

# PUBLICATION

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## Will CMS Consider Your Institution to Be a Hospital? Guidance on the "Primarily Engaged In" Standard

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**Recent guidance from CMS suggests that some hospitals, and particularly specialty hospitals that provide mostly outpatient care, may soon find themselves the focus of surveyors' scrutiny. In early September, CMS issued guidance addressing what it means to be "primarily engaged in" the provision of inpatient services, a Medicare requirement for a facility's payment as a hospital. That guidance is found in a memorandum to State Survey Agency Directors and in revisions to the State Operations Manual, and it highlights many of the considerations that CMS and its surveyors will take into account in determining whether a facility qualifies as a Medicare "hospital."**

### Background

From the inception of the Medicare program, the statute has defined a hospital as an institution that is "primarily engaged in" providing inpatient services. 42 U.S.C. § 1395x(e)(1). CMS, however, has never defined through rulemaking what it means to be "primarily engaged in," apparently recognizing the difficulties in setting hard and fast rules that should apply. In 2008, CMS issued limited guidance in the form of a [memorandum](#) stating that a hospital should devote 51 percent or more of its beds to inpatient care, but the agency also said that this standard was not dispositive in all cases and appeared to back away from that standard when focusing on individual cases. Nevertheless, at times CMS revoked hospitals' certifications, concluding that those institutions were not "primarily engaged in" furnishing inpatient services. As a result, there has been continuing uncertainty on the part of hospitals as to what the standard means and how it should be applied.

The latest documents from CMS provide some additional "primarily engaged in" guidance, but that guidance will still result in uncertainty. In the September guidance, CMS states that it will focus on whether hospitals are primarily engaged in providing services to inpatients, not merely on whether they have the capacity or potential capacity to provide this care. CMS states that surveyors must observe the actual provision of care to inpatients and that there should be at least two inpatients at the time of the survey to enable the surveyors to conduct the survey. If the hospital does not have the requisite number of inpatients at the time of the survey, the surveyors are then to review the institution's admission data to determine if it has an average daily census of at least two inpatients and an average length of stay of at least two midnights during the past 12 months. CMS states that if a facility fails to meet these threshold requirements, the facility is "most likely not primarily engaged" in providing care to inpatients, and that the CMS Regional Offices (ROs) must then look to "other factors."

The other factors that CMS identifies as being considered properly by the ROs in making this "primarily engaged in" determination "include but are not limited to" the following:

- The number of provider-based off-campus emergency departments (EDs). CMS states that a large number of off-campus EDs may suggest the facility is primarily engaged in providing outpatient emergency services.
- The number of inpatient beds in relation to the size of the facility and services offered. CMS states, by example, that a facility with four inpatient beds and six to eight operating rooms, 20 emergency department bays, and a ten-bed ambulatory surgery department is "most likely" not primarily engaged in providing inpatient care.

- The volume of outpatient surgical procedures compared to the volume of inpatient surgical procedures.
- Whether the number of inpatient beds could support emergency or unplanned admissions from the volumes of other services offered by the facility, such as ED patients or outpatient surgery patients?
- If the facility considers itself to be a "surgical" hospital, are the procedures mostly outpatient procedures? Are surgeries routinely scheduled early in the week, and does it appear that this results in all or most patients being discharged prior to the weekend? Does the facility routinely operate so that its designated "inpatient beds" are not being utilized on the weekends?
- Patterns and trends in the average daily census by day of the week. CMS suggests that if the average daily census consistently drops to zero on Saturdays and Sundays, this suggests that the facility is not primarily engaged in providing care to inpatients.
- Staffing patterns. Nurses, pharmacists, physicians, and others should be scheduled to work to support inpatient care on a 24/7 basis.
- How does the facility hold itself out to the community? Is it advertised as a "specialty" or "emergency" hospital? Does the facility identify itself in its name or advertising as a "clinic" or "center" as opposed to a hospital?

CMS states that the ROs should consider all of these factors as well as other factors as necessary to make determinations of whether institutions are truly operating as hospitals. Notably, CMS says that a determination of non-compliance will not be based on a single factor, such as failing to have two inpatients at the time of the survey. Rather, CMS will consider all of the factors listed above, and any others that it considers relevant, to evaluate "the facility in totality."

### **Baker Donelson Comments**

As noted, CMS's application of the "primarily engaged in" standard has been reflected mostly in the context of reported decisions from the HHS Departmental Appeals Board (DAB). Those decisions, however, have been quite fact-specific and have provided limited guidance to surveyors. This latest guidance provides a more concrete, if not definitive, set of standards that the surveyors are likely to apply. Facilities whose operations potentially could conflict with these standards might consider taking steps to adjust their patient, service, or delivery mix.