



Health Care ADVISORY ■

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Hospital EMTALA Obligations Under Recent COVID-19 Waivers

The coronavirus (COVID-19) pandemic has strained the nation's health care system, and providers are grasping for solutions to test and treat as many people as possible without exposing other patients or health care workers to the virus. In response, government authorities and health systems and other providers have stood up drive-through testing sites to facilitate quick COVID-19 screening while maintaining social distancing.

However, the Emergency Medical Treatment and Active Labor Act (EMTALA) generally requires that all hospitals that participate in Medicare ensure that (1) if an individual comes to the emergency department (ED), then an appropriate medical screening examination (MSE) must be conducted within the capability of the hospital by a qualified medical person (QMP) to determine whether an emergency medical condition (EMC) exists; and (2) if an individual has an EMC, the hospital must treat the individual to stabilize the EMC or appropriately transfer the individual to another hospital. These requirements must be fulfilled regardless of the patient's insurance status or ability to pay.

Because "comes to the emergency department" is a broadly defined term, a hospital's EMTALA obligations may be triggered even when an individual arrives on any part of the hospital property, including the parking lot, sidewalk, or driveway. And a hospital generally cannot send those who arrive to an offsite location without conducting the MSE (and if needed, providing stabilizing treatment), unless pursuant to an appropriate transfer. Accordingly, quick redirection of individuals coming to the hospital to offsite testing locations, with minimal contact, may be difficult under existing EMTALA rules. For this reason, several hospitals and health systems recently requested temporary, emergency waivers of their EMTALA obligations to facilitate off-campus drive-through COVID-19 testing sites.

Under Section 1135 of the Social Security Act, the Centers for Medicare & Medicaid Services (CMS) has the authority to waive actions under EMTALA for transfers of individuals who have not been stabilized and the direction or relocation of individuals to receive MSEs when consistent with state emergency or pandemic preparedness plans. After the President announced the current COVID-19 public health emergency, hospitals clamored to request these waivers, and many were approved.

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On March 30, 2020, [CMS announced a broad, blanket waiver](#) for all hospitals nationwide of “enforcement of section 1867(a) of the Act” regarding the MSE requirement, allowing hospitals “to screen patients at a location offsite from the hospital’s campus to prevent the spread of COVID-19.” This announcement provides tremendous flexibility to hospitals and health systems seeking to expedite the screening process.

First, hospitals may now redirect patients coming to the hospital or to an ED to an offsite location for COVID-19 screening, as long as it is consistent with the state emergency preparedness or pandemic plan. To clarify, *without this new waiver*, hospitals may set up alternative *on-campus* screening locations (such as in the hospital parking lot) and redirect people coming to the ED to those on-campus screening locations only. Further, without the waiver, hospitals could also set up or be involved in offsite screening locations, but the hospital could not redirect people coming to the hospital or ED to the offsite location (and EMTALA requirements would not apply to the offsite location). *With the new blanket waiver, the hospital may redirect patients coming to the hospital to the off-campus location for an MSE.*

Second, because Section 1867(a) contains the MSE requirement, *with the waiver*, the screening does not necessarily need to constitute a full MSE by a QMP. If a patient only requests a COVID-19 test and does not clearly have an EMC, then the patient can receive just the COVID-19 test. However, patients coming to a hospital ED should still be redirected by someone who is qualified to recognize individuals obviously in need of immediate treatment in the ED (for instance, a registered nurse) so that patients with a medical condition can receive stabilizing treatment rather than being redirected to the offsite screening location. Non-clinical staff may be stationed at other, non-emergency hospital entrances to redirect individuals to alternate locations.

Third, under recent CMS guidance announced on March 30 along with the waiver:

- Hospitals and community officials may encourage the public to go to off-campus sites to be screened for COVID-19 instead of the hospital.
- Hospitals should not hold any off-campus testing sites out to the public as a place that provides urgent, unscheduled care for EMCs in general, but only as a respiratory or potential/presumed COVID-19 patient screening center.
- There should be protocols in place to deal with patients who arrive in medical distress and need transportation to a hospital (which may simply be calling 911).
- Hospitals may use signage directing individuals to alternate locations when they are seeking COVID-19 testing only and do not want a full MSE or think they have a medical emergency.

Fourth, CMS also clarified that telehealth may be used, in part, to meet a hospital’s EMTALA obligations:

- Hospitals may perform the MSE via telehealth.
- QMPs performing MSEs via telehealth may be on campus (and using telehealth to self-contain) or offsite (due to staffing shortages), but in both cases, the QMP must conduct the MSE within their scope of practice under state law and as approved by the hospital’s bylaws, rules, or regulations.

- Telehealth evaluation of individuals who have not physically presented to the hospital does not trigger any EMTALA obligations.

CMS has granted hospitals and health systems significant flexibility with this EMTALA waiver and clarifying guidance. It is important to note that CMS still has the authority to provide a blanket waiver for EMTALA hospitals' transfer obligations, but has not done so yet. Accordingly, hospitals should still provide COVID-19 patients who present to the ED with an EMC with stabilizing treatment and accept transfers if the hospital has appropriate isolation capabilities, and if not, provide an appropriate transfer. Hospitals should coordinate with their state and local public health officials on appropriate placement and treatment of COVID-19 patients.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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