No Bright Lines…but CMS Helps Light the Path to the Emergency Department

Sherry A. Fabina-Abney
Margaret R. Emmert

The purpose of the Emergency Medical Treatment and Labor Act of 1986, 42 U.S.C. § 1395dd, *et. seq.,* ("EMTALA") is to ensure that individuals with emergency medical conditions, including women in labor, are provided an adequate first response to a medical crisis regardless of the ability of the individual to pay. Despite this noble purpose, over the last eighteen years, EMTALA evolved into a compliance quagmire for healthcare providers. For instance, determining when obligations under EMTALA are triggered or have ended has not always been clear and the terms "emergency department" and "hospital property" began to defy common sense. On September 9, 2003, the Centers for Medicare and Medicaid Services ("CMS") of the Department of Health and Human Services issued final regulations for EMTALA in an attempt to clarify what had become fuzzy. Although the final regulations do not provide bright line answers to all EMTALA questions, it is a step in the right direction.

Before reviewing the final regulations, it is helpful to review the basic EMTALA requirement:

> *In the case of a hospital that has a hospital emergency department, if any individual [whether or not that individual is eligible for Medicare or Medicaid benefits] comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition exists.*

42 U.S.C. § 1395dd(a). A patient injured by a hospital's failure to comply with the federal law can bring a private cause of action against the hospital. In addition, both hospitals and physicians are subject to civil monetary penalties and the potential of Medicare exclusion for violations.

The final regulations took effect November 10, 2003, and can be found at 68 Federal Register 53222 (Sept. 9, 2003). The following are some of the questions CMS attempted to answer through issuance of the regulations:

I. WHAT IS MEANT BY "COMES TO THE EMERGENCY DEPARTMENT"?

Because hospitals may incur obligations under EMTALA when an individual "comes to the emergency department," it is important to understand how that term is defined. In the preamble to the final regulations, CMS notes that individuals can "come to the emergency department" in one of two ways: (1) by presenting directly to the hospital's "dedicated emergency department" and requesting examination or treatment for a medical condition; or (2) by presenting elsewhere on the hospital's property and requesting examination and treatment for an emergency medical condition. 42 CFR § 489.24(b). Consequently, hospitals are not exempt from EMTALA because a person entered the "wrong" door.

A. "DEDICATED EMERGENCY DEPARTMENT"

A "dedicated emergency department" is defined as any department or facility of the hospital that is located on the main hospital campus, or off campus, that is at least one (1) of the following:

- A facility licensed by the State as an emergency room or department;
- Held out to the public (by name, posted signs, advertising, or other means) as a place that provides care for emergency medical conditions without requiring a previously scheduled appointment; or

- A department or facility that provides at least one-third of its entire outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment.

42 C.F.R. § 489.24(b).

A "dedicated emergency department" of the hospital includes labor and delivery departments, psychiatric units, and urgent care centers, as such locations commonly meet one of the three prongs of the revised provision. 68 FR 53222, 53230 (Sept. 9, 2003). CMS emphasized that accepting patients without requiring appointments is an important indicator of emergency department status. *Id.* at 53233.

B. "HOSPITAL PROPERTY"

EMTALA applies if an individual presents for treatment at any "hospital property" besides a dedicated emergency department *if* the individual seeks treatment for an emergency medical condition ("EMC"). The definition of "hospital property" includes the entire medical campus, which is defined as:

> *the physical area immediately adjacent to the provider's main buildings, other areas and structures that are not strictly contiguous to the main buildings but are located within 250 yards of the main buildings, and any other areas determined on an individual case basis, by the CMS regional office, to be part of the provider's campus.*

42 CFR § 489.65(a)(2). This includes the parking lot, sidewalk, and driveway of the hospital.

If an individual is in a location of the hospital other than the dedicated emergency department and clearly needs medical attention or services (such as a visitor in the hospital cafeteria with chest pain), the hospital should develop policies and procedures to assure that the individual receives an appropriate medical screening examination and that EMTALA requirements are followed. The new regulations clarify that some areas are not to be considered as a part of the hospital, even if owned by the hospital. This includes physician offices, rural health centers, skilled nursing facilities, or other entities that participate separately under Medicare, or restaurants, shops, or other nonmedical facilities. 42 CFR § 489.24(b).

Thus, off-campus departments of the hospital are not obligated to comply with any EMTALA obligations unless the location meets the definition of a "dedicated emergency department." However, the final rules require that the governing body of a hospital assure that, with respect to off-campus departments that are not dedicated emergency departments, the medical staff has written policies and procedures for the evaluation of emergencies and for referral or transfer of the individual when appropriate. CMS noted that it would appropriate for such departments to call for emergency medical services ("EMS") and to furnish whatever assistance they can while awaiting EMS personnel. 68 FR 53222, 53248 (Sept. 9, 2003).

EMTALA applies to *only* those off-campus departments that are treated by Medicare to be departments of the hospital (*i.e.*, provider-based entities), and that are equipped and staffed to meet the definition of a "dedicated emergency department." Off-campus provider-based departments that do not routinely offer services for EMCs are not subject to EMTALA. These facilities should, however, have policies in place for dealing with individuals who seek emergency care. CMS suggests these departments call EMS personnel if incapable of treating the patient, and aid the individual in whatever way it can while awaiting the arrival of the EMS personnel. *Id.*

II. DOES EMTALA APPLY TO FREESTANDING URGENT CARE CENTERS?

Freestanding urgent care centers are not categorically exempt from EMTALA. CMS noted that it would be difficult for any individual in need of emergency care to distinguish between a hospital department that provides care for an "urgent need" and one that provides care for an "emergency medical condition." If the department or facility is held out to the public as a place that provides care for emergency medical conditions, it meets the definition of a dedicated emergency department.

An urgent care center that is participating in Medicare through a hospital and which operates as a satellite facility off the main hospital campus is allowed to transfer a patient in an unstable condition to an affiliated hospital if it is determined, after the center has screened the individual, that treatment of the individual's condition is not within the capability or capacity of the center. Transfer of a patient is an unstable condition to an non-affiliated hospital is permitted only if, in addition to the above criteria, the hospital determines that the benefits of transfer exceed the risks.

III. DOES EMTALA APPLY TO NON-PATIENTS?

The final regulations limit the application of EMTALA to an individual who is not a patient. A "patient" is defined as an individual who has begun to receive outpatient services as part of an encounter, other than an encounter in which the hospital is already obligated to provide services under EMTALA, or an individual who has been admitted as an inpatient. 42 CFR § 489.24(b). Because such individuals are already patients of the hospital and have a previously established relationship with the hospital, CMS believed it to be inappropriate that they be considered as having "come to the hospital" for purposes of EMTALA. Instead, such individuals would be entitled to the more general protections afforded patients under the Medicare hospital conditions of participation.

IV. DOES EMTALA APPLY TO HOSPITAL INPATIENTS?

EMTALA obligations end once an individual is admitted for inpatient care. 42 CFR § 489.24(d)(2). If a hospital has screened an individual under EMTALA, found the individual to have an EMC, and has admitted that individual as an inpatient in good faith in order to stabilize the EMC, the hospital has satisfied its EMTALA obligations with respect to the individual. This rule applies to hospitalized patients who later develop an EMC. 68 FR 53222, 53244 (Sept. 9, 2003).

V. DOES EMTALA APPLY TO INDIVIDUALS REQUESTING NON-EMERGENCY SERVICES?

A hospital has an obligation with respect to any individual who comes to the emergency department to provide an appropriate medical screening examination. If the individual comes to a hospital's emergency department requesting an examination or treatment for a medical condition, but the nature of the request makes it clear that the medical condition is not an emergency, the hospital is only required to perform such screening as would be appropriate to determine that the individual does not have an EMC. Hospitals are not obligated to provide screening services beyond this level. *Id.* at 53234.

CMS clarified that a hospital has a right to direct patients to non-emergency locations for care once a qualified medical person has determined that no EMC exists. If an individual presents to an emergency department or elsewhere in the hospital and makes a request for services that are not considered an examination or treatment for a medical condition (*e.g.*, preventive care, laboratory or radiology services) the hospital is not obligated under EMTALA to provide a medical screening examination. *Id*. at 53238.

While the new final regulations do not answer all questions regarding a hospital's or physician's obligations under EMTALA, the new regulations are a step in the right direction and should assist hospitals and physicians carry out their EMTALA responsibilities.

Ms. Fabina-Abney is a member of the Defense Trial Counsel of Indiana and its section on Health Law Litigation. She is a partner, and Ms. Emmert is an associate, in the Indianapolis office of IceMiller.