

PUBLICATION

Why EMTALA is Worth Another Look: EMTALA Checklist [Ober|Kaler]

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Part Two of a Three-part Series

Part one of this series discussed the increase in uninsured patients and the related rise in EMTALA enforcement.

With EMTALA enforcement on the rise, hospitals would be wise to take the temperature of their EMTALA compliance. Below are five tips to verify that your hospital is EMTALA compliant.

Tip 1: Revisit Your Policies

It is time to dust off your policies and make sure they are up to date and understandable to the front line clinical personnel who need to follow policy. Although most hospitals maintain CMS-required EMTALA policies, consider taking a second look at your policies from the vantage point of busy and overloaded emergency department staff and physicians. Also, remember to involve your Board and medical staff in key decisions and policies, such as on-call services and screenings.

- *Definitions.* EMTALA legal framework includes rather specific language and definitions. Often times, EMTALA policies become bogged down in definitions, making the policy difficult to understand. For example, EMTALA uses terms such as *prudent layperson observer* and *comes to the emergency department* which have specific legal meaning. On the other hand, the emergency department staff needs to understand certain definitions. For example, staff should differentiate between the definition of *active labor* under EMTALA and the clinical definition.
- *On-Call Services.* EMTALA requires that hospitals arrange for emergency call and back-up arrangements. Hospitals must maintain an on-call list. On-call services are usually set through the hospital's medical staff bylaws and/or medical department policy and procedure. The Board is ultimately responsible to ensure those policies meet the hospital's EMTALA on-call responsibilities.
- *Screening Services and Stabilization.* Your policies should include who can conduct screening, detailed screening protocols and the process for reassessing patients after initial screenings. Your policies should address that screenings must be conducted by a physician or *qualified medical personnel* approved by the Board. Documentation of the screening and uniformity of screenings regardless of ability to pay should also be addressed in your policies. Policies should also establish conduct and timeframes for stabilization of patients as obligated under EMTALA.
- *Patient Transfers.* Policies should include the process and patients' rights for transfers. Your policies should establish requirements for physician certifications and medical record documentation for transfers. Hospitals, especially those with specialty capacities, should include processes for transfers into the hospital. Issues such as transfers to medical records and patient consent should be addressed. Policies should also address refusal for emergencies transfers and state-specific transfer requirements.
- *Reporting of Violations and Whistleblowers.* Ensure that your policies prohibit retaliation against whistleblowers that make reports. Create a method to internally report and address potential violations and timely conduct investigations. Centralizing reporting will ensure that the matter has been fully investigated before you reach out to the government. Consider the proper people in your

hospital and legal counsel before making decisions to self-report or to report another hospital for EMTALA violations.

- *Update with Changes in Law.* Finally, remember to update your policies based on any changes in the law or accreditation standards. Changes may come soon.

Tip 2: Training Your Staff

The key to a successful EMTALA program is education. A well-written EMTALA policy is only useful if your staff follows it. Often frontline staff members are responsible for EMTALA compliance. Although most members of an emergency department understand the general concept of EMTALA, an annual refresher course is suggested. Staff members will need to make quick decisions in real life situations on screening, stabilizing and transferring. This course can walk through close calls and difficult hypothetical situations to provide a more solid base for staff's EMTALA knowledge. New staff members and residents joining the emergency department who may not have the same level of understanding about EMTALA obligations should be trained on your hospital's policies. Even those with a solid base must use their knowledge while under the pressures of working in a fast-paced environment. The staff and physicians must understand subtle nuances. With emergency departments filled to capacity with patients, understanding the intersection of the hospital's EMTALA obligations and department diversion can be the difference between compliance and a violation.

Tip 3: Designate a Responsible Department and Work with Legal Counsel on Investigations and Reporting

EMTALA complaints can come from many sources, including other hospitals, patients, family members and ambulance companies. These complaints often turn into on-site state surveys with CMS and OIG oversight. Proper placement of the individuals responsible for compliance sends a strong message to enforcement agencies. Consider including clinical leadership as the responsible department when interfacing with state surveyors during investigations.

Designate a department to work with legal counsel on corrective action plans when deficiencies are found through internal investigations or by state surveyors or CMS. Legal counsel will also play an important role in guiding investigations and interactions with agencies. Investigations at the direction of legal counsel, especially outside counsel, will preserve privilege, especially since EMTALA provides for the potential for a private cause of action and for legal standard in malpractice cases. Also, consider centralized reporting and a process for self-reporting of EMTALA violations, which includes involving legal counsel as part of the decision making process.

Tip 4: Audit for Compliance

When we think of EMTALA, the concept of auditing might not come to mind. Auditing can provide a picture of your compliance and provide you with the ability to make corrections before violations occur. Some areas to consider during your audit are as follows:

- Physically walk through the hospital campus to determine emergency room flow, vulnerable areas and signage
- Review transfer policies and arrangements
- Audit attempts to avoid long delays in the emergency room and review triage and screening protocols and training
- Review on-call polices and contracts to ensure the emergency department has adequate coverage

- Review Bylaws related to who can conduct screens
- Ensure that staff members are not requesting payment prior to screening patients
- Review transfer forms and logs
- Conduct a medical record audit for screening and transfers
- Confirm whistleblower protections
- Review internal reporting chain
- Review training materials and documentation

Tip 5: Consider Integrating Discussions into Your Compliance Program

Generally, the clinical, risk management and/or accreditation departments of hospitals are responsible for EMTALA issues. Consider integrating EMTALA compliance audits into the hospital's overall compliance work plan. With the potential for Medicare contract termination, Medicare exclusions and civil monetary penalties from CMS and the OIG, EMTALA compliance should become part of your compliance discussion. Routine EMTALA compliance audits should be reported to your compliance committee as part of your compliance program, ensuring accountability for correction of deficiencies and training. Integrating EMTALA into the compliance plan ensures that the Board has oversight of the patient safety, quality and compliance aspects of EMTALA.

CMS has issued a proposed rule related to EMTALA obligations. Part three of this three-part series will review the regulatory changes CMS is considering.