



Kim Stanger

Partner
208.383.3913
Boise
kcstanger@hollandhart.com

The On-Call Physician's Liability for Failing to Respond to Emergency Room Call

Insight — 05/31/2017

On-call physicians may not realize their potential exposure if they fail or decline to respond to a call from the hospital's emergency department. Failure to respond is a violation of the Emergency Treatment and Active Labor Act ("EMTALA") that may expose the physician to a \$50,000 fine and exclusion from Medicare or Medicaid as well as contract liability. It may also expose the hospital to a fine of \$50,000 and a lawsuit by the relevant patient or a hospital that receives an improper transfer.

EMTALA generally requires hospitals to provide an emergency screening examination and stabilizing treatment to a patient who comes to the hospital seeking emergency care. See 42 USC § 1395dd; 42 CFR § 489.24. EMTALA establishes the following penalties:

- (A) A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of ... not more than \$25,000 ... for each such violation.
- (B) Subject to subparagraph (C) [below], *any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, ... is subject to a civil money penalty of not more than \$50,000 for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in [Medicare or Medicaid]....*

Id. at § 1395dd(d)(1), *emphasis added*; see also 42 CFR §§ 1003.500(a)-(c) and 1003.510. EMTALA expressly states that the foregoing penalties apply when an on-call physician fails to respond to a call for assistance:

If, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians ... and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not be subject to a penalty under subparagraph (B). *However, the previous sentence shall not apply to the hospital or to the on-call physician who failed or refused to appear.*

42 USC § 1395dd(d)(1), *emphasis added.*

The CMS Interpretive Guidelines for EMTALA address at length the on-call physician's obligation to respond:

On-call Physician Appearance Requirements. [EMTALA] provides for enforcement actions against both a physician and a hospital when a physician who is on the hospital's on-call list fails or refuses to appear within a reasonable period of time after being notified to appear. Hospitals would be well-advised to make physicians who are on-call aware of the hospital's on-call policies and the physician's EMTALA obligations when on call.

If a physician is listed as on-call and requested to make an in-person appearance to evaluate and treat an individual, that physician must respond in person in a reasonable amount of time....

If it is permitted under the hospital's policies, an on-call physician has the option of sending a representative, i.e., directing a licensed non-physician practitioner as his or her representative to appear at the hospital and provide further assessment or stabilizing treatment to an individual.... It is important to note, however, that the designated on-call physician is ultimately responsible for providing the necessary services to the individual in the [emergency department], regardless of who makes the in-person appearance. *Furthermore, in the event that the treating physician disagrees with the on-call physician's decision to send a representative and requests the actual appearance of the on-call physician, then the on-call physician is required under EMTALA to appear in person. Both the hospital and the on-call physician who fails or refuses to appear in a reasonable period of time may be subject to sanctions for violation of the EMTALA statutory requirements....*

[I]f a physician:

- *is on a hospital's on-call list;*
- *has been requested by the treating physician to appear at the hospital; and*
- *fails or refuses to appear within a reasonable period of time;*

then the hospital and the on-call physician may be subject to sanctions for violation of the EMTALA statutory requirements....

If a physician who is on-call ... refuses or fails to appear at the hospital where he/she is directly on call in a reasonable period of time, then that physician as well as the hospital may be found to be in violation of EMTALA. Likewise, if a physician who is on-call typically directs the individual to be transferred to another hospital instead of making an appearance as requested, then that physician as well as the hospital may be found to be in violation

of EMTALA. ... [EMTALA] provides for the Office of the Inspector General (OIG) to levy civil monetary penalties or take other actions against hospitals or physicians for EMTALA violations. CMS refers cases it has investigated to the OIG when CMS finds violations that appear to fall within the OIG's EMTALA jurisdiction. *[EMTALA] specifically provides for penalties against both a hospital and the physician when a physician who is on-call either fails to appear or refuses to appear within a reasonable period of time. Thus, a hospital would be well-advised to establish in its on-call policies and procedures specific guidelines-- e.g., the maximum number of minutes that may elapse between receipt of a request and the physician's appearance for what constitutes a reasonable response time, and to make sure that its on-call physicians and other staff are aware of these time-sensitive requirements.*

If a physician on-call does not fulfill his/her on-call obligation, but the hospital arranges in a timely manner for another of its physicians in that specialty to assess/stabilize an individual as requested by the treating physician in the [emergency department], then the hospital would not be in violation of CMS' on-call requirements. However, *if a physician on-call does not fulfill his/her on-call obligation and the individual is, as a result, transferred to another hospital, then the hospital may be in violation of CMS's requirements and both the hospital and the on-call physician may be subject to enforcement action by the OIG under the Act.*

CMS State Operations Manual App. V—Interpretive Guidelines for 42 CFR 489.20(r)(2), *emphasis added.*

The OIG recently amended its regulations governing civil monetary penalties for EMTALA violations. In doing so, the OIG reaffirmed that on-call physicians who fail to timely respond to requests for assistance may be subject to the \$50,000 penalty as well as exclusion from Medicare and Medicaid:

[EMTALA] provides that any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including any physician on-call for the care of such an individual, and who negligently violates [EMTALA] of the Act may be penalized under ... the Act. The definition of "responsible physician" also provides for on-call physician liability. We proposed to revise the definition to clarify the circumstances when an on-call physician has EMTALA liability. An on-call physician who fails or refuses to appear within a reasonable time after such physician is requested to come to the hospital for examination, treatment, or transfer purposes is subject to EMTALA liability. This includes on-call physicians at the hospital where the individual presents initially and requests medical examination or treatment as well as on-call physicians at a hospital with specialized capabilities or facilities where the individual may need to be transferred. In addition, an on-call

physician at the hospital with specialized capabilities or facilities may violate EMTALA by refusing to accept an appropriate transfer.

81 FR 88348; see also 42 CFR §§ 1003.500 and 1003.510. The potential for exclusion from Medicare and Medicaid is especially severe because it would effectively prevent the physician from billing Medicare or Medicaid for any services, or practicing in, contracting with, or being employed by any entity that participates in Medicare or Medicaid, including any hospital. See OIG, Updated Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs, available at <https://oig.hhs.gov/exclusions/files/sab-05092013.pdf>.

As demonstrated by the foregoing, CMS and the OIG require that hospitals implement appropriate policies and take corrective action against on-call physicians who violate EMTALA. Per the CMS Interpretive Guidelines, the on-call physician's failure to respond justifies an "immediate jeopardy" citation against the hospital, which generally requires an immediate plan of correction and exposes the hospital to potential program exclusion. See Interpretive Guidelines, Outline of Data Tags. If a physician fails to respond and the hospital is forced to transfer the patient to another facility, EMTALA requires that the transferring hospital send to the receiving facility "the name and address of any on-call physician ... who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment," presumably so the receiving facility may report the physician to CMS and/or the OIG for adverse action. 42 CFR § 489.24(e)(2)(iii). The OIG's recent amendments to the Civil Monetary Penalties Law confirms that EMTALA penalties may be mitigated by a hospital's voluntary self-report and prompt action to correct EMTALA violations before CMS investigates a complaint. 42 CFR § 1001.520(a).

Aside from EMTALA liability, on-call physicians who fail to respond when called may also be subject to adverse action under any on-call services agreement. Such agreements generally require compliance with EMTALA and/or other applicable laws, and may have specific requirements for responding to call. The on-call physician may be liable to the hospital for resulting damages the hospital may incur, including but not limited to the cost of responding to EMTALA investigations, EMTALA penalties, and suits by individuals.

To summarize, both the hospital and the on-call physician face significant EMTALA and contract liability if an on-call physician fails to respond when requested, including \$50,000 or more in penalties and damages, and possible exclusion from Medicare or Medicaid. If the hospital concludes that an on-call physician has failed to respond when requested, it should take and document immediate corrective action or face greater liability. Prompt corrective action may stave off penalties to the hospital.

For questions regarding this update, please contact:

Kim C. Stanger

Holland & Hart, 800 W Main Street, Suite 1750, Boise, ID 83702

email: kcstanger@hollandhart.com, phone: 208-383-3913

This news update is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author. This news update is not intended to create an attorney-client relationship between you and Holland & Hart LLP. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.