2012 Issue 11

www.ober.com

Why EMTALA is Worth Another Look - The Inpatient Debate: New Regulations Coming Soon?

By: Sarah E. Swank

Part Three of a Three-part Series

Part one of this series discussed the increase in uninsured patients and the related rise in EMTALA enforcement. Part two offered tips to verify your hospital's EMTALA compliance.

Congress enacted the Emergency Medical Treatment & Labor Act (EMTALA) in 1982 in reaction to patient dumping from hospital's emergency rooms. The last round of substantial changes to the regulatory scheme of EMTALA came in the 2003 [PDF] and FY 2009 [PDF] rules. A new round of EMTALA changes have been in the works, including issues related to inpatients who are not yet stabilized. On February 2, 2012, CMS published a request for comments [PDF], again attempting to address concerns related to hospital inpatients and specialty hospitals.

Hospital Inpatients

When an individual presents to the emergency department of a Medicare-participating hospital and a request is made for an examination or treatment for an emergency condition, that hospital has an obligation to screen that individual. If a hospital finds that the individual has an emergency medical condition, then the hospital must either stabilize or make an appropriate transfer to another medical facility at which the individual can be stabilized. Often, these individuals are admitted as inpatients to that hospital, but in many instances, they are not yet stabilized.

CMS continues to encounter concerns about the application of EMTALA to inpatients. CMS's February 2012 request for comments addresses the issue. In its request for comments, CMS cites a 1999 U.S. Supreme Court case, *Roberts v.*

***Health Law Alert*® is not to be construed as legal or financial advice, and the review of this information does not create an attorney-client relationship.**

Copyright© 2012, Ober, Kaler, Grimes & Shriver

Galen of Virginia, 525 U.S. 249 (1999), which related in part to EMTALA's application to inpatient. In *Roberts*, the U.S. Solicitor General advised the Court that the Department of Health and Human Services (HHS) would develop regulations clarifying its position on inpatients. In May 2002, CMS released a proposed rule [PDF] that EMTALA continued to apply to inpatients. CMS proposed that inpatients who frequently and rapidly went in and out of being stable would not be considered *stabilized* under EMTALA. At that time, CMS proposed that EMTALA would not apply to all other inpatients even if they became unstable because protections exist under the Medicare conditions of participation (CoPs) as well as licensing and other legal requirements to ensure that patients receive proper care.

Ultimately, CMS found in the 2003 final rule [PDF] that a hospital's EMTALA obligations end when the hospital admits the patient in good faith to stabilize the patient. Hospitals may not avoid EMTALA liability by admitting an individual without the intent to treat and stabilize the individual. CMS stated that the CoPs and malpractice laws afford enough protections for hospital inpatients.

Specialty Hospitals

In its recent request for comments, CMS asked whether EMTALA should apply to situations in which a hospital, having admitted as an inpatient an individual coming to the hospital's dedicated emergency department with an emergency medical condition, seeks to transfer that individual to a hospital with specialized capabilities because the admitted inpatient continues to have an unstabilized emergency medical condition that requires specialized treatment unavailable at the first hospital. EMTALA requires that hospitals receive appropriate transfers from other hospitals to assist in stabilizing the individual. Specifically, hospitals that participate in Medicare and have specialized capabilities cannot refuse to accept an appropriate transfer of an individual who requires such specialized capabilities. Specialized capabilities include burn units, shock-trauma units and NICUs.

In a 2008 proposed rule [PDF], CMS suggested that hospitals with specialized capabilities were required to accept individuals who have unstable emergency medical conditions even if those individuals were inpatients at the admitting hospitals. At that time, CMS found that the protections of the CoPs and other legal

***Health Law Alert*® is not to be construed as legal or financial advice, and the review of this information does not create an attorney-client relationship.**

Copyright© 2012, Ober, Kaler, Grimes & Shriver

obligations did not pertain to specialty hospitals under those circumstances, since those protections applied to individuals who were already the hospitals' inpatients. Specialty hospitals saw this proposal as a contradiction, given that the EMTALA obligations of the admitting hospital ended upon a good faith admission of the individual as an inpatient, but would continue for the specialty hospitals under this proposal. Commenters to the 2008 proposed rule were concerned that the rule would increase the number of inappropriate transfers because the specialty hospital could not determine whether the individual being transferred ever experienced a period of stability. In the final 2009 rule [PDF], CMS found that when a hospital admitted in good faith an individual in an unstable emergency medical condition, the EMTALA obligations end for both the admitting hospital and the specialty hospital. CMS found that specialty hospitals in general did accept transfers of patients, even absent a legal requirement under EMTALA.

Will Change Come?

Even after HHS found it settled the inpatient matter, courts, including the Sixth Circuit, appear to vary in their opinions of EMTALA obligations related to inpatients. In 2010, the U.S. Solicitor General once more advised the U.S. Supreme Court that HHS again would take up the issue of inpatients. At the end of 2010, CMS published an advanced notice of proposed rule making [PDF], seeking real-life examples of the impact on patients and of CMS's assumption that specialty hospitals would accept transfers even if not obligated by EMTALA. CMS did not receive comments providing such examples, however. In its February 2012 request for comments, CMS sought real-world examples and data relevant to this reconsideration. At this time, CMS has not proposed any changes to its policies regarding inpatients and the applicability of EMTALA to hospitals with specialized capacity, but indicates it might consider the issue in the near future to ensure clarity on the issues of inpatients.

***Health Law Alert*® is not to be construed as legal or financial advice, and the review of this information does not create an attorney-client relationship.**

Copyright© 2012, Ober, Kaler, Grimes & Shriver