obligation to stabilize the patient means that it cannot deny emergency care for a patient with an EMC.

Concisely stated, hospitals and medical staff have three obligations: (1) to provide an appropriate medical screening examination to determine whether an EMC exists; (2) to provide available medical stabilizing treatment within the hospital's capacity if the clinical assessment determines an EMC exists; and (3) to transfer a patient to another hospital upon request, or if necessary, once the patient has been stabilized, when a physician certifies that the medical benefits of the transfer outweigh the risks.[15] Failure to comply with EMTALA has consequences for hospitals, as well as for physicians working in the emergency department or on call to the emergency department.

How EMTALA Applies to Reproductive Care

Being pregnant is not in and of itself an EMC—the trigger is the pregnant patient's need for medical evaluation or screening and stabilization in the presence of an EMC. For a pregnant patient, an EMC includes active labor, abdominal pain resulting from an ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders including preeclampsia. The clinical circumstances may require an abortion to terminate the pregnancy to stabilize and treat the presenting EMC.

On July 11, 2022, at the direction of the U.S. Department of Health and Human Services (HHS), the Centers for Medicare & Medicaid Services (CMS) issued a memorandum[16] to State Survey Agency Directors and a letter[17] from Secretary Xavier Becerra reaffirming the EMTALA requirements for health care providers and reminding them of their professional and legal duties to provide stabilizing care to patients presenting with an EMC. CMS made clear that EMTALA preempts any state law or mandate that is directly in conflict with it—meaning that there is a federal obligation to offer stabilizing care to pregnant women even when it requires performing an abortion to medically stabilize the patient in a state where abortion is banned. Emergency care cannot be denied.

This means that if a pregnant woman presents to an emergency room, and the examining provider's clinical judgment is that an EMC exists, EMTALA allows the hospital to perform an abortion if it is within the hospital's capabilities, even if state law prohibits such services. Performing an abortion must be an appropriate stabilizing

treatment that is medically necessary to reasonably assure that there will be no material deterioration of the EMC or of the patient.

On May 1, 2023, the CMS announced two federal investigations into hospitals that denied necessary stabilizing care to a pregnant patient experiencing an EMC. The investigations related to a patient who initially went to a hospital in Missouri and then to a hospital in Kansas. At nearly 18 weeks pregnant, the woman presented with a preterm premature rupture of membranes. Medical providers at both hospitals told her that hospital policies prevented them from providing her with medical stabilizing care because it would terminate a pregnancy where the fetal heartbeat was still detectable and, therefore, could be considered an abortion under their state laws.[18]

CMS identified these two responses as a violation of EMTALA. Despite recognizing that her condition could rapidly deteriorate and that her pregnancy was not viable, she was denied medical stabilizing care that would prevent infection, hemorrhage, or potentially death, because of the conflict between state and federal law. As a result of these investigations, Secretary Becerra sent a letter to all hospital and provider associations emphasizing their ongoing obligations under EMTALA to provide stabilizing treatment, including abortion care or an appropriate transfer, to Medicare-participating hospitals despite this conflict.[19]

This example illustrates how inaction or deterrence on behalf of a hospital and medical staff can lead to a federal investigation. Although the patient survived, this incident highlights the uncertainty regarding the interplay between hospital procedures, state law, and federal law in a way that can jeopardize patient safety and quality of care.[20] Such uncertainty and misunderstanding may ultimately undermine the hospital's interest in promoting the best quality of care. Essentially, confusion surrounding compliance and a risk-adverse culture has effectively created deterrence, a refusal to treat, and denial of emergency care.

How an OPPE Can Avoid Federal Investigations and Adverse Outcomes

Hospital administration, along with the attending medical staff, department heads, and persons involved in quality and risk management, are responsible for monitoring compliance with EMTALA. Ensuring that treatments, or failures to treat, do not adversely affect a patient's health is instrumental to preventing summary suspensions and a federal investigation related to EMTALA. This requires hospitals and members of the medical staff to understand their professional and legal duties under EMTALA. To accomplish this, establishing policies incorporating the hospital's requirements and finding an effective way of disseminating such information is critical when the stakes can be high.

Failure to comply with EMTALA may result in civil monetary penalties by the Office of Inspector General, exclusion from Medicare and state health care programs, or termination of the hospital's provider agreement by CMS.[21] Additionally, failure to comply can result in civil suits filed by private citizens who are harmed by the hospital or health care provider's failure to perform medically necessary stabilizing treatment to prevent the patient's deterioration in emergency situations.[22]

When faced with a complex regulatory system such as EMTALA, continuous monitoring of the medical staff is a form of preemptive and preventative action. Hospitals could use an OPPE to self-monitor, protect patient safety, promote the best quality of care, and ultimately ensure compliance with EMTALA. An OPPE is a peer review function and part of the collegial intervention process to promote collaboration in furtherance of patient safety. Collegial intervention efforts often involve reviewing competency issues or the conduct of physicians on a hospital's medical staff. It may also include educating medical staff members regarding applicable policies or changes in the law, proctoring for newly admitted medical staff members, or sharing comparative information from various clinical practices to promote conformity across the hospital network.

Educating the medical staff on the requirements for appropriate screening, stabilization, and transfer of patients presenting with an EMC to hospitals' emergency departments will inevitably lead to better quality of care. However, presenting this information in conjunction with the applicable hospital policies by highlighting situations that present possible conflict between federal and state laws simultaneously identifies systemic failures that could prevent avoidable occurrences and potentially result in an adverse outcome. Disseminating the information in a non-punitive, collegial setting through peer review and self-critical analysis will prevent inaction and deterrence by focusing on improving the processes rather than assigning blame. In the end, it will achieve the hospital's overall objective to promote quality of care and ensure patient safety.

About the Author

Ms. Carroll concentrates her practice in litigation, with an emphasis on representing hospitals in medical staffing and peer review disciplinary matters arising out of issues related to quality care and patient safety that sound in breach of contract, violations of due process and fundamental fairness, defamation and trade libel claims, as well as matters related to professional licensure and credentialing. Her work also includes handling anti-competitive claims alleging violations of New Jersey's Anti-Trust Act, the Sherman Anti-Trust Act, and the Lanham Act, in addition to employment claims, including violations of the New Jersey Law Against Discrimination (NJLAD) and the Conscientious Employee Protection Act (CEPA), in state court, federal court, and in arbitrations. She can be contacted via e-mail at jcarroll@greenbaumlaw.com or via telephone at (973) 577-1910.

[1] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022).
[2] *Roe v. Wade*, 410 U.S. 113 (1973).
[3] EMTALA is codified in Sections 1866 and 1867 of the Social Security Act (42 U.S.C. §1395dd), and in the regulations and interpretive guidelines adopted by the Centers for Medicare and Medicaid Services (CMS).
[4] 42 U.S.C. §§ 299b-21 – 299b-26.
[5] 42 U.S.C.A. § 11101 et seq.
[6] Skip Freedman, MD, *Peer Review: How 2007 Joint Commission Standards Expand Hospital Peer Review—Patient Safety & Quality Healthcare* (Sept./Oct. 2007), https://www.psqh.com/analysis/peer-review-how-2007-joint-commission-standards-expand-hospital-peer-review/.
[7] Ongoing Professional Practice Evaluation (OPPE)—Understanding the Requirements | Critical Access Hospital | Medical Staff MS | The Joint Commission, https://www.jointcommission.org/standards/standard-faqs/critical-access-hospital/medical-staff-ms/000001500/.
[8] *See State Operations Manual, Appendix V–Interpretive Guidelines–Responsibilities of Medicare Participating Hospitals in Emergency Cases*, (Rev. 191, 07-19-19), https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/som107ap_v_emerg.pdf.
[9] Dep't of Health and Human Servs. (HHS), Press Release, *Statement by HHS Secretary Xavier Becerra On House Republicans Introducing Legislation to Rip Away Women's Access to Contraception and Abortion Medication* (Sept. 14, 2022), https://www.hhs.gov/about/news/2022/09/14/statement-by-hhs-secretary-xavier-becerra-house-republicans-introducing-legislation-to-rip-away-womens-access-contraception-abortion-medication.html.
[10] *Id.*
[11] 42 C.F.R. § 489.24(a)(1)(i).
[12] 42 C.F.R. § 489.24(a)(1)(ii) and (d).
[13] 42 C.F.R. § 489.24(a)(1)(i), (d), and (e).
[14] HHS, Press Release, *Statement by HHS Secretary Xavier Becerra On House Republicans Introducing Legislation to Rip Away Women's Access to Contraception and Abortion Medication* (Sept. 14, 2022), https://www.hhs.gov/about/news/2022/09/14/statement-by-hhs-secretary-xavier-becerra-house-republicans-introducing-legislation-to-rip-away-womens-access-contraception-abortion-medication.html.
[15] 42 C.F.R. § 489.24(a)(1)(i); 42 C.F.R. § 489.24(a)(1)(ii) and (d); 42 C.F.R. § 489.24(a)(1)(i), (d), and (e).
[16] HHS, QSO-22-22-Hospitals, *Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss* (last rev. Aug. 25, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf.

[17] Letter from Xavier Becerra, Secretary, HHS, and Chiquita Brooks-LaSure, Administrator, Ctrs. for Medicare & Medicaid Servs., to Health Care Providers (July 11, 2022), https://www.hhs.gov/sites/default/files/hhs-letter-to-governors-reproductive-health-care.pdf.
[18] Amy J. Dilcher and Arushi Pandya, *EMTALA and Pregnancy Care Remains a Federal Enforcement Priority*, NAT'L L. REV., May 17, 2023, https://www.natlawreview.com/article/emtala-and-pregnancy-care-remains-federal-enforcement-priority.
[19] HHS, Press Release, *HHS Secretary Xavier Becerra Statement on EMTALA Enforcement*, (May 1, 2023), https://www.hhs.gov/about/news/2023/05/01/hhs-secretary-xavier-becerra-statement-on-emtala-enforcement.html#ftnref1.
[20] Katherine Dillinger and Nadia Kounang, *Two hospitals under federal investigation over care of pregnant woman who was refused abortion*, CNN, May 1, 2023, https://www.cnn.com/2023/05/01/health/emtala-hospital-investigation/index.html.
[21] HHS, QSO-22-22-Hospitals, *Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss* (last rev. Aug. 25, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf.
[22] *Id.*

