CMS FAQs PROVIDE CLARIFCATION REGARDING COMPLIANCE WITH EMTALA DURING THE PUBLIC HEALTH EMERGENCY

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On April 30, 2020, Hancock Daniel issued a Client Advisory titled *Clarification or Confusion: CMS Updates Previously Issued Guidance Regarding Compliance With EMTALA During The COVID-19 Public Health Emergency*. The Advisory addressed CMS guidance regarding hospital and health system obligations under Emergency Medical Treatment and Labor Act ("EMTALA") during the pandemic in QSO-20-15-REVISED ("QSO") and highlighted a few areas of confusion remaining for providers in light of the QSO and its attachments. Fortunately, in a separate Frequently Asked Questions document ("FAQ"), CMS provided some clarification and supplemental information regarding alternative screening and testing locations, telehealth, and signage requirements. The FAQ is intended to be read in conjunction with the QSO to provide clarification on the parameters of patient redirection and other areas addressed in the QSO. A brief summary of the FAQ follows.

OFF-CAMPUS HOSPITAL-CONTROLLED SITES

CMS established that a hospital is permitted to set up alternative sites on its campus to perform medical screening exams ("MSEs"), and individuals can be redirected to these on-campus screening sites. However, one question remaining in the QSO was the parameters of a hospital's ability to redirect patients who present to the Emergency Department ("ED") to off-campus hospital-controlled sites. The FAQ provides a few answers that shed light on how CMS views off-campus redirection under EMTALA. The FAQ explains that hospitals may redirect incoming patients presenting to the ED to an off-campus site where an MSE will be completed as long as an individual is not requesting medical treatment or a reasonable layperson would not believe the individual needed examination or treatment of a medical condition. Interestingly, the FAQ further indicates that redirection to an off-site alternative screening location to receive an MSE is **allowed under a state emergency preparedness or pandemic plan** "*regardless of the presence of COVID-19 symptoms*." (emphasis added) However, all off-campus sites must be identified specifically by the hospital as a location to receive an MSE and have the capability and capacity to provide the required MSE. In summary, under the CMS waiver, EDs can redirect incoming patients to alternative screening sites "staffed by qualified medical workers, to ensure symptomatic or COVID-19-positive patients are directed to appropriate settings of care" for patients who do not otherwise need to be seen in the ED proper.

Further, the FAQ clarifies that there is not a specified time frame within which the MSE must occur after the referral to an off-campus location, but the required MSE, and any further stabilizing treatment, should not be unreasonably delayed. Under the section titled *Medical Screening Exam*, the FAQ states that, "the MSE must be the same MSE that the hospital would perform on any individual coming to the hospital's dedicated emergency department with those signs and

symptoms, regardless of the individual's ability to pay for medical care." Finally, if a patient comes to the hospital for COVID-19 testing only without requesting additional services, the FAQ indicates that such patient would not be subject to an MSE.

EMS PROTOCOL FOR TRANSFERING PATIENTS

In discussing the redirection of patients, the FAQ highlights that public health officials, EMS systems, and hospitals may develop protocols governing where EMS should transport individuals for emergency care. Specifically, the FAQ mentions creating protocols specific to individuals who meet criteria to be considered suspected cases of COVID-19. CMS clarifies it is allowable for a hospital-owned ambulance to transport an individual to a hospital other than that which owns the ambulance for screening and treatment, "so long as they are operating in accordance with a community-wide EMS protocol." However, it is important to note that if such ambulance does transport an individual to another hospital that does not own the ambulance, the presenting individual is deemed to have come to the ED of the hospital to which the individual is transported. Thus, the receiving hospital will be subject to EMTALA obligations when the individual is brought on to the property.

MULTIPLE HOSPITALTEMPORARY EXPANSION LOCATION SITES

The FAQ also explains that a Temporary Expansion Location (off-site) may serve multiple hospitals with different Medicare provider numbers as long as it is consistent with a hospital's state emergency plan. If permissible under the state emergency plan, such off-site location will not be subject to EMTALA requirements unless it is already a dedicated ED. However, if at any point the individual being treated requires emergency medical attention, the site must arrange for referral or transfer under Medicare's Conditions of Participation. Other additional requirements include having hospitals "operate in distinct clinical spaces within the location or designate one facility that will assume responsibility for ensuring compliance with the Conditions of Participation—including EMTALA requirements (if applicable)." If compliance issues do occur, the associated certified hospitals may be implicated depending upon the type of noncompliance identified.

SIGNAGE

As discussed in our prior Advisory, a hospital may post signage informing individuals who are in search of COVID-19 testing about alternative site testing or provide direction to alternative sites on campus providing MSEs. However, the FAQ adds and emphasizes that "it is a violation of EMTALA for hospitals and critical access hospitals (CAHs) with EDs to use signage that presents barriers to individuals, including those who are suspected of having COVID-19, from coming to the ED, or to otherwise refuse to provide an appropriate MSE to anyone who has come to the ED for examination or treatment of a medical condition."

TELEHEALTH

During the pandemic, CMS has waived the licensure requirements for Medicare and Medicaid providers utilizing telehealth as long as a physician has a valid license in another state. Importantly, however, for the federal waiver to be effective, individual states must also waive its licensure requirements either categorically or individually for the type of

practice the physician is licensed in their home state. If the above requirements are met, among others, physicians may provide telehealth to Medicare and Medicaid beneficiaries in a different state.

Furthermore, the FAQ highlights that ED physicians have the capability to perform telehealth services from any location. When delivering emergency telehealth services, ED physicians should use the code that most accurately reflects the service they furnish and use the place of service code that they would have used if that service was delivered in-person.[1] Additionally, ED physicians should also attach modifier 95 to the claim. Fortunately, the FAQ provides an example to give more clarity. The example is as follows, "regardless of their location, ED physicians who are delivering emergency services can use the ED E/M codes with place of service 23 (ED) and attach modifier 95." One distinction CMS draws is when a patient and the practitioner are in the same location (i.e., different areas of the same hospital building). In this circumstance, providers are not considered to be furnishing Medicare telehealth services, and the services are not subject to telehealth rules and restrictions. Thus, providers should report these services as in-person. Lastly, the use of telehealth to provide an evaluation of patients who have not "physically presented" to the hospital for treatment will not create an EMTALA obligation.

CONCLUSION

The FAQ answers many insightful questions regarding alternative screening and testing locations, telehealth, transfer and stabilization of patients, and community-wide EMS protocol. Note that in many of the situations addressed in the FAQ, hospitals must be acting in concert with a *state emergency preparedness or pandemic plan.* CMS is acting quickly to help provide flexibility to providers to address ongoing concerns and issues facing the health care industry during the public health emergency. It will be helpful for providers to stay up-to-date on guidance and other relevant documents released by federal agencies to learn how to best address some of these concerns. It is also recommended that, to the extent possible, hospital staff maintain documentation to show how compliance has been maintained either under the law or pursuant to applicable waivers. CMS will continue to provide additional information regarding coronavirus through its QSO and other CMS approved communication avenues via CMS's website.

For assistance or questions concerning EMTALA or other regulatory actions taken in response to the COVID-19 pandemic, please contact a member of Hancock Daniel's COVID-19 Task Force.

[1] CMS has temporarily added the ED E/M codes (CPT codes 99281 to 99285), the critical care codes (CPT codes 99291 and 99292), and the observation codes (CPT codes 99217-99220, 99224-99226, and 99234-99226) to the list of Medicare telehealth services for the duration of the COVID-19 national emergency.