



# EMTALA:

## The Continued Evolution

Changes to the  
CMS Interpretive Guidelines

June 2008

Ivy K. O'Rourke, RN, BSN, MBA, CEN

Rade B. Vukmir, MD, JD, FCCP, FACEP, FACHE





# EMTALA : The Continued Evolution

## History and Overview

The Emergency Medical Treatment and Active Labor Act (EMTALA) is a Federal statute that was initially implemented to govern when and how a patient may be (1) refused treatment or (2) transferred from one hospital to another when he has an unstable medical condition.

The EMTALA statute was passed as part of the Comprehensive Omnibus Budget Reconciliation Act of 1986, and is therefore sometimes referred to as "the COBRA law". EMTALA is also known as Section 1867(a) of the Social Security Act, and it is included as part of Section 42 Chapter IV §489.24 of the U.S. Code, which governs special responsibilities of Medicare hospitals in emergency cases.

EMTALA is primarily, but not exclusively, a non-discrimination statute. The purpose of the statute is to prevent hospitals from rejecting patients, refusing to treat them, or transferring them to "charity hospitals" or "county hospitals" because they are unable to pay for evaluation and/or treatment or are covered under the Medicare or Medicaid programs. The EMTALA statute was amended in 1988 and 1989 to add more stringent provisions regulating on-call physicians and the practice of obstetrics. In 1994 the statute continued to be expanded and the Health Care Financing Administration [HCFA, now the Center for Medicare and Medicaid Services (CMS)] made additions to the statute that further defined the obligations of hospitals under the EMTALA statute, while imposing certain new requirements.

The following is a brief time line of some of the more significant changes and additions to the EMTALA statute over the last 10 years.

In 1998 the most significant change added language that prohibited hospitals from making any verification, courtesy, or pre-authorization calls to payers prior to completion of the medical screening examination and stabilization. Hospitals that made pre-authorization calls were considered to be in violation of the law. Under the EMTALA statute the issue of payment or authorization for payment must not be allowed to influence the physician's decision as to (1) whether an emergency medical condition exists or (2) the nature or timing of the treatment needed.

In 1999 new regulations addressing patient rights added language regarding restraint and seclusion of patients that placed significant restrictions on the use of physical and chemical restraint. These revisions placed heavy restrictions on use of these methods for control of patient behavior, required physician face-to-face evaluation, prohibited PRN orders for restraint (including drugs for management purposes), and set time limits on orders.

In 2000 CMS issued new regulations for the Outpatient Prospective Payment System (OPPS) that included significant expansion of EMTALA. Specifically, the OPPS requires the hospital to provide emergency response capabilities, beyond merely calling 911, for accidents, injuries, or patient presentations on the hospital campus, which was defined to include a zone of 250 yards surrounding the main hospital building.

In May of 2002 CMS proposed an extensive list of revisions and clarifications to the EMTALA statute which became effective November 10, 2003. The clarifications and revisions affect areas including: Pre-authorization language instituted in 1998: the definition of "dedicated emergency department"; definition of "comes to the emergency department"; on-campus and off-site responsibilities; in-patient applicability

of EMTALA; on-call requirements; and clarification of conflicts regarding ambulance responsibility to community-wide EMS protocols versus the requirements of the EMTALA statutes.

In April 2008 CMS issued an updated State Operations Manual with updated language and clarifications regarding on-call requirements, special responsibilities of hospitals, “parking” Emergency Medical Service (EMS) patients, transport services for patient transfers, and waiver of EMTALA during public health emergencies.

## To whom does EMTALA apply?

### Participating Hospitals

EMTALA applies to "participating hospitals", ie, to hospitals that have entered into "provider agreements" under which they will accept payment from the Department of Health and Human Services (DHHS) or CMS under the Medicare program for services provided to beneficiaries of that program. In practical terms, this means that it applies to virtually all hospitals, including Critical Access Hospitals (CAHs), in the United States. Its provisions apply to all patients presenting to those hospitals, not just to Medicare patients.

Additional requirements are imposed upon a hospital that (1) has "specialized capabilities or facilities" such as burn units, shock-trauma units, or neonatal intensive care units, or which (2) is a "regional referral center" in a rural area, which will be discussed further in another section of this document. However, CMS has clarified that specialized capabilities or facilities includes virtually any service that is available at the receiving hospital that is not available at the sending hospital. Therefore, having orthopedic, neurologic, pediatric, plastics, etc also constitutes a specialized capability.

### Dedicated Emergency Departments

On November 10, 2003 CMS provided what it determined was an objective, measurable definition of “dedicated emergency department” (DED). The definition includes three criteria, of which any one, would define whether or not a department or location must be considered a DED. In addition, CMS once again emphasized that the location of the department is not a determining factor. The criteria are:

- Is licensed by the state in which it is located under applicable state law as an emergency room or emergency department; or
- It is held out to the public (by name, posted signs, advertising, or other means) as a place that provides care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment; or
- During the calendar year immediately preceding the calendar year in which a determination under §489.24 is being made, based on a representative sample of patient visits that occurred during that calendar year, it provided at least one-third of all its outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment.<sup>1</sup>

Under this definition other departments of hospitals, such as labor and delivery departments and psychiatric units of hospitals that provide urgent or emergent evaluation without requiring a previously scheduled appointment, would be included. An Urgent Care Center or Immediate Care Center, whether or not located on the main hospital campus, would also be included if it operates under the same license number as the hospital or advertises its services to the community using slogans such as “*For Life’s Little Emergencies.*”

This language does not mean that a hospital must maintain emergency medical screening and/or treatment capabilities in each department or at each door of the hospital, nor anywhere else on hospital property other than the area that is commonly thought of as the Emergency Department. This would, however, require the hospital to have a policy and procedure that details where care of an individual that presents to an area outside of the emergency department should be provided, as well as how and with whom the patient will be transported to that area. Care should be provided in the most appropriate setting, as determined by the hospital.

In addition, **urgent care centers** are very specifically addressed and included in this definition. The comments by CMS state:

“We believe it would be very difficult for any individual in need of emergency care to distinguish between a hospital department that provides care for an “urgent need” and one that provides care for an “emergency medical condition” need. Indeed, to CMS, both terms seem to demonstrate a similar, if not exact functionality.”<sup>2</sup>

The statute clarifies for hospitals that they must provide at least a medical screening examination to all individuals who “come to the Emergency Room” (as defined by CMS) and request examination or treatment for a medical condition, or have such a request made on their behalf.

#### **Applicability to Hospital Inpatients [§ 489.24(d)(2)]**

The hospital’s obligations under EMTALA end once an individual is admitted for inpatient care. Further, an inpatient is defined as “a person who has been admitted to a hospital for bed occupancy purposes of receiving inpatient hospital services. A person is considered an inpatient if “normally admitted as an inpatient with the expectation that he/she will remain at least overnight and occupy a bed even though it later develops that he/she can be discharged or transferred to another hospital and does not actually use a hospital bed overnight.” Admitting an individual with no intention of treating the patient and then inappropriately transferring or discharging the patient without having met the stabilization requirement is absolutely not allowed and would be subject to harsh penalties.

The statute also addresses issues related to the “admitted” patient who is waiting in the emergency department for an inpatient bed in the following comments: “The hospital must provide stabilizing treatment, even if the individual is awaiting admission in the dedicated emergency department. **Once the individual has been stabilized, the EMTALA obligations end.**”

Individuals who are “boarded” and admitted in the dedicated emergency department would be determined to be inpatients for the purposes of EMTALA if, generally, they have been admitted by the hospital with the expectation that they will remain at least overnight and occupy beds in the hospital.

#### **Individual Physicians**

There are provisions that do, by their terms, apply to physicians. These provisions are unchanged, and include:

- Section 1395dd(d)(1)(C) imposes a penalty on a physician who fails to respond to an emergency situation when requested to do so, when he is assigned as the on-call physician.
- A physician who signs a certification in support of an appropriate transfer is liable if he knew or should have known that the certification was false.
- The Balanced Budget Act of 1997 amended section 1395dd(d)(1)(B) to provide directly for liability of physicians working at specialty hospitals (not just assigned on-call physicians) which violate the special obligations imposed on those hospitals.

The penalty imposed on physicians adds exclusion from the Medicare program in repeated cases or in a "gross and flagrant" violation.

### **Hospital owned ambulances**

Ambulance services that are owned and operated by hospital systems, whether or not they are located on the main hospital campus have, to some extent, the same responsibilities as the hospital emergency department as defined in these statutes.

To avoid imposing requirements that are inconsistent with local EMS requirements, the 2003 language was revised to state that EMTALA would *not* be applicable if a hospital-owned ambulance is operating under community-wide EMS protocols that require it to transport an individual to a hospital other than the hospital that owns the ambulance (such as the geographically closest hospital). In addition, rather than being interpreted that an individual is considered to have "come to the emergency department" as soon as they enter a hospital-owned ambulance, the definition states that an individual would be considered to have "come to the emergency department" of the hospital to which the individual was transported at the time the individual is brought onto that hospital's property regardless of who owns the ambulance.

Additionally, there has long been controversy regarding the responsibilities of the emergency department when an ambulance delivers an individual through the dedicated emergency department as a direct admission to the hospital. As of 2003 CMS clarified that "whenever there is a direct admission of a particular individual as an inpatient, EMTALA no longer applies."

This does not, however, mean that the emergency department can refuse to see the patient if the EMTs (regardless of their level of certification) have concerns regarding the appropriateness of the direct admission, or if they perceive a change in condition and request examination.

### **Who enforces the rules?**

CMS is responsible for investigation and partially responsible for enforcement of this statute. The Office of Inspector General (OIG) under the aegis of DHHS is responsible for other enforcement aspects of the law. Violations of EMTALA also are reported to the Justice Department for evaluation for violations to the Hill-Burton Act, to the Office of Civil Rights for evaluation of discrimination implications, to the Internal Revenue Service for evaluation of implications for tax-exempt status, and to The Joint Commission for accreditation review. All of these agencies are potential enforcers of the law, but only CMS and the OIG are actively involved in most instances.

## **Definitions**

### **Comes to the Emergency Department**

The definition of "comes to the Emergency Department," as added in 2000, originally extended to include the entire main hospital campus, including the parking lot, sidewalk, and driveway, *and other property located within 250-yards*. This was added to the statute primarily in response to an incident that occurred in Chicago in 1998, in which hospital personnel would not leave the ED to assist a young man in the alley adjacent to the hospital who had suffered a gunshot wound. Hospital policy did not allow staff to leave the ED to assist someone not on hospital property. This was a common practice at the time, as leaving hospital property to assist someone outside was considered to be taking staff away from the patients in the ED for whom they were responsible. Although hospital personnel called 911 to assist the victim, he did not survive his injury due to the additional time elapsed prior to his care.

The 250-yard stipulation proved to be overly broad, as it could possibly include other privately owned properties, buildings, etc. This language had significant revisions in 2003 that clarified and limited the

areas of responsibility. The revised definition is based, in part, on the definition of “hospital campus” as contained in §413.65(b), which reads: “*Campus* means the physical area immediately adjacent to the provider’s main buildings, other areas and structures that are not strictly contiguous to the main buildings but are located within 250-yards of the main buildings, and any other areas determined on an individual case basis, by the CMS regional office, to be part of the provider’s campus.”<sup>3</sup>

The 2003 revisions provide:

- A person who presents anywhere on the hospital campus and requests emergency services, or who would appear to a reasonably prudent person to be in need of medical attention, must be handled under EMTALA. Other presentations outside the emergency room do not invoke EMTALA.
- The 250-yard zone will continue to apply when defining the "hospital campus". The term campus no longer includes non-medical businesses (shops and restaurants located close to the hospital), nor does it include physicians' offices or other medical entities that have a separate Medicare identity [§ 413.65(b)]. It does not include independent medical practices such as physician offices, Rehabilitation Centers, and Skilled Nursing Facilities<sup>4</sup> either.
- EMTALA does not apply to any off-campus facility, regardless of its provider-based status, unless it independently qualifies as a dedicated emergency department.

### **Off-Campus responsibilities**

Even though the “250-yard rule” has been revised, that does not absolve the facility of responsibility for off-campus departments. Off-campus departments that are held out to the public (by name, posted signs, advertising, or other means) as a place that provides care for emergency medical conditions on an urgent basis without requiring a previously scheduled appointment, or during the previous calendar year provided at least one-third of its outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment. Such departments would be included if they would be perceived by a prudent layperson as an appropriate place to go for emergency care, whether or not the words “Emergency Room” or “Emergency Department” were used by the hospital to identify the departments.

### **Emergency Medical Condition**

The term Emergency Medical Condition (EMC) is much broader under EMTALA than under typical medical usage. This is a primary cause for many EMTALA violations. The term EMC includes any condition that is a danger to the health and safety of the patient or unborn fetus; or may result in a risk of impairment or dysfunction to the smallest bodily organ or part if not treated in the foreseeable future; and includes a specific range of itemized conditions:

- Undiagnosed, acute pain sufficient to impair normal functioning is an EMC
- Pregnancy with contractions present is an EMC -- ie legally defined as unstable
- Symptoms of substance abuse ie, alcohol ingestion
- Psychiatric disturbances ie, severe depression, insomnia, suicide attempt or ideation, disassociative state, inability to comprehend danger or to care for one's self

### **Medical Screening Exam (MSE)**

The scope of the medical screening exam (MSE) under EMTALA is very comprehensive. The hospital must provide all necessary testing, including, history and physical, lab, x-ray and ECG, as well as on-call services within the capability of the hospital to reach a diagnosis that excludes the presence of legally defined EMCs.

In regard to a minor that presents unaccompanied to the ED, the 2008 revision also states:

“A minor (child) can request an examination or treatment for an EMC. The hospital is required by law to conduct the examination if requested by an individual or on the individual’s behalf to determine if an EMC exists. Hospital personnel should not delay the MSE by waiting for parental consent. If, after screening the minor, it is determined that no EMC is present, the staff can wait for parental consent before proceeding with further examination and treatment.”<sup>5</sup>

If an individual comes to a hospital’s dedicated emergency department and a request is made on his or her behalf for examination or treatment for a medical condition, but the nature of the request makes it clear that the medical condition is not of an emergent nature, the hospital is required only to perform such screening as would be appropriate for any individual presenting in that manner, to determine that the individual does not have an “emergency medical condition.” In other words, all EMTALA screenings do not need to be equally extensive. The medical screening exam may be tailored to the presenting complaint.

A qualified medical person (as defined in hospital policy/bylaws) may make the determination that an emergency medical condition does not exist, and may direct the patient to an outpatient clinic where non-emergency personnel will provide the services requested. Presentations that would fit this definition would be requests such as suture removal of a wound that is healing well, dressing change of a non-infected wound, request for pregnancy test, request for prescription refill, etc.

*“An MSE is the process required to reach, with reasonable clinical confidence, the point at which it can be determined whether the individual has an EMC or not. An MSE is not an isolated event. It is an ongoing process that begins, but typically does not end, with triage.*

***Triage** entails the clinical assessment of the individual’s presenting signs and symptoms at the time of arrival at the hospital in order to prioritize when the individual will be seen by a physician or other qualified medical personnel (QMP).”<sup>6</sup>*

***The nursing triage exam without a separate medical screening exam provided by a qualified medical person, as defined in the hospital’s bylaws, is not acceptable under EMTALA.***

## **Labor**

According to the EMTALA statute, labor is defined as:

“The process of childbirth beginning with the latent or early phase of labor and continuing through the delivery of the placenta. A woman experiencing contractions is in true labor unless a physician, certified nurse-midwife, or other qualified medical person acting within his or her scope of practice as defined in hospital medical staff bylaws and State law, certifies that, after a reasonable time of observation, the woman is in false labor.”<sup>7</sup>

## **Stabilization**

As is the case with the term “emergency medical condition”, the statute provides a definition, but this determination is ultimately a matter of clinical judgment on the part of the medical professional assessing the patient. Stability under EMTALA requires a much higher level of patient condition than that typically connoted by the word “stable” in usual medical usage.

The statute requires that, in non-maternity cases, the hospital must assure that the patient is **not reasonably at risk to deteriorate from, during, or following transfer or discharge**. If the patient is



reasonably at risk to deteriorate from the natural process of their condition, they are legally unstable under this standard, just as if the transfer or discharge itself caused the deterioration. The statute defines stability of a pregnant female experiencing contractions as not legally stable until the baby and placenta are delivered.

## What does EMTALA require hospitals to do?

1. Conspicuously post signage which must be visible from a distance of 20 feet which specifies rights of individuals under United States Code (USC) 1395(dd) with respect to examination and treatment for emergency medical conditions and women in labor, as well as information indicating whether or not the hospital participates in the Medicaid program under a state plan approved under subchapter XIX of this chapter.
2. Any individual who comes to the hospital seeking emergency service must receive an appropriate medical screening examination (within the capabilities of the facility) to determine whether he/she has an EMC. This examination must be in compliance with a facility's written policy and protocol and must be conducted by a "qualified medical provider". (The hospital bylaws should define qualified medical provider.) Triage and medical screening exam should be recognized as separate functions. The medical screening exam:
  - a. Must be performed in the hospital rather than by referral to a physician office, HMO or other provider.
  - b. Is performed by a QMP.
  - c. Is defined by facility policies and procedures and is designed to support or rule out an EMC.
  - d. Is performed consistently to ensure that all patients seeking emergency care receive the same screening exam as appropriate to their condition and complaint. Therefore, as discussed previously, a patient presenting with a complaint of a minor problem such as a paronychia would not require the same degree of assessment as someone presenting with chest pain.
  - e. Is clearly documented in the medical record.
3. Not allow discussion or verification of insurance coverage or ability to pay to delay the medical screening exam (MSE). The September 2003 clarifications clearly stated that:
  - a. "It is acceptable for hospitals to follow reasonable registration processes for individuals for whom examination or treatment is required under EMTALA, including asking whether an individual is insured and, if so, what that insurance is, as long as that inquiry does not delay screening or treatment. Reasonable registration processes may not unduly discourage individuals from remaining for further evaluation."<sup>8</sup>

Additionally, the clarifications allow hospitals to seek authorization for all service concurrently with providing any stabilizing treatment as long as obtaining this information does not result in a delay in treatment.

4. If a patient is found to have an emergency medical condition, his condition must be stabilized before transfer or discharge. There are two exceptions to this requirement:
  - a. The patient cannot be stabilized because the facility lacks the needed equipment or necessary personnel and a physician certifies that the benefits of the transfer outweigh the risks of the transfer, or

- b. the patient insists on being transferred. This assumes that the patient has had the risks and benefits of such a transfer explained to him/her and he/she is competent to make such a decision. The medical record must clearly reflect this *informed* decision.
5. Provide medically appropriate transfers in which the patient is transferred for medical necessity. (The term “transfer” does not apply to the individual who has been declared dead or the patient that leaves the hospital without the permission and/or the knowledge of the hospital’s staff.) This process requires:
  - a. Physician certification that at the time of transfer, the risks of transfer are outweighed by the reasonably anticipated benefits. Specific individual risks and benefits must be listed and the record must support them, or
  - b. Written request for transfer by the patient, without suggestion or pressure of the hospital or physician to induce the request. The request should be documented using a form which is signed by the patient (or legally designated responsible party), contains a brief statement of the hospital’s EMTALA obligations, indicates the reason for the transfer (patient request) and describes the benefits and risks of the transfer which were outlined to the patient.
  - c. Transfer by the appropriate medical transfer vehicle; ie, private passenger vehicles are not permitted unless ambulance transport has been refused in writing.
  - d. Medical orders for appropriate attendant personnel; ie, must have the licensure and skill level to maintain and/or initiate/re-initiate ordered treatment or drugs and deal with the known potential adverse affects of the procedures or drugs.
  - e. Medical orders for appropriate life support equipment; ie, field ambulance equipment may not be sufficient for a specific transfer. Equipment such as an IV pump, balloon pump, etc should be specified.
  - f. Copies of medical records, tests, and x-rays must be sent with the patient, unless delay for records might jeopardize the patient, in which case records must be transported to the receiving hospital as soon as completed and on a STAT basis.
6. If the patient refuses to accept further examination, stabilizing treatment or transfer, the hospital should take all reasonable steps to obtain the patient’s informed written refusal [Against Medical Advice (AMA) form]. There should be documentation in the patient record describing the refused examination, treatment, or transfer, and the reasons for the patient’s refusal. If the patient refuses to sign the AMA form, this too should be documented.
7. If a pregnant woman is having contractions, she should not be sent home unless a physician, certified nurse-midwife, or other QMP acting within his or her scope of practice as defined in hospital medical staff bylaws and state law certifies that, after a reasonable period of observation, certifies that the woman is not in active labor. It is no longer a requirement that the QMP consult a physician prior to discharging the patient.
8. Maintain an on-call system to provide coverage to be available to assist with the stabilization of patients. Hospitals are allowed flexibility to comply with EMTALA obligations by maintaining a level of on-call coverage that is within their capability, and each hospital has the discretion to maintain the on-call list in a manner to best meet the needs of its patients. However, the following are requirements:
  - a. A named individual who is designated as responsible for call at a given time in a given specialty should be listed as such on a call list, and that call list must be conspicuously posted in the ED at all times. An accurate record of each on-call list must be maintained for five years.

- b. The hospital must have policies and procedures to be followed when a particular specialty is not available or the on-call physician cannot respond because of situations *beyond his or her control*.
  - c. On-call physicians must respond to the hospital in-person and render evaluation and care in the hospital if requested to do so by the treating ED physician or mid-level provider. It is not permissible to send patients to a specialist's office for definitive care. The on-call physician may send a provider of lesser training, such as a mid-level provider in his stead, unless the ED physician or mid-level provider caring for the patient objects.
  - d. It is permissible to utilize modern telecommunications to facilitate consultation with specialists who are not present in the hospital/CAH. There is also no EMTALA prohibition against the treating physician consulting on a case with another physician, who may or may not be on the hospital's or CAH's on-call list, by telephone, video conferencing, transmission of test results, or any other means of communication.
9. The statute and the regulations provide that any participating hospital that (1) has "specialized capabilities or facilities" such as burn units, shock-trauma units, or neonatal intensive care units, or which (2) is a "regional referral center" in a rural area, 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 it has the capacity to treat the individual. [42 USC 1395dd(g); CFR 489.24(e)]. This requirement applies to any participating hospital with specialized capabilities, regardless of whether the hospital has a dedicated emergency department. The hospital may decline a patient who does not need the services of the facility, who can be adequately and completely cared for at the originating facility, or when the hospital lacks the physical capacity to handle the patient. However, CMS has clarified that specialized capabilities or facilities includes virtually any service that is available at the receiving hospital that is not available at the sending hospital. Therefore, having orthopedic, neurologic, pediatric, plastics, etc, also constitutes a specialized capability. These hospitals are at great risk if they decline a transfer. Further expectations of these hospitals include the following:
- a. If the hospital has the ability to utilize on-call personnel, it must do so to accommodate the patient.
  - b. If the hospital has handled patients in excess of its stated capacity on prior occasions, it is required to accept the patient.
  - c. If the hospital could use step-down beds or early discharge to accommodate a patient, it must do so.
  - d. Patients must be accepted without regard to means or ability to pay, or third-party payer involvement.
10. Avoid "parking" EMS patients. Following reports that several hospitals routinely prevent Emergency Medical Service (EMS) staff from transferring patients from their ambulance stretchers to a hospital bed or gurney, including patients being left on EMS stretchers (with EMS staff in attendance) for extended periods of time, the issue was addressed by CMS.
- a. CMS has stated that the agency "recognizes the enormous strain and crowding many hospital emergency departments face every day; however, this practice is not a solution." They clarify that a hospital has an EMTALA obligation as soon as a patient "presents" and a request is made on the individual's behalf for examination or treatment of an emergency medical condition.
  - b. However, CMS further clarified that this does not mean that a hospital will necessarily have violated EMTALA if it does not, in every instance, immediately assume from the EMS provider all responsibility for the individual, regardless of any other circumstances in the ED. For instance, if the EMS provider brought an individual to the dedicated ED at a time when ED staff was

occupied dealing with an issue such as multiple major trauma cases, it could, under those circumstances, be reasonable for the hospital to ask the EMS provider to stay with the individual for a short period of time until ED staff becomes available to provide care to that individual. However, even if a hospital cannot immediately provide a medical screening exam (MSE), ***it must still triage the individual's condition immediately upon arrival*** to ensure that an emergent intervention is not required.

11. Allow free choice of transport services. If you are transferring a patient to a hospital with specialized capabilities (eg, neonatal ICU, interventional cardiology, etc.) the receiving hospital may not dictate use of an air medical or other transportation service owned by the receiving hospital for the transfer. In other words, ***the acceptance of the patient may not be predicated upon any specific qualifications outside those defining an appropriate transfer in the EMTALA statute.***
12. Mandatory reporting. If it is necessary to transfer a patient because an on-call physician failed or refused to come to the emergency department, the emergency physician must list the name and address of the on-call physician in the transfer documentation. This results in the receiving hospital reporting the incident for EMTALA investigation, with the resulting likelihood that the transferring hospital and on-call physician will be cited for an EMTALA violation. Failure to list the name is a specific violation that may result in the hospital, ED physician, and on-call physician being cited.

## Transfer of Unstable Patients

1. Transfer of an unstable patient must include a Physician's Certification for Transfer:
2. If a physician proposes to transfer an unstabilized patient, the transfer is for medical reasons, and the physician has certified in writing that the medical benefits to be expected from the transfer outweigh the increased risks to the patient (including an unborn child).
3. The certification provides a complete picture of the benefits to be expected from the transfer and the risks associated with the transfer. The summary should reflect the thought processes of the physician; what was considered, what care and testing was provided to evaluate and stabilize the patient, the working diagnosis and a clear statement of why the patient is being transferred.
4. The physician's transfer order defines:
  - a. The appropriate mode of transfer. If a patient is being transferred because of lack of capability, he or she is being transferred to a higher level of care, and requires medical oversight. A patient being transferred for a higher level of care should never be transferred via a private vehicle. If the patient insists, document discussion of the risks very completely, and obtain a written, signed refusal of the recommended mode of transportation.
  - b. The level of professional (MD, RN, level of EMT) needed to accompany the patient.
  - c. The equipment needed to manage the known and possible needs of the patient. The hospital must supplement the transport vehicle's equipment if necessary.
  - d. Who will maintain continuous medical management via radio control.
  - e. Contingency plans regarding what to do if the patient worsens during the transfer.
  - f. Orders for medication that may be continued or administered during transport.

## Hospital Diversion

All hospitals should have a written policy/procedure addressing steps to be taken when resources have been overwhelmed and the facility is no longer able to accept ambulance patients, and the hospital is being placed on temporary ambulance diversion status. This policy and procedure should compliment and conform to the community EMS diversion policy.

When a hospital is placing itself on temporary ambulance divert status several steps should be taken:

- Documentation of time hospital is placed on temporary ambulance diversion status.
- Resources not available should be detailed, such as:
  - No beds available
  - Saturation of hospital resources
  - No monitors available
  - No CT scanner available
- Divert status should be reviewed and updated at regularly defined intervals.
- Notification of appropriate agencies should take place in a timely manner.
- Ensure continued provision of safe, appropriate, and timely care of patients who continue to enter the EMS system during periods of diversion.

## Public Health Emergencies

Hospitals with dedicated emergency departments in an emergency area (as defined below) will not, for a 72-hour period starting with each hospital's activation of its hospital disaster protocol, be subject to EMTALA sanctions for:

- "Redirecting individuals seeking an MSE when a state emergency preparedness plan or a pandemic preparedness plan has been activated in the emergency area; or
- Inappropriate transfers arising out of the circumstances of the emergency."<sup>5</sup>

An emergency area is defined as one in which:

- "The President has declared an emergency or disaster; and
- The Secretary has declared a public health emergency covering an area within the CMS Regional Office's (RO's) jurisdiction; and
- The Secretary has exercised his waiver authority pursuant to section 1135 of the Social Security Act ("the Act")."<sup>5</sup>

## Pitfalls

Careful adherence to the regulations outlined here will help to ensure compliance at the facility level.

- Transfer of any patient presents a risk. It is essential to make sure all steps have been addressed:
  - Documented physician to physician contact.
  - Document verification of acceptance by receiving hospital.
  - DO NOT transfer potentially unstable patients unless they require a higher level of care than your hospital is able to provide.
  - Transfer form is filled out completely – do not assume that the nurse has taken care of it; many sections are solely the responsibility of the physician.

- Complete and sign the certification for transfer attesting to the fact that the transfer was either medically necessary, or was requested by the patient/family.
- Make sure that all appropriate medical records are sent with the patient.
- Transfer of any pregnant patient is fraught with risk. Unless the transferring physician can guarantee that the patient will not begin to have active labor while in transit (which is virtually impossible) she should not be transferred. All emergency departments should be equipped to deliver a baby.
- Transfer at the request of the patient or family does not absolve the ED physician of responsibility.
- The ED physician is 100% responsible for the patient until they have arrived at their destination.
- A patient should never be transferred to another facility via private vehicle, even if requested by the patient or family. If their condition is serious enough to require transfer, they require medical observation en-route.

---

<sup>1</sup> US Department of Health and Human Services. Special responsibilities of Medicare hospitals in emergency cases. 42 CFR §489.24. Revised September 9, 2003. Effective November 10, 2003. Available at: [http://www.access.gpo.gov/su\\_docs/fedreg/a030909c.html](http://www.access.gpo.gov/su_docs/fedreg/a030909c.html). Accessed June 19, 2008.

<sup>2</sup> Centers for Medicare and Medicaid Services. Emergency Medical Treatment and Labor Act (EMTALA) Interim Guidance. S&C-04-10. Effective November 7, 2003. Available at <http://www.cms.hhs.gov/SurveyCertificationGenInfo/downloads/SCLetter04-10.pdf>. Accessed June 19, 2008.

<sup>3</sup> US Department of Health and Human Services. Centers for Medicare and Medicaid Services. Publication CMS-1063-F; Clarifying Policies Related to the Responsibilities of Medicare-Participating Hospitals in Treating Individuals with Emergency Medical Conditions. September 9, 2003. Effective September 9, 2003. Available at <http://www.cms.hhs.gov/QuarterlyProviderUpdates/Downloads/cms1063f.pdf>. Accessed June 19, 2008.

<sup>4</sup> US Department of Health and Human Services. Special responsibilities of Medicare hospitals in emergency cases. 42 CFR §489.24. Revised September 9, 2003. Effective November 10, 2003. Available at: [http://www.access.gpo.gov/su\\_docs/fedreg/a030909c.html](http://www.access.gpo.gov/su_docs/fedreg/a030909c.html). Accessed June 19, 2008.

<sup>5</sup> Department of Health and Human Services. Centers for Medicare and Medicaid Services. Publication S&C-08-15. Revised state operations manual appendix V – EMTALA. Page 20. Published March 21, 2008. Effective March 21, 2008. Available <http://www.cms.hhs.gov/SurveyCertificationGenInfo/PMSR/itemdetail.asp?filterType=dual,%20keyword&filterValue=emtala&filterByDID=0&sortByDID=3&sortOrder=ascending&itemID=CMS1209114&intNumPerPage=10>. Accessed June 19, 2008.

<sup>6</sup> Department of Health and Human Services. Centers for Medicare and Medicaid Services. Publication S&C-08-15. Revised state operations manual appendix V – EMTALA. Page 18.

<sup>7</sup> Department of Health and Human Services. Centers for Medicare and Medicaid Services. Publication S&C-08-15. Revised state operations manual appendix V – EMTALA. Page 19.

<sup>8</sup> Department of Health and Human Services. Centers for Medicare and Medicaid Services. Publication S&C-08-15. Revised state operations manual appendix V – EMTALA . Page 35.

*This publication is part of the Education program that has been prepared by ECI for its clients. Information contained herein may address emergency medical practice in general, but it is not a substitute for the physician's judgment, knowledge, and skill in the care and treatment of any individual patient. This information is a guide to assist the physician in a wide variety of circumstances and is not intended to establish a standard of care.*