# PUBLICATION

## Immediate Jeopardy: Handling EMTALA Complaints in a COVID-19 World

**Authors: Michelle A. Williams**
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**Before the COVID-19 pandemic, Emergency Department (ED) visits had risen more than 60 percent since 1997 to about 146 million, with nearly 46 visits per 100 persons in 2016. With waves of COVID-19 cases overwhelming the health care system, hospital EDs continue to be at or past capacity, and overworked physicians and hospital staff are forced to make daily decisions to deal with associated crowding and increased overall ED patient lengths of stay. The Emergency Medicine Treatment and Labor Act (EMTALA) presents specific challenges for EDs operating in a COVID-19 pandemic world.**

### EMTALA Overview

In 1986, the United States Congress passed EMTALA – seeking to prevent discrimination of patients by hospitals through the rampant acts of "patient dumping" at that time. EMTALA, the antidumping law, currently applies to approximately 98 percent of hospitals in the United States and consists of three legal requirements:

- to provide a medical screening examination (MSE) when a request is made for examination or treatment for an emergency medical condition (EMC), including active labor, regardless of an individual's ability to pay;
- to provide stabilizing treatment for patients with EMCs; or
- if a hospital is unable to stabilize a patient within its capability, or if the patient requests, an appropriate transfer should be implemented.

### QIO Involvement

When investigating hospitals for potential EMTALA violations, the applicable Regional Office of the Centers for Medicare and Medicaid Services (CMS) obtains two medical reviews of the case from a Quality Improvement Organization (QIO). The QIO is charged with assessing whether the patient involved had an emergency medical condition, and the appropriateness of the hospital's MSE, stabilizing treatment, or transfer care. The QIO's initial "five-day review" is done to assist CMS in determining whether the hospital violated EMTALA and whether it should terminate the hospital from Medicare.

After completing its investigation, if CMS determines the hospital violated the law, it then requests a second review by the QIO. In this "60-day review," the QIO affords the affected hospital and providers the opportunity of a hearing to formally present their side of the case. CMS sends the 60-day QIO report to the Office of Inspector General (OIG), the branch of the Department of Health and Human Services that prosecutes the EMTALA Civil Monetary Penalties phase against hospitals and physicians.

### Facts and Figures

Medicare participating hospitals face high risk for violations of the antidumping law. Additionally, EMTALA penalties have more than doubled with the enactment of the Federal Civil Penalties Inflation Adjustment Act of 2015. Currently, the Civil Monetary Penalty for each violation of EMTALA by a hospital with 100 beds or more sits at $112,916 (up from $50,000), while a hospital with less than 100 beds risks a fine of $56,460 (up from $25,000).

A review of published 2020-2021 EMTALA fines by OIG reiterates the government's dedication to EMTALA, and includes the following settlements:

- On February 10, 2020, OIG settled with a Maryland hospital for $106,965 after the hospital failed to provide an MSE and stabilizing treatment to a patient who initially presented to the hospital, was diagnosed with a contusion of the face and lip abrasion and was discharged. The patient refused to sign the discharge forms, stating that she was homeless. She was escorted by security off of the hospital's property wearing only a hospital gown and socks. The following day, the patient retuned to the hospital via ambulance after a bystander called 911. The bystander found the patient at a bus stop outside the hospital in 30-degree weather. A nurse told the patient that she would need to go to a shelter if she did not have a place to stay. The patient was then discharged without receiving an MSE or being stabilized.

- On April 20, 2020, OIG settled with a Georgia hospital for $260,000 after a hospital failed to provide an adequate MSE and stabilizing treatment to 21 individuals while utilizing a non-patient specific checklist.

- On December 21, 2020, OIG settled with a North Carolina hospital for $100,000 after the hospital's ED failed to provide an appropriate MSE and stabilizing treatment to an individual with chest pain. An EKG was performed, but the hospital provided no further examination – despite the patient's spouse's repeated pleas. The patient left without treatment and presented to a second hospital where an emergency heart catheterization revealed triple vessel disease and the patient underwent a triple coronary bypass the next day.

- On December 29, 2021, OIG settled with a Tennessee hospital for $725,000 when it failed to provide an appropriate MSE and stabilizing treatment to 29 patients after presentment with an EMC. In two of these incidents, rather than admitting the patient, the hospital discharged the patient home with an unstable EMC. For other presentments, rather than admitting the patient, the hospital held the patient inappropriately in its ED for over 24 hours before transferring the patient. OIG found that the decision to transfer the patient, was based, in part, on the patient's insurance status – despite the hospital's assertion that the decision was based on a recommendation from a mobile crisis team.

However, hefty fines are not the sole concern of hospitals when it comes to EMTALA. On October 1, 2016 (Fiscal Year 2017), a new wrench was thrown into the EMTALA plan, making violations riskier for Medicare-participating hospitals. Under CMS's Hospital Value-Based Purchasing Program, a hospital risks exclusion for a particular program year if, during the performance period for that fiscal year, they were cited three times for deficiencies that pose immediate jeopardy to the health or safety of patients. Accordingly, hospitals found liable for multiple EMTALA violations risk forfeiting their portion of an approximately $1.9 billion pie.

## Conclusion

The hidden pitfalls of handling an EMTALA complaint survey are not readily apparent during the survey process. Most hospitals and physicians are familiar with, and address well, an unannounced survey by a state survey agency investigating an EMTALA complaint. However, most hospitals are unaware of their rights related to the QIO hearing process and the additional financial burden which may be incurred on their value-based payments.

For more information, please call any member of the Baker Donelson EMTALA response team.