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CLARIFICATION OR CONFUSION: CMS UPDATES PREVIOUSLY ISSUED GUIDANCE REGARDING COMPLIANCE WITH EMTALA DURING THE COVID-19 PUBLIC HEALTH EMERGENCY

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On March 30, 2020, CMS released guidance document QSO-20-15-REVISED (Memorandum) that added additional information to its guidance document (QSO-20-15) previously issued on March 9, 2020, regarding hospital and health system obligations under the Emergency Medical Treatment and Labor Act (EMTALA) during the COVID-19 pandemic. The initial version of QSO-20-15 was addressed in a previous Client Advisory which may be accessed here. The original and revised versions of QSO-20-15 intend to provide guidance and options for maintaining EMTALA compliance in the midst of increasing visits to hospital emergency departments (EDs) resulting from the COVID-19 pandemic. The Memorandum, which includes two attachments that have also been revised, provides guidance on an array of issue including the establishment of drive through testing sites; clarification of expectations regarding the triage process and medical screening examinations; and use of telehealth for medical screening examinations. While some of the revisions in the Memorandum provide further clarification on these issues, there are also instances of confusion created by the Memorandum. The updated guidance is posted here, and a brief summary of key provisions, including areas of uncertainty in light of the revisions, follows.

MEDICAL SCREENING EXAMINATIONS (MSEs)

The Memorandum addresses some of the EMTALA requirements related to medical screening examinations generally. For example, in Attachment 2 of the Memorandum, hospitals are advised that they may request an individual 1135 waiver to allow medical screening examinations to be performed by qualified medical staff authorized by the hospital, such as registered nurses, who are acting within their scope of practice and licensure, but who are not yet designated in the bylaws as qualified personnel for the purposes of performing screening examinations. Additionally, CMS permits hospitals to use telehealth equipment to conduct MSEs by qualified medical personnel. The qualified medical personnel may be on-campus (and using telehealth to self-contain) or offsite (due to staffing shortages) as long as they are performing within their scope of practice and have been approved by a hospital's governing body. When using telehealth to provide an evaluation, individuals who have not physically presented to the hospital for treatment will not create an EMTALA liability.

TRANSFERS OF COVID-19 PATIENTS

Under EMTALA, hospitals with capacity and specialized capabilities are required to accept appropriate transfers of patients with suspected or confirmed cases of COVID-19 from hospitals lacking the necessary capabilities. However,

CMS clarifies in its guidance document that the receiving hospital may refuse the transfer if they do not have the capacity to provide the necessary care. Per the original and revised versions QSO-20-15, hospitals should coordinate with their state and local public health officials regarding appropriate placement of individuals who meet specified COVID-19 assessment criteria, and the most current standards of practice for treating individuals with confirmed COVID-19 infections which may also be subject to change as more is learned about the virus. Attachment 2 to the Memorandum indicates under Section B.1. that if "specially designated COVID-19 treatment facilities are implemented as part of a local, state, or national pandemic plan, then the transfer of patients under these plans would be in compliance with EMTALA."

Another noteworthy addition to guidance on EMTALA transfers during the pandemic is included in Attachment 2 of the Memorandum under Section C.9, which provides that the EMTALA 1135 blanket waiver "does not apply to transfer of an individual who has not been stabilized if the transfer arises out of an emergency." This statement appears to apply to patients who have been subject to an EMTALA emergency medical screening examination and who have been identified as having an emergency medical condition that requires stabilization.

ALTERNATIVE SCREENING SITES ON-CAMPUS AND REDIRECTION OF PATIENTS

The Memorandum highlights that a hospital is permitted to set up alternative sites on its campus to perform medical screening examinations and individuals can be redirected to these on-campus screening sites. This redirection is clarified to constitute the "triage" process in the Memorandum. Section 1 of Attachment 1 to the Memorandum provides "[t]riage is the process of sorting individuals based on their need for immediate medical treatment and is not considered to be a medical screening examination in and of itself. It is appropriate for hospital staff to triage individuals for purposes of directing them to the appropriate location of the hospital where the medical screening exam will occur, based on the hospital's triage and alternate screening protocols." The person redirecting patients from the ED should be qualified to recognize a person in obvious need of immediate treatment in the ED. As for other entrances to the hospital, hospital non-clinical staff can provide redirection to on-campus alternative screening locations for those seeking COVID-19 testing. Of note, the revisions contained in the Memorandum make clear that individuals do not need to first present to the ED, and if they do present to the ED, they may still be redirected to the on-campus alternative screening location for logging and subsequent screening. What is less clear is whether a patient who presents to the ED may be directed to a hospital controlled off-site screening location. Regardless of whether the individual is seen at the alternate on-campus site or in the ED, they should be logged in where they are seen.

With respect to signage, the Memorandum states, "[i]n addition, it is acceptable for a hospital to post signage informing individuals who are seeking COVID-19 testing about alternative community locations (non-hospital controlled sites) for COVID-19 testing but do not want a medical screening exam or think they have an emergency medical condition." This type of signage is viewed unfavorably by CMS under non-national emergency conditions.

ALTERNATIVE SCREENING SITES OFF-CAMPUS—HOSPITAL CONTROLLED LOCATIONS

Typically, a hospital can only redirect patients who have already come to the ED to an on-campus alternative screening location for an MSE. However, CMS's recent guidance document explains that hospitals may currently redirect patients to an off-campus location for COVID-19 screening as long as it is in accordance with a state emergency preparedness or

pandemic plan. EMTALA requirements do not apply to these locations unless the off-site location is already a dedicated ED.

However, it should be noted that the Memorandum retains a provision from the original QSO-20-15 that indicates that if a patient presents to a hospital ED, that patient may not be redirected to the off-site screening location. In both versions of the QSO-20-15, under Section II.B. regarding screening an at off-campus, hospital controlled site, the following statement is included, "…a hospital may not tell individuals who have already come to its ED to go to the off-site location for a medical screening examination (MSE)." While it is likely that CMS intended to permit hospitals to redirect individuals to off-site locations under prescribed circumstances and this was addressed in the body of the Memorandum but not in Attachment 1, this lack of consistency results in some uncertainty regarding the parameters of this redirection.

COMMUNITY OR HOSPITAL TESTING STATIONS OUTSIDE THE CONTROL OF A HOSPITAL

Communities or hospitals may establish testing stations in locations not under the control of a hospital (i.e., a mall or retail parking lot). These sites should establish protocols and procedures to safely transport patients that arrive to the location in medical distress and need to be admitted to the hospital. CMS has indicated that these policies and procedures can be as simple as utilizing 911. While there are no EMTALA obligations at these sites (even if hospital personnel assist with the testing), a hospital may not tell individuals who have already come to its ED to go to the off-site location for the COVID-19 testing until they have been provided an MSE and determined not to have an emergency medical condition. This part of the guidance is very clear.

In addition, the Memorandum provides that drive through testing sites established for COVID-19 testing purposes only do not have EMTALA implications. Although this guidance is set forth under the heading related to testing stations outside of a hospital's control, Section 1 of Attachment 1 to the Memorandum indicates that EMTALA will not apply to any drive through testing site that is established on the hospital campus: "Drive through testing sites that have been established for COVID-19 testing alone, including on a hospital campus, do not have EMTALA implications." However, CMS clarifies that EMTALA would still apply if a patient who was seeking only COVID-19 testing made a request for emergency medical treatment while on the hospital's campus.

CONCLUSION

The Memorandum provides helpful guidance and options for hospitals working hard to maintain EMTALA compliance during the COVID-19 pandemic, despite some inconsistencies within the document. The Memorandum also provides some additional links to helpful resources for providers. As CMS is continually updating its guidance on EMTALA obligations during the COVID-19 public health emergency, it will be helpful to stay abreast of these changes. Although not a legal mandate, if the use of the guidance in the Memorandum or any 1135 waiver creates a conflict with your current policies, procedures, bylaws, etc., consider obtaining a resolution from your governing board that recognizes such conflicts and approves operating outside of established policy, procedures, etc. during the public health emergency.

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.

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