

“Some (Minor) Relief In Sight: Secretary Issues 1135 Waiver of EMTALA’s Medical Screening and Transfer Requirements,” (March 2020).

Articles

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As COVID-19 cases continue to rapidly rise across the country, hospitals are increasingly likely to be faced with impossible triage choices. Consider two examples:

- Should a hospital send a “less-emergent” individual to another center without an EMTALA-required medical screening exam? Or should hospital staff keep the patient waiting for hours in their ED because they are unable to appropriately triage and treat all individuals who walk in doors because their resources are being overwhelmed?

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- Should a hospital transfer a non-stabilized patient in contravention of EMTALA? Or, should it keep (yet not adequately treat) that patient because there aren't enough resources to stabilize the patient prior to transfer?

Fortunately, solutions are emerging for hospitals based on recent changes in the law inspired by COVID-19.

Medical Screening Exam Solution: Direct or relocate individuals to other locations in compliance with your state's emergency preparedness plan.

Effective March 15, 2020, but retroactively effective to March 1, 2020, the Secretary of the Department of Health and Human Services issued a Section 1135 waiver of EMTALA sanctions for hospitals that must direct or relocate individuals prior to a medical screening exam. To qualify, hospitals must follow their state's guidance, act in good faith, and not discriminate on the basis of the individual's source of payment or ability to pay.

Transfer Solution: Transfer non-stabilized patients *if* the transfer is required because of the COVID-19 pandemic.

The Section 1135 waiver also removed the possibility of EMTALA sanctions for hospitals that must transfer patients prior to full stabilization, as long as "the transfer is necessitated by the circumstances of the declared Federal public health emergency for the COVID-19 pandemic." Again, the hospital must act in good faith.

Suggestions:

1. If your hospital needs further relief from certain federal regulations, consider making your waiver request. The Secretary has broad authority to waive various regulatory requirements with Section 1135 waivers. States and hospitals can both request additional waivers if they are being overrun and need additional support from the government, or relief related to certain regulatory



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requirements. Florida was the first state to request such a waiver (its request was [granted](#)), and CMS is expecting more such requests.

2. Document your (likely evolving) policies and procedures, and your compliance with them, if you are directing and relocating patients without a medical screening exam or transfer non-stabilized patients.

WTO will continue to evaluate changes to the law and provide functional guidance for healthcare clients as these issues continue to develop amid the spread of—and response to—COVID-19.

For more information, contact WTO partners [Joe Farchione](#) or [Joel Neckers](#).