

HEALTH LAW UPDATE

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Hospital Visitation Rights: CMS Proposed Rule Implements Presidential Memorandum

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On June 28, 2010, the Centers for Medicare & Medicaid Services ("CMS") published a proposed rule that would update the Medicare Conditions of Participation ("CoPs") for all hospitals and critical access hospitals ("CAHs") participating in Medicare and Medicaid by requiring the protection of a patient's right to designate visitors, including same-sex partners.¹

The proposed rule would implement a Presidential Memorandum on Hospital Visitation² issued on April 15, 2010 that tasked the Department of Health and Human Services ("HHS") with drafting regulations that would address the right of a patient to choose who may and may not visit him or her and would ensure equitable visitation policies for all patients. The Presidential Memorandum also directed the HHS Secretary to ensure that patients' representatives have the right to make informed decisions regarding patients' care.³

Under the proposed rule, a hospital must have written policies and procedures regarding the visitation rights of patients, including those setting forth any clinically necessary reasonable restriction or limitation that the hospital may need to place on such visitation rights. Specifically, a hospital must:

- (1) Inform each patient (or representative) of his or her visitation rights, including any clinical restriction on such rights;
- (2) Inform each patient (or representative) of the right, subject to his or her consent, to receive the visitors whom he or she designates, including, but not limited to, a spouse, a domestic partner (including a same-sex domestic partner), another family member, or a friend, and his or her right to withdraw or deny such consent at any time;
- (3) Not restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, sexual orientation, gender identity, or disability; and

¹ See 75 Fed. Reg. 36610.

² The Presidential Memorandum on Hospital Visitation is currently *available online* at: <http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation>

³ In response to the Presidential Memorandum, CMS noted in the proposed rule that the hospital conditions of participation at 42 CFR § 482.13(b)(2) currently address a patient's right to designate a representative who can act on behalf of the patient. Thus, in the proposed rule, CMS is soliciting comment on whether § 482.13(b)(2) "effectively addresses any inappropriate barriers to a patient's ability to designate a representative, and consistently ensures the right to designate a representative for all patients in all Medicare- and Medicaid-participating hospitals." 75 Fed. Reg. 36613.

(4) Ensure that all visitors designated by the patient (or representative) enjoy visitation privileges that are no more restrictive than those that immediate family members would enjoy.

CMS is proposing to incorporate the proposed visitation rights requirement for hospitals as a new standard within the current patient rights CoP.⁴ CMS is also seeking public comments on how best to present notices or disclosures that would inform patients of a hospital's visitation rights. Comments on the proposed rule are due August 27, 2010 and a final regulation is expected by late fall. In addition, HHS Secretary Kathleen Sebelius asked hospitals in a June 22, 2010 letter⁵ to review their policies in advance of a final rule and adhere to the intent of the Presidential Memorandum.

If you have any questions about this *Health Law Update*, please contact any of the attorneys in our Healthcare Practice Group listed below.

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⁴ CMS is proposing to amend the Conditions of Participation ("CoPs") at 42 CFR Section 482.13 (which relates to the overall rights of hospital patients) by adding a new paragraph (h). CMS is proposing to apply these same requirements to CAHs by revising the Conditions of Participation (CoPs) for CAHs. Because the CoPs for CAHs do not currently contain any patient rights provisions, CMS is proposing to add a new standard on patient visitation rights at § 485.635(f) within the existing CoP on provision of services. See 75 Fed. Reg. 36611.

⁵ HHS Secretary Sebelius's Letter is currently available online at: <http://www.hhs.gov/news/press/2010pres/06/20100622d.html>