As the virus continues to spread, U.S. hospitals will likely see increasing numbers of potential cases of COVID-19 in their emergency departments. Hospitals are obligated under the Emergency Medical Treatment and Labor Act (EMTALA) to provide these individuals with certain examinations and, if necessary, stabilizing treatment or transfer. This raises a host of issues for hospitals that receive these individuals for care, including capacity and resource concerns, and the risks these individuals may pose to medical personnel and other people in the vicinity, including other patients and staff.

On March 9, 2020, the Centers for Medicare & Medicaid Services (CMS) released a memorandum, a fact sheet, and a Q&A on hospitals’ EMTALA obligations and COVID-19. Hospitals and critical access hospitals should carefully review this guidance to understand what they may or may not do. Below is an explanation of some of the main points made by CMS.

Basic EMTALA obligations

EMTALA generally requires hospitals and critical access hospitals with emergency departments to provide an appropriate medical screening examination to individuals who come to the emergency department for examination or treatment of an emergency medical condition, including active labor, to make a determination as to whether they actually have an emergency medical condition, and if so, to provide stabilizing treatment within the hospital’s capabilities or, if appropriate, a transfer.

These obligations apply regardless of an individual’s ability to pay — and also regardless of the existence of a pandemic. CMS states that “hospitals that refuse to screen an individual who comes to their emergency department would likely be found to have violated EMTALA, regardless of presenting signs, symptoms, and possible diagnoses.” This is true even if the medical personnel who may perform the medical screening examination do not have appropriate personal protective equipment.

CMS also advises hospitals to have a system in place to monitor the conditions of individuals who come to an emergency department and opt to wait in their vehicles (as the Centers for Disease Control and Prevention (CDC) has suggested). If the medical screening examination is not completed in a timely
fashion, it exposes the hospital to a potential EMTALA violation.

**EMTALA waivers or emergency department closures**

If an EMTALA waiver were in effect, a hospital covered by the waiver could direct or relocate individuals who come to the emergency department to an alternative off-campus site for a medical screening examination, “in accordance with a State emergency or pandemic preparedness plan,” or transfer individuals with unstable emergency medical conditions. However, such waivers require several significant procedural hurdles to first be crossed, such as a presidential disaster declaration, the Secretary of the Department of Health & Human Services invoking its waiver authority, and at least 48 hours’ notice to Congress. No waivers have been issued at this time.

However, EMTALA would not bar a hospital from closing its emergency department if it genuinely no longer has the capacity to screen and treat individuals. State and local laws that may limit this ability should be carefully followed. And even if there is such an emergency department “closure,” the hospital is always obligated by EMTALA to act within its capabilities to provide screening and any necessary stabilization or transfer to an individual who comes to the hospital for examination or treatment for an emergency medical condition.

**Alternative screening areas**

With respect to COVID-19, CMS identifies three alternatives to performing a medical screening examination in the emergency department. CMS expects hospitals to have written policies and procedures in place concerning such alternatives.

**On-Campus:** First, the hospital may set up an alternative screening site on the hospital’s campus. There could even be a separate intake area for these individuals, who may then be redirected to the alternate site. The individual redirecting patients should be qualified to identify any individuals “who are obviously in need of immediate treatment in the ED,” such as a nurse. The medical screening examination must also be conducted by qualified medical personnel, which could include physicians, nurse practitioners, registered nurses, or physician’s assistants. The medical screening examination itself must be as simple or as complex as the case dictates, and individuals found to have an emergency medical condition must be moved as needed for stabilizing treatment or transfer.

The alternative screening site could be in another building on the hospital’s campus or even in tents placed in the parking lot, so long as it is clinically appropriate for the medical screening examinations. Hospitals should review screening guidance provided by the CDC. **Whatever location is used, the hospital should make sure it is identified as a practice location on its Form 855A.** Otherwise, the hospital may not be able to bill Medicare for services provided at the new location.
Off-Campus, Hospital-Controlled. Second, hospitals may set up off-campus, hospital-controlled sites for individuals with flu-like symptoms to visit for a medical screening examination. If the off-campus site is not itself an emergency department, then EMTALA does not apply. Importantly, however, if an individual first goes to an emergency department, he or she may not be told or forced to go to the off-site location for a medical screening examination.

Just like an on-campus site, CMS states that the off-campus site should be staffed with appropriate medical personnel who can evaluate individuals with flu-like symptoms. If the individual needs additional medical attention, CMS states that the hospital is required, under the Medicare Conditions of Participation, to provide an appropriate referral or transfer, and that “prior coordination with local emergency medical services ... is advised.”

For any off-campus site, the hospital “should not hold the site out to the public as a place that provides care for emergency medical conditions in general on an urgent, unscheduled basis.” The hospital may hold it out as a screening center for flu-like illnesses, however.

Off-Campus, Not Hospital-Controlled. Finally, hospitals and local government may encourage individuals to go to community screening sites that are not hospital-controlled. Again, hospitals may not tell individuals to go to a community site for the medical screening examination if they present at the emergency department. And again, EMTALA does not apply to this type of screening site, but communities are “encouraged” to staff these sites with appropriate medical personnel, and to have a plan for any referral or treatment that may be necessary.

Hospital treatment or transfer

If an individual has COVID-19 and it is severe enough to be an emergency medical condition, the hospital must either treat and stabilize the condition within its capability, or transfer the individual to a hospital with the capability and capacity to treat the emergency medical condition.

CMS repeatedly notes that hospitals with “specialized capabilities” — regardless of whether they have an emergency department — “may not refuse an appropriate transfer under EMTALA if they have the capacity to treat the transferred individual.” CMS is vague with respect to what, exactly, constitutes “specialized capabilities” with respect to COVID-19. CMS merely notes that there are no formally designated COVID-19 treatment centers as of yet, and no determination has been made that any such specialized centers will be created.

Regardless, CMS goes on to state the capabilities of both the referring and recipient hospitals need to be evaluated when determining whether any EMTALA violation may have occurred. “The presence or absence of negative pressure rooms (Airborne Infection Isolation Room (AIIR)) would not be the sole determining factor related to transferring patients from one setting to another when in some cases all that
EMTALA IN THE AGE OF CORONAVIRUS: CMS RELEASES NEW GUIDANCE

would be required would be a private room.”

Isolation of patients and infection control

If a medical screening examination finds that an individual in the emergency department may have COVID-19, the patient must be isolated to prevent cross-contamination while appropriate treatment or transfer is arranged, in coordination with public health officials and the CDC. This applies to all hospitals. All hospitals are also “expected” to follow accepted standards of infection control in order to prevent the spread of COVID-19. For example, “standard, contact, and airborne precautions with eye protection should be used when caring for the patient,” consistent with CDC standards.

Ambulances

If a patient is brought to a hospital in an ambulance pursuant to communitywide emergency protocols, “then the individual is considered to have come to the emergency department of the hospital to which the individual is transported, at the time the individual is brought onto hospital property and the hospital becomes subject to EMTALA.” An ambulance that is owned and operated by a hospital may transport an individual to a different hospital in accordance with a communitywide protocol or at the direction of a physician “who is not employed or otherwise affiliated with the hospital that owns the ambulance.”

EMTALA complaints

CMS also stated that any complaints it receives will take into consideration several factors, including but not limited to:

- CDC guidance at the time of the alleged violation;
- Clinical considerations specific to the individual;
- The capabilities of the referring hospital;
- Screening and treatment activities performed by the referring hospital; and
- The capabilities of the recipient hospital and its capacity at the time of the request.

Additional guidance from CMS on this and other subjects related to COVID-19 may be accessed through its website on current emergencies.

Link to COVID-19 Resources page