

HEALTH LAW

Update

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

CMS Clarifies Hospital Emergency Service Obligations – Proposes Transparency Of Emergency Response Capability

May 15, 2007

On April 26, 2007, the Centers for Medicare and Medicaid Services (CMS) issued a Survey and Certification letter to state survey agency directors (the Guidance) addressing the requirement that Medicare-participating hospitals provide certain emergency medical services in order to comply with the Medicare Conditions of Participation (CoPs). CMS indicated in the Guidance that Medicare participating hospitals, including specialty hospitals and those without emergency departments, must have the ability to (a) evaluate individuals with emergency conditions, (b) provide initial treatment to them, and (c) transfer them if medically appropriate. The Guidance does not apply to critical access hospitals, which are governed by separate regulations.

The Guidance comes approximately one month after the termination of West Texas Hospital's Medicare provider agreement following the highly publicized death of a patient that occurred in January of 2007. In that incident, a patient experienced post-surgical respiratory arrest at West Texas Hospital, a physician-owned specialty hospital, and had to be transferred by ambulance to a local community hospital for emergency services after the staff at the specialty hospital called 9-1-1. The patient later passed away at the local community hospital.

Use of 9-1-1 by Hospital Staff

In the Guidance, CMS clarifies that the CoPs do not permit a hospital to rely upon 9-1-1 services as a substitute for the hospital's own required emergency response capabilities. While reiterating that there is no specific prohibition on a hospital (either with or without an emergency department) calling 9-1-1 in order to obtain transport of a patient to another hospital, CMS indicates that the hospital may not rely on 9-1-1 to fulfill the hospital's own basic obligations to provide appraisal, initial treatment, and transfer where appropriate.

Basic Emergency Response Capabilities

CMS uses the Guidance to flesh out a hospital's basic obligations for appraisal, initial treatment, and transfer. All hospitals subject to the CoPs, including those without emergency departments,

must maintain policies and procedures that address patients' emergency care needs that arise at any time of day and any day of the week.

In particular, the Guidance specifies the type of RN staffing that the policies and procedures must set forth in order to assure the hospital's capability to provide appraisal and initial treatment of persons with medical emergencies. The policies and procedures must also provide that the MD/DO (on-site or on-call) would directly provide appraisals of emergencies or provide medical direction of on-site staff conducting appraisals. Finally, the Guidance specifies that the hospital must have policies and procedures designed to enable hospital staff members who respond to emergencies to recognize when a person requires a referral or transfer and to assure appropriate handling of the transfer to appropriate facilities, i.e., those with the appropriate capabilities to handle the patient's condition.

CMS acknowledges in the Guidance that the Medicare CoPs do not include a definition of a "medical emergency" that would trigger the above obligations of a hospital. CMS attaches the definition of emergency applicable under the Emergency Medical Treatment and Active Labor Act (EMTALA) to the Guidance, but cautions that the EMTALA definition is only a "general guide" and that the CoPs do not mandate the EMTALA definition.

CMS also notes in the Guidance that hospitals with emergency departments are subject to additional requirements beyond the basic obligations of appraisal, initial treatment, and transfer where appropriate. Although nothing in the CoPs requires a hospital to "offer emergency services," those that do, i.e., those that have an emergency department, must be in compliance with the Emergency Services CoP at 42 CFR 482.55, which includes requirements as to direction of emergency services by qualified medical staff, integration of emergency services with other hospital departments, supervision of emergency services, and presence of adequate personnel qualified in emergency care.

Increased Transparency of Emergency Response Capabilities

The Guidance is not the only recent CMS regulatory activity concerning the emergency response capability of hospitals. In the recently proposed rule for the hospital inpatient prospective payment system (IPPS) for fiscal year 2008,¹ CMS proposes to require that hospitals furnish all patients notice at the beginning of their hospital stay or outpatient service if a doctor of medicine or osteopathy is not present in the hospital 24 hours per day, 7 days a week, and to describe how the hospital will meet the medical needs of any patient who develops an emergency medical condition at a time when no physician is present in the hospital. CMS also specifically solicits comments in the proposed rule on whether current requirements for emergency service capability in hospitals with or without emergency departments should be strengthened in certain areas.

¹ 72 Fed. Reg. 24680, 24817 (May 3, 2007).

Conclusion

If you have questions or would like a copy of the Guidance, or if you would like assistance in incorporating any of this additional guidance into your policies and procedures, please contact one of the Bass, Berry & Sims attorneys in our healthcare practice area listed at the end of this update.

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