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May Nurses Perform EMTALA Screening Exams?

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The federal Emergency Medical Treatment and Active Labor Act (EMTALA) generally requires that hospitals provide an appropriate medical screening exam (MSE) to individuals who come to the hospital seeking care to determine if the individual has an emergency medical condition. (42 USC § 1395dd(a); 42 CFR § 489.24(a)). CMS regulations require that the MSE must be conducted by a “qualified medical person” (QMP). This client alert addresses whether and under what circumstances a registered nurse may perform the required MSE.

1. QMPs in General. There are at least three requirements for a QMP under EMTALA: (i) he or she must be qualified to perform the MSE; (ii) the hospital's governing body must approve the clinician or class of clinicians as qualified to perform MSEs in the hospital bylaws, rules and regulations, or another governing body-approved document; and (iii) the MSE must be within the clinician's scope of practice under applicable law. The EMTALA regulations state:

In the case of a hospital that has an emergency department, if an individual ... comes to the emergency department ..., the hospital must—

(i) Provide an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition exists. *The examination must be conducted by an individual(s) who is determined qualified by hospital bylaws or rules and regulations and who meets the requirements of § 482.55¹ of this chapter concerning emergency services personnel and direction...*

(42 CFR § 489.24(a)(1), emphasis added). The relevant CMS Interpretive Guidelines explain:

The MSE must be conducted by an individual(s) who is determined qualified by hospital bylaws or rules and regulations and who meets the

requirements of §482.55 concerning emergency services personnel and direction. The designation of the qualified medical personnel (QMP) should be set forth in a document approved by the governing body of the hospital. If the rules and regulations of the hospital are approved by the board of trustees or other governing body, those personnel qualified to perform the medical screening examinations may be set forth in the rules and regulations, or the hospital bylaws. It is not acceptable for the hospital to allow informal personnel appointments that could frequently change.

(CMS, *State Operations Manual Appendix V – Interpretive Guidelines – Responsibilities of Medicare Participating Hospitals in Emergency Cases* (rev'd 7-19-19) at § 489.24(a)(1)(i)), available at https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_v_emerg.pdf (“Interpretive Guidelines”). Furthermore:

A hospital must formally determine who is qualified to perform the initial medical screening examinations, *i.e.*, qualified medical person. *While it is permissible for a hospital to designate a non-physician practitioner as the qualified medical person, the designated non-physician practitioners must be set forth in a document that is approved by the governing body of the hospital.* Those health practitioners designated to perform medical screening examinations are to be identified in the hospital bylaws or in the rules and regulations governing the medical staff following governing body approval.

(*Id.* at Part I, Investigative Procedures, emphasis added).

Although the regulations and Interpretive Guidelines do not clearly define which practitioners or clinicians may be designated as a QMP, the fact that the person must be a “qualified” medical person suggests that just being designated in hospital policies is not enough: they must also be qualified to perform the exam, including having the skills and training necessary to properly perform the exam and such exam must be within their scope of practice. For example, 42 CFR § 489.24(b) states:

A woman experiencing contractions is in true labor, unless a physician, certified

nurse-midwife, or other qualified medical person acting within his or her scope of practice as defined in hospital medical staff bylaws and State law, certifies that, after a reasonable time of observation, the woman is in false labor.

(emphasis added). In the context of the COVID-19 pandemic, CMS confirmed that “the QMP must be performing within the scope of their state practice act, and approved by the Hospital’s Governing Body to perform MSEs.” (CMS, QSO-20-15-Hospital/CAH/EMTALA Rev’d (3/30/20)).

2. Nurses as QMPs. The Interpretive Guidelines and additional CMS commentary confirm that registered nurses may qualify as QMPs for certain types of MSEs, but not necessarily for all MSEs. For example, the Interpretive Guidelines state:

A hospital may, if it chooses, have protocols that permit a QMP (e.g., registered nurse) *to conduct specific MSE(s) if the nature of the individual’s request for examination and treatment is within the scope of practice of the QMP* (e.g., a request for a blood pressure check and that check reveals that the patient’s blood pressure is within normal range).

(Interpretive Guidelines at § 489.24(c), emphasis added). CMS’s EMTALA FAQs state,

Q: Can the MSE be conducted by a Registered Nurse (RN)?

A: Yes. MSEs must be conducted by qualified personnel, which may include physicians, nurse practitioners, physician’s assistants, or RNs [i] trained to perform MSEs, [ii] acting within the scope of their state licensure law, and [iii] approved by the hospital’s governing body....²

(CMS, *Frequently Asked Questions for Hospitals and Critical Access Hospitals regarding EMTALA* (4/30/20), available at <https://www.cms.gov/files/document/frequently-asked-questions-and-answers-emptala-part-ii.pdf>, emphasis added (“CMS EMTALA FAQs”); see also CMS, QSO-20-215 Hospital/CAH/ EMTALA Rev’d (3/30/20) (“MSEs must be conducted by qualified personnel, which may include physicians, nurse practitioners, physician’s assistants, or RNs trained to perform MSEs and acting within the scope of their State Practice Act.”)).

a. Scope of Practice. Hospitals and nurses assigned to

perform MSEs must ensure the performance of any MSE is within the scope of the nurse's practice and licensure under the relevant state's nursing practices act and associated regulations. Many state medical and/or nurse practices acts prohibit registered nurses (as opposed to advanced practice registered nurses) from diagnosing or treating conditions without appropriate practitioner direction. Some states have adopted a rather vague decision-making model to determine a nurse's scope of practice, which model may be similar to the following:

Decision-Making Model.

The decision-making model is the process by which a licensed nurse evaluates whether a particular act is within the legal scope of that nurse's practice and determines whether to delegate the performance of a particular nursing task in a given setting....

a. Determining Scope of Practice.

To evaluate whether a specific act is within the legal scope of nursing practice, a licensed nurse shall determine whether:

- i. The act is expressly prohibited by the Nursing Practice Act, or the act is limited to the scope of practice of advanced practice registered nurses or to licensed registered nurses, or the act is prohibited by other laws;
- ii. The act was taught as a part of the nurse's educational institution's

required
curriculum and
the nurse
possesses
current clinical
skills;

iii. The act is
consistent with
standards of
practice
published by a
national
specialty nursing
organization or
supported by
recognized
nursing literature
or reputable
published
research and the
nurse can
document
successful
completion of
additional
education
through an
organized
program of study
including
supervised
clinical practice
or equivalent
demonstrated
competency;

iv. Performance
of the act is
within the
accepted
standard of care
that would be
provided in a
similar situation
by a reasonable
and prudent
nurse with
similar education
and experience
and the nurse is
prepared to

accept the consequences of the act.

(IDAPA 24.34.01.200.01). No matter the form of the statute, allowing or requiring nurses to perform MSEs outside the scope of their licensure may subject the nurse to adverse licensure action, may expose the hospital to malpractice or negligence *per se* claims if there is an adverse outcome, and may create EMTALA exposure if the hospital fails to provide an appropriate MSE.

b. Qualified to Perform the MSE. In addition to acting within the scope of the nurse's licensure, the nurse must be qualified to perform the exam, *i.e.*, the nurse must be “trained to perform [the relevant] MSEs...” This is consistent with the conditions of participation for critical access hospitals, which state:

A registered nurse *with training and experience in emergency care* can be utilized to conduct specific medical screening examinations only if—

...

(ii) The nature of the patient's request for medical care is within the scope of practice of a registered nurse and consistent with applicable State laws and the CAH's bylaws or rules and regulations.

(42 CFR § 485.618(d), emphasis added). Ensuring appropriate qualification—including appropriate training—is not just a regulatory requirement; it is essential to ensuring the hospital provides quality patient care and reduces malpractice risk.

c. Specific MSEs and Protocols. As set forth above, CMS generally takes the position that “[a] hospital may ... *have protocols* that permit a QMP (*e.g.*, registered nurse) to conduct *specific MSE(s)*” within the scope of the nurse's licensure. (Interpretive Guidelines at § 489.24(c), emphasis added; see also 42 CFR 485.618(d)(2) (“A registered nurse with training and experience in emergency care can be utilized to conduct *specific medical screening examinations...*”, emphasis added). For example, the Interpretive Guidelines suggest that a registered nurse may appropriately perform the MSE if the nurse responds to “a request for a blood pressure check and that check reveals that the patient's blood pressure

is within normal range” (Interpretive Guidelines at § 489.24(c)); and, depending on applicable state scope-of-practice law and hospital bylaws, a physician, certified nurse-midwife, or other QMP may “certif[y] that, after a reasonable time of observation, [a] woman is in false labor.” (42 CFR § 489.24(b), definition of labor). Registered nurses are likely not qualified or licensed to perform all MSEs, and hospitals should establish protocols that identify the types and circumstances under which nurses may perform MSEs, which may vary depending on the department and training of the type of nurse. As one author wrote,

CMS's general approach to non-physician screening is to evaluate the system on a number of elements:

1. The level of non-physician is approved for each individual Department authorized to perform medical screening, such as emergency department, obstetrics, newborn nursery, employee health, etc., by the Board or in bylaws approved by the Board;
2. The scope of providing an MSE is within the scope of licensure for the individual involved, under state standards;
3. The individual non-physician functions under medically approved protocols;
4. The protocols define the limits of the non-physician's practice in providing an MSE and define objective criteria as to when the MSE must be performed by a physician; and
5. Individuals providing non-physician MSEs are properly qualified, have appropriate competencies, are trained for the role, and are reviewed for quality on a

regular basis.

(J. Moffatt, The EMTALA Answer Book at Q 3:37 (2023)). Defining permissible MSEs and establishing protocols for the MSEs will help ensure the nurse stays within the scope of her or his license as well as help ensure patients receive care with appropriate physician or practitioner supervision or direction.

3. Physician Certification for Transfers. Even if a registered nurse (or other non-physician practitioner) may appropriately perform an MSE, EMTALA requires physician certification for a transfer of a patient with an unstabilized emergency medical condition unless the transfer is made at the patient's request, or at the request of the patient's legally responsible representative, after being informed of the hospital's obligations and the risks of transfer. (42 CFR § 489.24(e)(1)(ii)(B)-(C)). Per the Interpretive Guidelines:

a physician must certify that the medical benefits to the individual with the EMC that could reasonably be expected from provision of appropriate treatment at another hospital outweigh the increased risks that result from being transferred.... Under certain circumstances qualified medical personnel other than a physician may sign the certification. A qualified medical person (QMP) may sign the certification of benefits versus risks of a transfer only after consultation with a physician who agrees with the transfer. The physician must subsequently countersign the certification. The physician's countersignature must be obtained within the established timeframe according to hospital policies and procedures. Hospital by-laws or rules or regulations must specify the criteria and process for granting medical staff privileges to QMPs, and, in accordance with the hospital or CAH Conditions of Participation, each individual QMP must be appropriately privileged.

(Interpretive Guidelines at § 489.24(e)).

Conclusion. If a hospital decides to allow a registered nurse to perform MSEs, the hospital and nurse should (i) review the hospital's bylaws, policies, rules, or other governing body-approved documents to confirm that they identify such nurses as QMPs for the specific types of MSEs he or she is asked to perform; (ii) ensure that the MSE is within the scope of

the nurse's license under applicable law; (iii) ensure that the hospital has appropriate protocols in place to direct the nurse's performance of the MSE, including criteria for when a physician or other practitioner must conduct or conclude the MSE; (iv) ensure the nurse is qualified by training and experience to perform the relevant MSE; and (v) document and periodically review the nurse's competency and performance. For everything outside the permissible scope, the nurse should call on other QMP practitioners to conduct or conclude the MSE.

¹ 42 CFR § 482.55 establishes the conditions of participation for hospitals providing emergency services, including:

Standard: Personnel

- (1) The emergency services must be supervised by a qualified member of the medical staff.
- (2) There must be adequate medical and nursing personnel qualified in emergency care to meet the written emergency procedures and needs anticipated by the facility.

² During the COVID-19 public health emergency, CMS noted that “Hospitals may request a waiver to allow MSEs to be performed by other personnel, including trained RNs not previously approved by the governing body to perform MSEs.” (CMS EMTALA FAQs). Hospitals should confirm that any current waiver authority is available before relying on such a waiver.

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