EPSTEIN BECKER GREEN

EMTALA: The Golden Rule of the Emergency Room

Lessons Learned from Violations and Self Disclosures

Teresa Mason, JD, RN
Senior Legal Counsel
Epstein Becker and Green
May 16th, 2019

Agenda

1. Overview of EMTALA Requirements
2. Common EMTALA Vulnerabilities
3. Self Disclosure Best Practices
4. Responding to a CMS Inquiry
5. Key Takeaways

EPSTEIN BECKER GREEN

Overview of EMTALA and its Requirements

Emergency Medical Treatment and Labor Act (EMTALA)

Overview

- **"Anti-dumping" law enacted in 1986**
- **Three main hospital obligations under EMTALA:**
  - **Evaluate**
  - **Stabilize**
  - **Transfer**

EMTALA

Triggering Events

- **EMTALA applies to Medicare "participating hospitals" with "dedicated emergency departments"**
- **Dedicated Emergency Departments:**
  - Licensed by the state in which it is located under applicable law as a emergency department;
  - Held out to the public as a place that provides emergency medical care on an unscheduled basis; OR,
  - During the previous calendar year, at least one-third of the department's outpatient visits were for emergency medical conditions

EMTALA

Triggering Events

- **EMTALA is triggered if:**
  - A person "comes to the hospital" and requests emergency care or
  - A reasonably prudent person would believe the person requires emergency care
- **"Comes to hospital" means that a patient presents:**
  - To the main campus of the hospital, including parking lots, sidewalks, and driveway, OR
  - To the area within 250 yards of the hospital, OR
  - To an off campus facility with a dedicated emergency department, OR
  - In a hospital-owned ambulance

EMTALA

Non-Triggering Events

- **EMTALA does not apply to requests for clearly non-emergent care such as:**
  - Preventive care (e.g. immunization, social services),
  - Requests for non-emergency tests (e.g. blood pressure tests, mammogram) or
  - Pre-scheduled appointment with a physician
- **EMTALA does not apply if the patient is already a patient of the hospital**
  - Inpatient – EMTALA ends once the patient is admitted as an inpatient
  - Outpatient – EMTALA does not apply if the patient has begun receiving outpatient services other than emergency care (e.g. chemotherapy infusions)

EPSTEIN BECKER GREEN

Medical Screening Exam

EMTALA

Medical Screening Exam

- **Goal:** To determine whether an **Emergency Medical Condition** exists
- **Medical Screening Exam**
  - Begins with triage but triage is not an MSE
  - Includes ongoing monitoring according to the individual's needs
  - Continues until patient is stabilized, admitted or transferred
  - May require diagnostic tests
  - Is not typically an isolated event

EMTALA

Medical Screening Exam

- Must be performed by a **Physician** or **Qualified Medical Personnel**
- **Qualified Medical Personnel:** if other than a physician, a QMP must be approved by the Hospital's Board and identified in Medical Staff Rules and Regulations

EMTALA

Medical Screening Exam

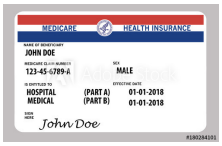
If it isn't documented, it didn't happen

- **Thorough documentation of the MSE is key and should include (if appropriate):**
  - Chief complaint, vital signs, history of present illness, medical history
  - Any abnormal findings that could constitute an emergency medical condition
  - Diagnostic testing (e.g., imaging, lab testing, ECGs, etc.) and procedures performed to stabilize the patient
  - Details of medical decision-making AND
  - Description of treatment plan

EMTALA

Medical Screening Exam

- **MSEs must be conducted in non-discriminatory manner**
  - Treatment received does not differ based on payment status, gender, sexual orientation, race, national origin, disability, etc.
- **MSEs must not be delayed to inquire about the patient's method of payment or insurance status**
  - Patients inquiring about financial responsibility should be encouraged to wait until after the MSE is completed



EPSTEIN BECKER GREEN

Emergency Medical Condition

EMTALA

Emergency Medical Condition

Emergency Medical Condition ("EMC"): medical condition manifesting itself by acute symptoms of sufficient severity that the absence of immediate medical attention could reasonably be expected to result in:

- Placing the individual's health or that of an unborn child in serious jeopardy,
- Serious impairment to bodily functions,
- Serious dysfunction of any body part, or
- Severe pain

EMTALA

Emergency Medical Condition

Emergency Medical Condition Specific to the Pregnant Patient

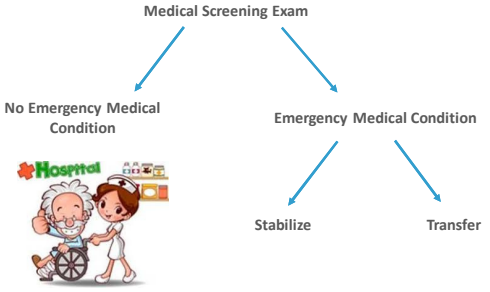
- Pregnant women with contractions (active labor)
- There is inadequate time to effect a safe transfer to another hospital before delivery or
- Transfer may pose a threat to the health or safety of the woman or the unborn child

- In order to be considered stable or eligible for transfer / release, a physician or QMP must certify that the patient is in false labor after a reasonable period of observation

Stabilization and Transfers

EMTALA

Stabilize or Transfer



EMTALA

Stabilization

Stabilization: medical treatment of an EMC within the capabilities of the facility and staff

Stable for Discharge
Patient has reached a point where their continued care (including diagnostics or treatment) could be reasonably performed as an outpatient or later as an inpatient; for psychiatric patients, that patient is no longer a threat to themselves or others

Stable for Transfer
No material deterioration of condition (including delivery of child) is likely, within a reasonable medical probability, to result from transfer

Once an EMC is stabilized for discharge or transfer, there are no further legal obligations under EMTALA specific to that patient

EMTALA

Transfer – Stable versus Non-Stable

Transfer of Stable Patient

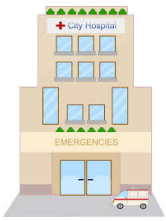
- At request of patient
- According to a pre-arranged transfer with receiving facility

Transfer of Unstable Patient

- At request of patient
- Physician certification
  - Based on information at time of transfer
  - Medical benefits reasonably expected from transfer outweigh risks to patient (and/or unborn child)
  - Signed by physician

EMTALA

Transferring Hospitals



Transferring Hospitals

- Provides medical treatment within its capacity to minimize risk to the patient
- The transfer requires qualified personnel and necessary equipment
- Send all medical records related to the emergency condition, including documentation of patient's request (if appropriate) or consent form that certifies understanding and acceptance of risk of transfer
- Maintain transfer records for a minimum of 5 years

EMTALA

Receiving Hospitals

Receiving Hospitals

- Typically must accept patient transfers so long as available space and qualified personnel
- Can refuse to accept the transfer of an **unstable** patient under certain circumstances:
  - The patient doesn't require the specialized capabilities and facilities of the receiving hospital,
  - The receiving hospital does not have capacity to accept the patient at the time of the transfer, OR
  - Lateral transfers – the sending and receiving hospitals have comparable resources

shutterstock.com • 273560996

EMTALA

What if Patient Leaves Before Stabilization or Transfer?

Against Medical Advice (AMA)

- The Hospital has an obligation to show further examination and/or treatment was offered prior to patient's refusal or departure
- Need to document discussion of risks of AMA
- If patient leaves without notifying hospital staff, then staff should document that patient departed without notifying staff, what time patient departure was discovered and inability to have the patient sign an AMA form

EPSTEIN BECKER GREEN

Other Non-Clinical EMTALA Requirements

EMTALA

Other Requirements

On-Call Physician Coverage

- The hospital must maintain list of on-call physicians to provide further evaluation and treatment necessary to stabilize an individual;
- Hospital policies must address
  - Response times and tracking methods
  - What to do when a specialty is not on-call or cannot respond
  - Requirement of physicians to see patients in ED and not in their office
  - A mechanism for disciplinary action against violators

EMTALA

Other Requirements

Central Patient Log

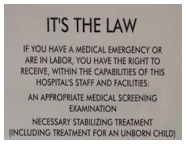
- Must contain, at a minimum, the following information:
  - The name of the individual, time of arrival and medical record number;
  - The time of discharge, transfer or admission;
  - The disposition of the individual, including whether the individual:
    - Refused treatment
    - Was refused treatment by the hospital / provider
    - Was stabilized and transferred to another facility
    - Was transferred to another facility prior to stabilization
    - Was treated and admitted as an inpatient
    - Was stabilized and discharged.

EMTALA

Other Requirements

EMTALA Signage

- The hospital must post signage that:
  - Specifies the rights of individuals with respect to examination and treatment of emergency medical conditions, including women in labor
- Signs must be posted in any area where an emergency medical condition can be addressed, not limited to traditional ED rooms
- Words must be clear and in simple terms and language understandable by the population served by the hospital



EMTALA

Other Requirements

Polices and Procedures

- Adopt policies to ensure compliance with EMTALA
- System v. hospital site

Reporting Violations

- Promptly report suspected EMTALA violations of transferring facilities
- Reports made to local CMS office
- Can be made anonymously
- Failure to report an EMTALA violation can result in termination of Medicare participation
- Self-reporting

EMTALA

EMTALA Violation Penalties

Administrative Sanctions

- Termination of Medicare provider agreement
- Potential exclusion from participating in the Medicare and Medicaid programs

Civil Penalties

- Physicians and Hospitals over 100 beds – maximum penalty of $104,826 per violation (can be multiple violations per patient)
- Fines subject to adjustment for inflation

Private Rights of Action

- By individuals who suffer personal harm
- By other medical facility who suffered financial loss

Referral to Other Agencies

- OIG
- Department of Justice
- Office of Civil Rights
- Joint Commission

EPSTEIN BECKER GREEN

Common EMTALA Pitfalls / Violations

Common EMTALA Vulnerabilities

Potential Violations

Medical Screening Exams

- Lack of documentation
- Not thorough or complete

Transfers

- Lack of resources at facility create opportunities for hospitals to inadvertently violate EMTALA just through errors in the transfer process itself

Incomplete Patient Logs

- Needs to be systematic
- EMR implementation has helped but often still see issues (different EMR ED and L&D, flags)

Signage

- Must be posted where patient is being stabilized (not necessarily just ED)

Common EMTALA Vulnerabilities

Potential Violations

Psychiatric Patients

- AnMed Health settlement for $1.3 million dollars - largest ever settlement related to EMTALA violations – based on allegation that AnMed held patients with unstable psychiatric conditions in its emergency department without providing appropriate psychiatric treatment in 36 incidents
- Issues with overcrowding on inpatient / state facilities
- Use of telemedicine

Labor and Delivery Patients

- *Burditt v. U.S. Department of Health and Human Services, 934 F.2d 1362* (5th Cir. 1991
- Considerations of ability to care for mother AND baby dependent on risks

Common EMTALA Vulnerabilities

Potential Violations

Extended Wait Times

- Triage nurse not qualified to perform an MSE
- Need to have process in place to address MSEs during extended wait times
- Higher risk of patients leaving without being seen or leaving against medical advice

ED Personnel

- Difficult providers
- Miscommunication with team
- Nurses responsible for many EMTALA violations

EPSTEIN BECKER GREEN

Self Disclosure Best Practices

Self-Disclosure

Internal Investigation

- **Notification of a Potential Violation**
  - Internal investigations of potential EMTALA violations are complaint driven either by employee or patient / patient advocate / other facility
- **Response**
  - Promptly respond to all complaints by reviewing relevant documents and interviewing those involved
  - Review policies and procedures
  - Consult with compliance / legal if not already involved and driving investigation
  - If a violation is identified, despite how defensible the hospital views it, notify the local regional CMS office

Self-Disclosure

Notification to CMS

- Notification should include: facts of incident, identification of root cause of violation and corrective actions taken to ensure repeat violation will not occur
- Make necessary corrective actions which may include modifying policies, conducting additional training, and potential disciplinary actions
- Get prepared for an unannounced on-site visit from CMS (or local state agency)
- Prompt remedial action may mitigate exposure to penalties and sanctions per OIG's Final Rule in 2016

CMS
CENTERS for MEDICARE & MEDICAID SERVICES

EPSTEIN BECKER GREEN

Responding to CMS Inquiry

CMS Inquiry

Survey

- Complaint driven process
- CMS works with local state agency to lead the hospital survey
- On-site review: conducts interviews, reviews policies, logs, signage, sample of other patient charts
- Be cooperative
- Often finds other deficiencies

CMS Inquiry

CMS Response

- If violation(s) identified, CMS will send a letter describing the EMTALA violations and other deficiencies
- CMS will give you an opportunity to explain and submit a corrective action plan (Form 2567)
- Present your reasonable position
  - If valid violation, clearly state corrective actions hospital has taken in response to violation (policy changes, process implementations, educational trainings)
  - If hospital does not view situation as a violation, provide additional facts or statements that may not appear in the record reviewed and explain why there was no EMTALA violation
- CMS will often accept the plan of correction without further action
- Hospital will often be monitored for a period of at least 90 days; surveyors may re-visit to ensure corrective actions

CMS Inquiry

Recent OIG Penalties

STATE	FINES	VIOLATIONS
Alabama	$80,000	Failed to provide medical screening exam
North Carolina	$200,000	Failed to provide medical screening exam, stabilization and appropriate transfer
South Carolina	$1.3 M	Failed to provide medical screening exam and stabilization
Georgia	$25,000	Failed to provide medical screening exam and stabilization
Florida	$20,000	Failed to provide medical screening exam and stabilization
Missouri	$360,000	Failed to provide medical screening exam and appropriate transfer

EPSTEIN BECKER GREEN

Key Takeaways

EMTALA Compliance

Key Takeaways and Best Practices

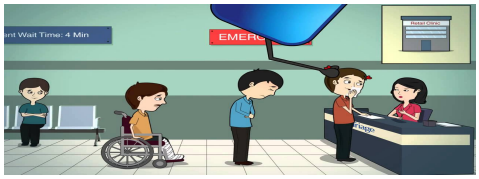
- Always do what is best for the patient
- Develop EMTALA specific policies and procedures
- Perform and DOCUMENT appropriate medical screening exams
- Use qualified medical personnel
- DOCUMENT stabilizing treatment
- Post appropriate signage in designated areas
- Maintain and review central patient log with required fields
- Train employees upon hire and annually thereafter that focuses on EMTALA

EPSTEIN BECKER GREEN

EMTALA Compliance

Key Takeaways and Best Practices

- Review on-call coverage to make sure it includes names of providers, not just practice groups
- Do not delay appropriate medical screening or treatment to obtain payment information

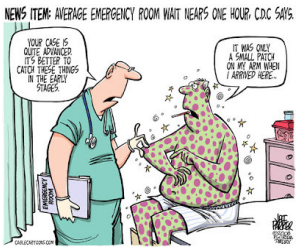


EPSTEIN BECKER GREEN

EMTALA Compliance

Key Takeaways and Best Practices

- Transfer appropriately – means, personnel, approval
- For transfers, DOCUMENT patient consent or physician certification
- Receive appropriate transfers
- Establish monitoring practices related to regular review of provider documentation to support an MSE, patient log, on-call practices, transfer documentation and overall ED workflow to identify any potentially vulnerable areas



Questions?

TMason@ebglaw.com