

American College of Emergency Physicians INFORMATION PAPER

COVID-19 EMTALA Waiver: Important, but NOT a “Free-for-All”

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On March 30, 2020, CMS issued a “Blanket” EMTALA waiver related to redirection of individuals to alternative sites for MSE.

“Blanket” means it covers the entire country. **It does not mean EMTALA has been entirely suspended.** A blanket waiver also means hospitals are NOT required to request individual waivers. We are clarifying if hospitals must activate individual Disaster Plans.

Regardless, with regard to redirection of individuals to alternative sites for MSE, these actions must be in concert with the state’s Pandemic\Emergency Preparedness Plan.

CMS did NOT issue a waiver related to “transfer of an individual who has not been stabilized if the transfer is necessitated by the circumstances” (but may in the future).

On March 13, 2020 the US Dept. of Health & Human Services (HHS) authorized waivers and modifications to certain federal requirements pursuant to authorization by the President’s declaration of a National Emergency on that same date [<https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx>]. HHS had previously declared a “Public Health Emergency” on Jan 31, 2020 fulfilling both requirements for initiation of waivers[<https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>].

Amongst other provisions, these actions authorize CMS to issue specific waivers for certain aspects of the Emergency Medical Treatment & Labor Act (EMTALA).

As noted, on March 30, 2020 CME issued a blanket EMTALA waiver pursuant to the above. To be clear, the waiver is limited in scope by federal law [42 USC 1320b-5(b)(3)], the Code of Federal Regulations (CFR) [42CFR§489.24(a)(2)] and the waiver itself. **In fact, most of EMTALA remains in force, including the requirement to accept patients in transfer, medical screening (MSE) requirements, stabilization requirements, on-call list\specialist requirements and non-discrimination.**

SUMMARY:

- Additional waivers are not in effect unless CMS initiates and defines their scope.
- Unless it is a “Blanket Waiver” (as this one is), individual hospitals must request a waiver from CMS, which becomes effective when the hospital’s Disaster Plan is activated.
- EMTALA waivers can only impact transfers and (off-campus) alternative medical screening sites, which must be in compliance with the State’s Pandemic\Emergency Preparedness Plan.
- The waiver may obviate sanctions (citation\ fines), but not necessarily an investigation.
- The waiver may not necessarily limit your civil or regulatory liability.
- Medical screening & transfers are always complex. A waiver does not make them less so.
- Most of EMTALA remains in force, despite the waiver.
- It is probably more important to know what an EMTALA waiver does NOT cover.
- **In general, regardless of a waiver, it is best to continue to follow all the usual EMTALA requirements, unless they somehow significantly impede patient care.**

What can an EMTALA waiver do to help hospitals/EDs?

1. Waives certain requirements “for the direction or relocation of an individual to receive medical screening at an alternate location” (off hospital campus) “pursuant to an appropriate state Pandemic\Emergency Preparedness Plan”.

- a. The operative point is compliance with the state’s Pandemic\Emergency Preparedness Plan. Failing to do so in this context may be considered by CMS to be an EMTALA violation.
- b. As noted, under certain circumstances, hospitals must activate their own Disaster Plan. Hospitals should review their Disaster Plan to determine if it might have any bearing on the waiver provisions and the state’s Pandemic\Emergency Preparedness Plan. **NOTE: This requirement is being clarified with CMS.**
- c. Relocation of on-campus screening & emergency care was already allowed by EMTALA, but was clarified in a CMS memo on **March 30, 2020** [Emergency Medical Treatment and Labor Act (EMTALA) Requirements and Implications Related to Coronavirus Disease 2019 (COVID-19) (Revised)] (which replaced a March 9th memo).

2. Can waive certain requirements for the “transfer of an individual who has not been stabilized if the transfer is necessitated by the circumstances”. **NOTE: FYI ONLY - CMS has NOT initiated this waiver provision as yet.**

- a. This provision is rather broad in that it could apply to virtually any transfer (including discharge). And the qualification “if the transfer is necessitated by the circumstances” leaves room for post hoc interpretation. CMS has not provided guidance for which circumstances might be considered necessary.
- b. The CFRs further delineate that the waiver applies to an “inappropriate transfer” as long as the “transfer is necessitated by the circumstances of the declared emergency in the emergency area during the emergency period”.

(1) To understand “inappropriate” transfer one must refer to the regulations detailing “appropriate” transfer [42CFR§489.24 (e)(2)].

(2) In brief, this means CMS will not sanction for a transfer in which the hospital fails to:

- (a) obtain a written “Request for Transfer” &/or “Certification for Transfer” based on risk vs benefit.
- (b) provide medical treatment to minimize the risks to the individual's health.
- (c) confirm that the receiving facility has space and personnel to treat.
- (d) confirm the receiving facility has agreed to accept the transfer.
- (e) send medical records.
- (f) provide the name and address of any on-call physician who refused to provide treatment.
- (g) assure the transfer is effected through qualified personnel and transportation equipment.

3. The waiver only applies to the specified geographic region & only during the specified time frame.

- a. However, this “blanket” waiver applies to the entire country, albeit only to redirection for MSEs.
- b. The waiver is retroactive to March 1, 2020.
- c. “The waiver will continue in effect until the termination of the applicable declaration of a public health emergency.” [42CFR§489.24(a)(2)(ii)]

What does an EMTALA waiver NOT do?

1. The following EMTALA requirements remain:
 - a. EMTALA signage & prohibition of signs that may dissuade seeking treatment (except for directing patients to on-campus alternate screening locations or, under this waiver, redirection to off-campus screening sites in compliance with the state Pandemic\Emergency Preparedness Plan, if applicable).
 - b. Logging of patients. May be done at the ED or at on-campus alternate screening location.
 - c. Medical Screening Exam (MSE) requirements, including QMP requirements.
 - d. On-call list & specialist requirements.
 - e. “The hospital does not discriminate on the basis of an individual's source of payment or ability to pay.”
 - f. “Recipient hospital responsibilities”: “may not refuse to accept from a referring hospital within the boundaries of the United States an appropriate transfer of an individual who requires such specialized capabilities or facilities if the receiving hospital has the capacity to treat the individual.”
2. The requirement for the transferring hospitals to provide “medical treatment within its capacity that minimizes the risks to the individual's health” is part of an “appropriate transfer”.
3. State laws\regulations, Joint Commission Standards, hospital policies & local standards of care, etc. still apply.
4. Unless there is some sort of federal liability protection established, medical malpractice liability remains, although it may be mitigated due to circumstances and the waiver.
5. Other more nuanced details may apply should CMS initiate an additional EMTALA waiver.

Requirements to Obtain an EMTALA Waiver (N/A)

Included for future reference: Not required in this instance (i.e. MSE redirection) due to CMS's blanket waiver.

1. Assure your state has activated its Pandemic\Emergency Preparedness Plan.
2. Petition CMS for an EMTALA waiver in anticipation of or because of activating the hospital Disaster Plan (within its express criteria) and in concert with your state's Pandemic\Emergency Preparedness Plan.

a. CMS 1135 Waiver Website has information necessary to understand & request a waiver:

<https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/1135-Waivers>

b. Email CMS: 1135waiver@cms.hhs.gov (for requirements see “Process for 1135 Waiver Request” below)

c. CMS 1135 Waiver Links:

- **1135 Waivers At A Glance (PDF)** <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/1135-Waivers-At-A-Glance.pdf>
- **Requesting an 1135 Waiver 101 (PDF)** <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/Requesting-an-1135-Waiver-101.pdf>
- **Process for 1135 Waiver Request (PDF)** <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/What-Information-to-Provide-for-an-1135-Waiver-Request.pdf>

Hypothetical Examples (Assuming a Wavier Has Been Granted in the Respective Geographic Region):

Warning: Some of these examples are tragic, but not unheard of in pandemic disasters.

Referral or signage instructing individuals with specified symptoms to proceed to a “Coronavirus Screening Pavilion” 2 miles away: As part of a State Preparedness Plan, the County Health Department in coordination with the National Guard set up screening facilities. TV\Radio\Social Media advised the public with symptoms of runny nose, sore throat, cough, fever, or muscle aches to only go to these facilities. A wife drives her husband to the hospital after 3 days of progressive symptoms. She sees the signs, but stops anyway. Security advises her to go to the off-site County “Screening Pavilion”. The ED is busy & the hospital in disaster status, having received a CMS EMTALA waiver. They had taken down their URI screening tent after the County “Screening Pavilion” opened. Upon arrival to the off-site pavilion, the husband is in extremis & dies shortly after. This could result in an EMTALA investigation, but under the waiver, sanctions would be unlikely.

Same Scenario as Above: Except the State Preparedness Plan requires anyone presenting to an ED be assessed by a “triage nurse” to assure they are “stable” before being referred to the pavilion. This situation could result in an EMTALA citation & fine, because the State’s Plan was not followed.

REFERENCES



COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers, March 30, 2020

<https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf>

Special Waivers

EMTALA:

Only two aspects of the EMTALA requirements can be waived under 1135 Waiver Authority: 1) Transfer of an individual who has not been stabilized, if the transfer arises out of an emergency or, 2) Redirection to another location (offsite alternate screening location) to receive a medical screening exam under a state emergency preparedness or pandemic plan. A waiver of EMTALA sanctions is effective only if actions under the waiver do not discriminate as to source of payment or ability to pay. Hospitals are generally able to manage the separation and flow of potentially infectious patients through alternate screening locations on the hospital campus.

Therefore, waivers to provide Medical Screening Examinations at an offsite alternate screening location not owned or operated by the hospital will be reviewed on a case by case basis. Please note, there is no waiver authority available for any other EMTALA requirement.

For the duration of the COVID-19 national emergency, CMS is waiving the enforcement of section 1867(a) of the Social Security Act (the Emergency Medical Treatment and Active Labor Act, or EMTALA). This will allow hospitals, psychiatric hospitals, and CAHs to screen patients at a location offsite from the hospital’s campus to prevent the spread of COVID-19, in accordance with the state emergency preparedness or pandemic plan.



Public Health Emergency

Public Health and Medical Emergency Support for a Nation Prepared

Waiver or Modification of Requirements Under Section 1135 of the Social Security Act

<https://www.phe.gov/emergency/news/healthactions/section1135/Pages/covid19-13March20.aspx>

March 13, 2020

1. Pursuant to Section 1135(b) of the Social Security Act (the Act) (42 U.S.C. § 1320b-5), I, Alex M. Azar II, Secretary of Health and Human Services, hereby waive or modify the following requirements . . .
 - c. Sanctions under section 1867 of the Act (the Emergency Medical Treatment and Labor Act, or EMTALA) for the **direction or relocation of an individual to another location to receive medical screening pursuant to an appropriate state emergency preparedness plan** or for the **transfer of an individual who has not been stabilized if the transfer is necessitated by the circumstances** of the declared Federal public health emergency for the COVID-19 pandemic.

EMTALA Code of Federal Regulations (CFR):

42CFR§489.24 (a) Applicability of provisions of this section.

- (2) (i) When a waiver has been issued in accordance with section 1135 of the Act that includes a waiver under section 1135(b)(3) of the Act, sanctions under this section for an inappropriate transfer or for the direction or relocation of an individual to receive medical screening at an alternate location do not apply to a hospital with a dedicated emergency department if the following conditions are met:
 - (A) The transfer is necessitated by the circumstances of the declared emergency in the emergency area during the emergency period.
 - (B) The direction or relocation of an individual to receive medical screening at an alternate location is pursuant to an appropriate State emergency preparedness plan or, in the case of a public health emergency that involves a pandemic infectious disease, pursuant to a State pandemic preparedness plan.
 - (C) The hospital does not discriminate on the basis of an individual's source of payment or ability to pay.**
 - (D) The hospital is located in an emergency area during an emergency period, as those terms are defined in section 1135(g)(1) of the Act.
 - (E) There has been a determination that a waiver of sanctions is necessary.
- (ii) A waiver of these sanctions is limited to a 72-hour period beginning upon the implementation of a hospital disaster protocol, except that, if a public health emergency involves a pandemic infectious disease (such as pandemic influenza), the **waiver will continue in effect until the termination of the applicable declaration of a public health emergency**, as provided under section 1135(e)(1)(B) of the Act.

EMTALA Code of Federal Regulations (CFR):

42CFR§489.24 (e) Restricting transfer until the individual is stabilized—

(1) General. If an individual at a hospital has an emergency medical condition that has not been stabilized (as defined in paragraph (b) of this section), the hospital may not transfer the individual unless—

(i) The transfer is an appropriate transfer (within the meaning of paragraph (e)(2) of this section); and

(ii) (A) The individual (or a legally responsible person acting on the individual's behalf) requests the transfer, after being informed of the hospital's obligations under this section and of the risk of transfer. The request must be in writing and indicate the reasons for the request as well as indicate that he or she is aware of the risks and benefits of the transfer;

(B) A physician (within the meaning of section 1861(r)(1) of the Act) has signed a certification that, based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual or, in the case of a woman in labor, to the woman or the unborn child, from being transferred. The certification must contain a summary of the risks and benefits upon which it is based; or

(C) If a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person (as determined by the hospital in its by-laws or rules and regulations) has signed a certification described in paragraph (e)(1)(ii)(B) of this section after a physician (as defined in section 1861(r)(1) of the Act) in consultation with the qualified medical person, agrees with the certification and subsequently countersigns the certification. The certification must contain a summary of the risks and benefits upon which it is based.

(2) A transfer to another medical facility will be appropriate only in those cases in which—

(i) The transferring hospital provides medical treatment within its capacity that minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child;

(ii) The receiving facility—

(A) Has available space and qualified personnel for the treatment of the individual; and

(B) Has agreed to accept transfer of the individual and to provide appropriate medical treatment;

(iii) The transferring hospital sends to the receiving facility all medical records (or copies thereof) related to the emergency condition which the individual has presented that are available at the time of the transfer, including available history, records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, results of diagnostic studies or telephone reports of the studies, treatment provided, results of any tests and the informed written consent or certification (or copy thereof) required under paragraph (e)(1)(ii) of this section, and the name and address of any on-call physician (described in paragraph (g) of this section) who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment. Other records (e.g., test results not yet available or historical records not readily available from the hospital's files) must be sent as soon as practicable after transfer; and

(iv) The transfer is effected through qualified personnel and transportation equipment, as required, including the use of necessary and medically appropriate life support measures during the transfer.

TITLE 42 – Public Health and Welfare – United States Code 1395dd

42USC§1395dd (c) Restricting transfers until individual stabilized

(1) Rule

If an individual at a hospital has an emergency medical condition which has not been stabilized (within the meaning of subsection (e)(3)(B) of this section), the hospital may not transfer the individual unless--

- (A)(i) the individual (or a legally responsible person acting on the individual's behalf) after being informed of the hospital's obligations under this section and of the risk of transfer, in writing requests transfer to another medical facility,
 - (ii) a physician (within the meaning of section 1395x(r)(1) of this title) has signed a certification that \1\ based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer, or
 - (iii) if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person (as defined by the Secretary in regulations) has signed a certification described in clause (ii) after a physician (as defined in section 1395x(r)(1) of this title), in consultation with the person, has made the determination described in such clause, and subsequently countersigns the certification; and
- (B) the transfer is an appropriate transfer (within the meaning of paragraph (2)) to that facility.

A certification described in clause (ii) or (iii) of subparagraph (A) shall include a summary of the risks and benefits upon which the certification is based.

(2) Appropriate transfer

An appropriate transfer to a medical facility is a transfer--

- (A) in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child;
- (B) in which the receiving facility--
 - (i) has available space and qualified personnel for the treatment of the individual, and
 - (ii) has agreed to accept transfer of the individual and to provide appropriate medical treatment;
- (C) in which the transferring hospital sends to the receiving facility all medical records (or copies thereof), related to the emergency condition for which the individual has presented, available at the time of the transfer, including records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, treatment provided, results of any tests and the informed written consent or certification (or copy thereof) provided under paragraph (1)(A), and the name and address of any on-call physician (described in subsection (d)(1)(C) of this section) who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment;
- (D) in which the transfer is effected through qualified personnel and transportation equipment, as required including the use of necessary and medically appropriate life support measures during the transfer; and
- (E) which meets such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals transferred.

TITLE 42—The Public Health and Welfare - United States Code 1320b–5

42USC§1320b–5. Authority to waive requirements during national emergencies

(a) Purpose

The purpose of this section is to enable the Secretary to ensure to the maximum extent feasible, in any emergency area and during an emergency period (as defined in subsection (g)(1) of this section)—

- (1) that sufficient health care items and services are available to meet the needs of individuals in such area enrolled in the programs under subchapters XVIII, XIX, and XXI of this chapter; and
- (2) that health care providers (as defined in subsection (g)(2) of this section) that furnish such items and services in good faith, but that are unable to comply with one or more requirements described in subsection (b) of this section, may be reimbursed for such items and services and exempted from sanctions for such noncompliance, absent any determination of fraud or abuse.

(b) Secretarial authority

To the extent necessary to accomplish the purpose specified in subsection (a) of this section, the Secretary is authorized, subject to the provisions of this section, to temporarily waive or modify the application of, with respect to health care items and services furnished by a health care provider (or classes of health care providers) in any emergency area (or portion of such an area) during any portion of an emergency period, the requirements of subchapters XVIII, XIX, or XXI of this chapter, or any regulation thereunder (and the requirements of this subchapter other than this section, and regulations thereunder, insofar as they relate to such subchapters), pertaining to—

- (1)(A) conditions of participation or other certification requirements for an individual health care provider or types of providers,
- (B) program participation and similar requirements for an individual health care provider or types of providers, and
- (C) pre-approval requirements;
- (2) requirements that physicians and other health care professionals be licensed in the State in which they provide such services, if they have equivalent licensing in another State and are not affirmatively excluded from practice in that State or in any State a part of which is included in the emergency area;

(3) actions under section 1395dd of this title (relating to examination and treatment for emergency medical conditions and women in labor) for—

- (A) a transfer of an individual who has not been stabilized in violation of subsection (c) of such section if the transfer is necessitated by the circumstances of the declared emergency in the emergency area during the emergency period; or**
- (B) the direction or relocation of an individual to receive medical screening in an alternative location—**
 - (i) pursuant to an appropriate State emergency preparedness plan; or**
 - (ii) in the case of a public health emergency described in subsection (g)(1)(B) that involves a pandemic infectious disease, pursuant to a State pandemic preparedness plan or a plan referred to in clause (i), whichever is applicable in the State;**