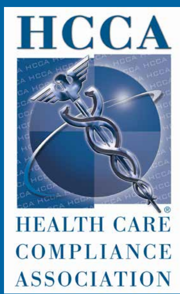

# Compliance TODAY

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## From the courtroom to Compliance — one lawyer's journey and the lessons learned

an interview with Tracy Carlson Ivers
Compliance and Legal Analyst, Masonicare

*See page* 16

**BONUS**

Research Study Downloadable Worksheets

*See page* 65

**25**
The Two-Midnight Rule: Past, present, and future
Janice Anderson and Sara Iams

**29**
Keys to EMTALA compliance
Kim C. Stanger

**35**
Drug diversion in healthcare facilities, Part 1: Identify and prevent
Erica Lindsay

**40**
Recent corporate integrity agreements: Best practices for compliance
Wade Miller, Kimyatta McClary, and Amy Bailey

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by Kim C. Stanger

# Keys to EMTALA compliance

- » Violations of EMTALA may result in significant fines and penalties for hospitals and physicians. Serious violations may result in termination of the hospital's Medicare provider agreement.
- » EMTALA applies to all hospitals that participate in Medicare and their affiliated physicians; however, EMTALA requirements differ depending on the type of hospital.
- » Understanding when EMTALA applies is crucial to avoiding fines and penalties.
- » Hospitals that violate EMTALA are not generally required to report themselves, but they should take steps to mitigate their liability if a violation is discovered.
- » A provider is unlikely to face a significant EMTALA penalty if it does what is best for the patient and documents its actions.

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Violations of the Emergency Medical Treatment and Active Labor Act, also known as EMTALA (42 USC 1935dd), may result in significant fines and penalties for hospitals and physicians. Physicians who violate EMTALA may be fined up to $50,000 per violation. Hospitals that violate EMTALA may be fined up to $50,000 per violation depending on their number of beds. In addition, hospitals may be sued by those who have been damaged by the hospital's violation, including injured patients or other medical facilities that provided care in the wake of a hospital's failure to do so. Serious violations may result in termination of the hospital's Medicare provider agreement.

Stanger

## EMTALA requirements

EMTALA applies to all hospitals that participate in Medicare and their affiliated physicians; however, EMTALA requirements differ depending on the type of hospital. If a hospital has a dedicated Emergency Department and a person comes to the hospital seeking emergency care, the hospital must provide an appropriate medical screening examination. A "dedicated" Emergency Department includes a licensed emergency room or department; a department that is held out to the public as a place that provides emergency care without requiring a prescheduled appointment (e.g., an Urgent Care center, labor or delivery unit, or mental health unit); or a department in which at least one-third of its outpatient visits for emergency care during the prior year were provided without prescheduled appointments. If the exam reveals an emergency medical condition, the hospital must provide either stabilizing treatment or an appropriate transfer of the patient to another facility. Participating hospitals with specialized capabilities (including specialty hospitals without a dedicated Emergency Department) must accept the transfer of an emergency patient. Hospitals must fulfill their EMTALA obligations, even if the patient cannot pay.[1]

## Complying with EMTALA

The following summarizes key EMTALA compliance issues as well as tips for avoiding or minimizing EMTALA liability.[2]

**Know when EMTALA applies**

EMTALA is generally triggered when a person seeking emergency care comes to the hospital, including the hospital's main campus and hospital-owned and operated buildings within 250 yards of the hospital. EMTALA also likely applies to a hospital's off-campus Urgent Care centers or similar facilities that operate as a department of the hospital if patients receive emergency care at the facility without prescheduled appointments. EMTALA does *not* apply to persons who: (1) have already been admitted as inpatients, or (2) have already begun to receive outpatient services. Also, EMTALA does not apply to persons who present to the Emergency Department for prescheduled tests or preventive care, such as flu shots or immunizations. In such situations, hospitals should ensure that the documentation supports the conclusion that EMTALA does not apply.

EMTALA is generally triggered when a person seeking emergency care comes to the hospital…

**Beware ambulances**

EMTALA applies if a person is in an ambulance owned and operated by the hospital, even if it has not arrived at the hospital. EMTALA also prohibits hospitals from diverting any inbound ambulance unless the hospital is on diversionary status (i.e., it lacks the staff or facilities to accept additional emergency patients). Hospitals should clearly document when they are on diversionary status and the basis for such. If the hospital is not on diversionary status, it may discuss with ambulance personnel whether the person's condition requires specialized care available at another facility, but the hospital should make it clear and document that it is not diverting the ambulance and that it will provide care within its capability if the person is brought to the hospital. Even if the hospital is on diversionary status, EMTALA applies if the person is brought to the hospital.

**Conduct and document an appropriate medical screening examination**

If a person presents at the hospital for emergency care, the hospital must conduct an appropriate medical screening exam that is reasonably calculated to identify an emergency medical condition. An "emergency medical condition" is generally "a medical condition manifesting itself by acute symptoms of sufficient severity… such that the absence of immediate medical attention could reasonably be expected to… plac[e] the health of the individual… in serious jeopardy."[3]

The scope of the exam depends on the person's presenting symptoms and the hospital's capabilities. It may range from simple questioning sufficient to confirm clearly non-emergent conditions, to performance of ancillary tests or specialty services for complex or serious matters. The medical record should reflect ongoing monitoring appropriate to the person's symptoms until it is determined whether the person has an emergency medical condition. If an appropriate exam concludes that there is no emergency medical condition, then the hospital's EMTALA obligation ends. On the other hand, if the exam identifies an emergency medical condition, then the hospital is obligated to provide stabilizing treatment or an appropriate transfer. Accordingly, it is critical that the records document the performance of an appropriate exam, as well as the conclusions of the exam.

**Use qualified personnel to conduct the examination**

The medical screening exam must be performed by persons who have been designated as qualified to perform appropriate screening exams ("qualified medical personnel") in a document approved by the hospital's governing body. Different categories of providers may be authorized to perform exams for different types of patients. For example, a nurse or nurse midwife may be designated as a qualified medical person to rule out labor, if consistent with state scope-of-practice laws.

**Provide and document stabilizing treatment**

If the medical screening exam reveals a potential emergency medical condition, the hospital must provide either stabilizing treatment within its capability and capacity (including ancillary services and on-call specialists available to the hospital) or an appropriate transfer to another facility. A person is deemed stabilized if "no material deterioration of the condition is likely… to result from or occur during transfer… or, with respect [to a woman in labor], that the woman has delivered the child and the placenta."[4]

According to CMS, a person is deemed "stable" for discharge if: (1) the emergency medical condition that caused the individual to present to the hospital is resolved even though the underlying medical condition may persist, and (2) "the individual has reached the point where his/her continued care… could be reasonably performed as an outpatient or later as an inpatient, provided the individual is given a plan for appropriate follow-up care…."[5]

The hospital's EMTALA obligations end when the person is stabilized or admitted in good faith as an inpatient. On the other hand, if the person is not stabilized, the hospital's EMTALA obligations continue until the person is stabilized, admitted as an inpatient, or appropriately transferred. It is therefore vital to document that an emergency patient is "stable" before they are discharged; otherwise, the hospital must continue to provide care or conduct and document an appropriate transfer.

It is therefore vital to document that an emergency patient is "stable" before they are discharged; otherwise, the hospital must continue to provide care or conduct and document an appropriate transfer.

**Obtain patient consent or physician certification to transfer or discharge an unstable patient**

A hospital may not discharge or transfer an unstable patient unless either: (1) the person requests the discharge or transfer after being informed of his/her EMTALA rights; or (2) a physician certifies in writing that the benefits of discharge or transfer outweigh the risks. The physician's certification must be express and state the reasons for the transfer. The certification must be made by a physician, not a mid-level provider, nurse, or other practitioner. If the physician is not present, a qualified medical person may sign the certification, but only after consulting with the physician and the physician must countersign. Of course, EMTALA would not require these steps if the person's emergency medical condition had ended or the patient was stabilized, but it is prudent to obtain the certification for all transfers in case CMS questions whether the patient was stabilized.

**Provide and document an appropriate transfer**

When transferring an unstable patient, the hospital must: (1) provide treatment to minimize the risks during transfer; (2) ensure the receiving facility has agreed to receive the transfer; (3) send relevant medical records to the receiving facility; and (4) use qualified personnel and equipment to effect the transfer. Transfers by private vehicle are not prohibited, but they are suspect. If the patient insists on transfer by car, the hospital should document the patient's informed decision.

**Document a patient's refusal of care**

EMTALA does not require care contrary to the wishes of a competent patient or their authorized representative. If the patient refuses care otherwise required by EMTALA, the statute requires that the hospital document the refusal in writing. If possible, the hospital should obtain the patient's written and signed request or refusal for care. The documentation should identify the treatment offered; confirm that the risks, benefits, and the hospital's EMTALA obligations were explained to the patient; and document the patient's informed refusal or request for alternative care.

**Do not delay or discourage care**

EMTALA prevents hospitals from delaying the required care while it obtains information about payment. Providers may engage in reasonable registration processes, including asking about insurance, as long as it does not delay care, but hospitals may not seek preauthorization before initiating care or discourage patients from receiving appropriate care.

**Maintain required signs, logs, lists, and policies**

EMTALA requires hospitals to post signs explaining patients' EMTALA rights in Emergency Departments and similar locations. They must maintain a log of persons who came to the Emergency Department seeking assistance, and document whether the person was treated, admitted, transferred, or discharged. The log is often the first place surveyors go when reviewing EMTALA compliance; it behooves hospitals to periodically review the log to ensure that it is being properly maintained and reflects compliant practices.

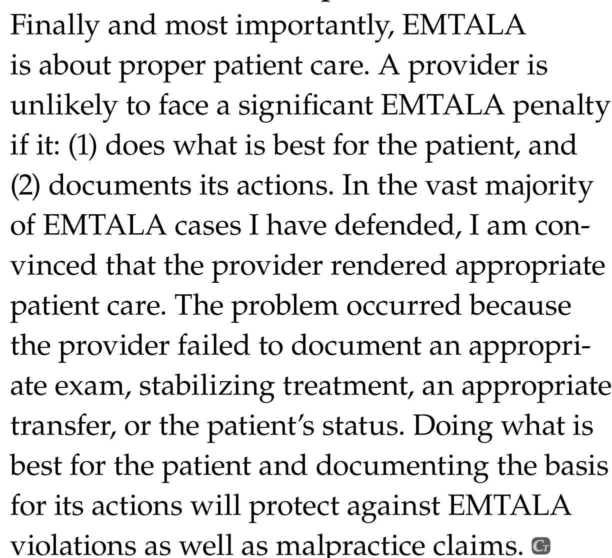
Hospitals must maintain a list of providers who are on call for emergency services. Hospitals have a great deal of flexibility in how they manage their on-call list, but they should ensure that providers comply with their on-call duties to minimize the hospital's liability if the provider fails to respond. Among other things, hospitals that transfer a patient because of an on-call physician's failure to respond must notify the receiving facility of the name of the physician. Finally, hospitals should implement written EMTALA policies and periodically train personnel concerning their EMTALA obligations. Having written policies and documented training will both help avoid EMTALA violations and mitigate sanctions if a violation occurs.

**Receive transfers if you have specialized capabilities**

The foregoing requirements generally apply to hospitals with dedicated Emergency Departments; however, all participating hospitals must accept transfers of emergency patients if the hospital has specialized capabilities. Failure to do so is an EMTALA violation. A hospital may refuse to accept the transfer if: (1) it lacks specialized capabilities (i.e., the transferring hospital can provide the same level of care as the receiving hospital); and (2) if the patient was admitted as an inpatient at the transferring facility. Hospitals seeking to transfer an emergency patient may want to avoid admitting the patient before the transfer.

**Respond promptly to potential violations**

If a potential EMTALA violation occurs, respond immediately. Hospitals that have received an improper transfer must report the violation to the appropriate state or federal agencies. Hospitals that violate EMTALA are not generally required to report themselves, but they should take steps to mitigate their liability if a violation is discovered. Among other things, they should immediately investigate and document the facts while the matter is still relatively fresh in witnesses' minds, including key facts concerning the care provided and patient's status (e.g., whether the emergency condition was resolved or the patient was stabilized). They should correct or supplement documentation through appropriate medical record entries. If warranted, they should take corrective action against providers or employees who have violated policies, modify policies and procedures, and/or train personnel to avoid recurrences. Prompt corrective action may help avoid EMTALA penalties.



**Do what is best for the patient**

Finally and most importantly, EMTALA is about proper patient care. A provider is unlikely to face a significant EMTALA penalty if it: (1) does what is best for the patient, and (2) documents its actions. In the vast majority of EMTALA cases I have defended, I am convinced that the provider rendered appropriate patient care. The problem occurred because the provider failed to document an appropriate exam, stabilizing treatment, an appropriate transfer, or the patient's status. Doing what is best for the patient and documenting the basis for its actions will protect against EMTALA violations as well as malpractice claims.

1. Centers for Medicare & Medicaid Services (CMS): Medicare Program, Emergency Medical Treatment and Labor Act (EMTALA): Applicability to Hospital Inpatients and Hospitals With Specialized Capabilities. 42 CFR 489.24(a-g). February 2, 2012. Available at http://1.usa.gov/1xk622v
2. CMS: State Operations Manual, Appendix V, EMTALA Interpretive Guidelines for 489.24(a)(i). Available at http://go.cms.gov/1DCXN3m
3. 42 CFR 489.24(b), definition of "emergency medical condition."
4. 42 CFR 489.24(a)(ii) and (d), definition of "stabilized."
5. *Ibid.*, *Ref* #2: Interpretive Guidelines at 489.24(d)(1)(i).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