

COVID-19 Healthcare Law Update: CMS Modification of EMTALA Requirements

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As part of the response to the COVID-19 outbreak, the Centers for Medicare and Medicaid Services (CMS) has modified provisions of the Emergency Medical Treatment and Labor Act (EMTALA), 42 U.S.C. § 1395dd, in a two-step process.

The basic obligations under EMTALA are that any hospital participating in Medicare that has a dedicated emergency department must provide an "appropriate" Medical Screening Examination (MSE) to any individual who presents to the hospital regardless of ability to pay. The MSE's purpose is to determine if an Emergency Medical Condition (EMC) is present. If there is an EMC, the hospital must treat and stabilize the individual's EMC within its capabilities - or if it does not have the necessary capability, it must transfer the individual to a hospital that does have that capability.

On March 9, 2020, CMS issued a memorandum to State Survey Agency Directors on the subject of EMTALA, "Requirements and Implications Related to Coronavirus Disease 2019 (COVID-19)." In that memorandum, CMS indicated that hospitals could set up alternative screening sites on campus and could set up screening done at off-campus, hospital-controlled sites. This included authorization for signs to redirect potential patients to these locations. The memorandum further indicated that if an MSE indicated that an individual may be a possible COVID-19 case, then isolation should be done immediately with stabilizing treatment while maintaining isolation.

This guidance was updated on March 13, 2020 when CMS issued a waiver pursuant to Section 1135 of the Social Security Act. (The subject of 1135 waivers was addressed at some length in a previous Alert.) CMS waived sanctions against a hospital for noncompliance with EMTALA for redirecting an individual to an alternative location for the MSE pursuant

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to a state emergency or pandemic preparedness plan that would otherwise not be allowed under EMTALA. The Secretary of Health and Human Services (HHS) would also waive sanctions for a hospital's inappropriate transfer such as one done before the patient was stabilized if the transfer was necessitated by the circumstances of the declared emergency.

The waiver was predicated on the President declaring an emergency or disaster under the Stafford Act or the National Emergencies Act. On March 13, 2020 the President had declared the COVID-19 pandemic a national emergency and the Secretary of HHS acted accordingly.

The EMTALA waiver became effective on March 15, 2020 but had a retroactive effect to March 1, 2020. The waiver is in effect for 60 days or for the duration of the COVID-19 emergency, whichever is earlier.

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