Holland & Hart

Kim Stanger

Partner

208.383.3913

Boise

kcstanger@hollandhart.com

Diverting Ambulances and EMTALA

Insight — 10/01/2019

Hospitals—especially rural hospitals—may want to divert inbound ambulances to other facilities, especially when the patient requires services that the hospital may be unable to provide. However, improper diversions may violate the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 USC § 1395dd. EMTALA violations may result in penalties of $53,484 to $106,965, depending on the number of beds at the hospital. (42 CFR § 1003.510 and 45 CFR § 102).

EMTALA generally applies to individuals who come to the hospital's emergency department. In addition to those persons who actually arrive at the hospital, "comes to the emergency department" is defined to include an individual who:

> (3) Is in a ground or air ambulance owned and operated by the hospital for purposes of examination and treatment for a medical condition at a hospital's dedicated emergency department, even if the ambulance is not on hospital grounds[1] … [or]
> (4) Is in a ground or air nonhospital-owned ambulance on hospital property for presentation for examination and treatment for a medical condition at a hospital's dedicated emergency department. However, an individual in a nonhospital-owned ambulance off hospital property is not considered to have come to the hospital's emergency department, even if a member of the ambulance staff contacts the hospital by telephone or telemetry communications and informs the hospital that they want to transport the individual to the hospital for examination and treatment. *The hospital may direct the ambulance to another facility if it is in "diversionary status," that is, it does not have the staff or facilities to accept any additional emergency patients.* If, however, the ambulance staff disregards the hospital's diversion instructions and transports the individual onto hospital property, the individual is considered to have come to the emergency department.

(42 CFR § 489.24(b), emphasis added). Federal courts have held that this regulation prohibits a facility from diverting an inbound ambulance unless the hospital is on diversionary status. *Arrington v. Wong*, 237 F.3d 1066 (9th Cir. 2001); *Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia*, 524 F.3d 54 (1st Cir. 2008). That interpretation is supported by the current CMS interpretive guidelines, which state:

> *If an individual is in an ambulance, regardless of whether the ambulance is owned by the hospital, a hospital may divert individuals when it is in "diversionary" status because it does not have the staff or facilities to accept any additional emergency patients at that time.*

> However, if the ambulance is owned by the hospital, the diversion of the ambulance is only appropriate if the hospital is being diverted pursuant to community-wide EMS protocols. Moreover, if any ambulance (regardless of whether or not owned by the hospital) disregards the hospital's instructions and brings the individual on to hospital campus, the individual has come to the hospital and the hospital has incurred an obligation to conduct a medical screening examination for the individual.

(CMS State Operations Manual, Appendix V – Interpretive Guidelines – Responsibilities of Medicare Participating Hospitals in Emergency Cases (Rev. 191, 07-19-19) at Tag A2406, emphasis added). Neither the regulations nor the interpretive guidelines define "diversionary status" other than to note that a hospital may go on diversionary status "because it does not have the staff or facilities to accept any additional emergency patients at that time." (*Id.*). It is not entirely clear whether a hospital may go on diversionary status for some conditions but not others, or whether some hospital departments or units may go on diversionary status while others do not. To be safe, the hospital should adopt and follow policies for diversion situations, clearly document when and why the hospital is on diversionary status, and notify ambulance services of its status.

Although a hospital that is not on diversionary status may be prohibited from "diverting" the inbound ambulance, hospital personnel may still explain to the ambulance crew that the patient needs services the hospital cannot provide and, therefore, it is in the best interest of the patient to take them elsewhere. In so doing, the hospital should ensure that the ambulance crew understands that the hospital is not diverting the ambulance or refusing to accept the patient; instead, the hospital is simply recommending that the patient be taken directly to a more appropriate facility to expedite needed care. The hospital should document its discussion in case there is a dispute as to the conversation. Of course, if the ambulance comes to the hospital, the hospital must provide stabilizing treatment and/or an appropriate transfer to comply with EMTALA.

---

[1] On the other hand,

> an individual in an ambulance owned and operated by the hospital is not considered to have "come to the hospital's emergency department" if—
> (i) The ambulance is operated under communitywide emergency medical service (EMS) protocols that direct it to transport the individual to a hospital other than the hospital that owns the ambulance; for example, to the closest appropriate facility. In this case, the individual is considered to have come to the emergency department of the hospital to which the individual is transported, at the time the individual is brought onto hospital property;
> (ii) The ambulance is operated at the direction of a physician who is not employed or otherwise affiliated with the hospital that owns the ambulance.

(42 CFR § 489.24(b), definition of "*comes to the emergency department*").

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 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. 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.