



Center for Medicaid and State Operations/Survey and Certification Group

Ref: S&C-08-05
(Revised 12/14/07)

DATE: December 7, 2007

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Waiver of Emergency Medical Treatment and Labor Act (EMTALA) Sanctions in Hospitals Located in Areas Covered by a Public Health Emergency Declaration

****This memorandum is revised to reflect an additional condition, specified in the Act, concerning non-applicability of EMTALA sanctions and also adds specificity to the 72-hour effective period****

Memorandum Summary

- The EMTALA regulation at 42 CFR 489.24(a)(2) concerning non-applicability of EMTALA sanctions during public health emergencies declared by the Secretary of Health and Human Services has been revised pursuant to amendments to Section 1135(b) of the Social Security Act.
- The scope of the waiver of sanctions has been clarified. The regulation now specifies that the waiver applies to both inappropriate transfers and redirection or relocation of individuals for a medical screening examination pursuant to an appropriate State emergency preparedness plan or State pandemic preparedness plan by a hospital located in an emergency area.
- In addition, a timeframe of 72 hours for the duration of the waiver has been added, consistent with the statute.

On August 22, 2007, the Centers for Medicare & Medicaid Services (CMS) published the Hospital Inpatient Prospective Payment System (IPPS) Final Rule that implemented a change to the EMTALA regulations at 489.24, "Special responsibilities of Medicare hospitals in emergency cases under EMTALA." The change to the regulation was intended to clarify existing requirements and is in effect.

Prior to the amendment, the EMTALA regulations at 42 CFR 489.24(a)(2) specified that sanctions for inappropriate transfers during a national emergency do not apply to a hospital with a dedicated emergency department located in an emergency area, as defined in section 1135(g)(1) of the Social Security Act ("the Act").

The IPPS final rule, pursuant to amendments to section 1135(b) of the Act, clarifies that the waiver of sanctions under §489.24(a)(2) includes those for:

- The inappropriate transfer of an individual who has not been stabilized. Pursuant to the Act the inappropriate transfer must arise out of the circumstances of the emergency; or
- The direction or relocation of an individual to receive a medical screening examination (MSE) at an alternate location pursuant to an appropriate State emergency preparedness plan or state pandemic preparedness plan.

The waiver of sanctions applies to hospitals with dedicated emergency departments located in an emergency area during an emergency period. The regulations at 489.24(a)(2) were also revised to specify a 72-hour duration of the waiver from EMTALA enforcement. The 72-hour period would begin with the implementation of a hospital disaster protocol. In the case of an infectious pandemic disease, however, the waiver would continue past the 72 hours and remain in effect until termination of the declaration of a public health emergency as described in section 1135(e)(1)(B) of the Act.

Section 1135(g)(1) of the Act defines an emergency area as a geographical area in which there exists:

- An emergency or disaster declared by the President pursuant to the National Emergencies Act or the Robert T. Stafford Disaster Relief and Emergency Assistance Act;
 - *and*
- A public health emergency declared by the Secretary pursuant to section 319 of the Public Health Service Act.

Regional Office (RO) Procedures

The Act and the revised regulation apply when:

- The President has declared an emergency or disaster; *and*
- The Secretary has declared a public health emergency covering an area within the RO's jurisdiction, *and*
- The Secretary has exercised his waiver authority pursuant to section 1135 of the Act.

When all three above conditions exist, then the RO may issue an advisory notice that hospitals with dedicated emergency departments in the emergency area will not, during the emergency period, 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.

The RO notice must also indicate that the waiver of sanctions will be for the 72-hour period starting with each hospital's activation of its hospital disaster protocol. However, the 72-hour period may not in any case start before the effective date of the Secretary's public health emergency declaration. In the case of an infectious pandemic disease, however, the RO notice should indicate that the waiver may continue past the 72-hour period and remain in effect until termination of the declaration of public health emergency as described in section 1135(e)(1)(B) of the Act.

EMTALA complaints alleging violations by a hospital in an emergency area during an emergency period related to failure to provide an MSE or an inappropriate transfer must first be reviewed to determine whether a waiver of sanctions was in effect. The review may require some preliminary investigation, usually by telephone. If the review indicates a waiver was in effect for that hospital, then CMS expects that the RO will not authorize an EMTALA investigation of the complaint.

These changes will be incorporated into the SOM, Appendix V the next time it is revised.

If you have further questions, please contact Donna Smith at (410) 786-3255 or via e-mail at donna.smith1@cms.hhs.gov.

Effective Date: The effective date of the change in regulation was October 1, 2007, and should be implemented immediately.

Training: This information should be distributed to all survey and certification staff, surveyors, their managers, and with managers who have responsibility for processing EMTALA complaints.

/s/
Thomas E. Hamilton

cc: Survey and Certification Regional Office Management