

Health Law ADVISORY

Current legal insights for health care executives

September 29, 2006

Julie A. Knutson, Editor

Proposed CAH Regulations, Definition of “Labor” and Specialty Hospitals Under EMTALA

New critical access hospital (CAH) regulations were proposed on August 23, 2006, revising the Conditions of Participation for emergency services. Historically, the Conditions of Participation for emergency services have required that a physician, a physician assistant or a nurse practitioner, with training or experience in emergency care, be on-site or “on call and immediately available by telephone or radio contact and available on-site” generally within thirty minutes. The proposed regulation would recognize a long-standing interpretation by the state licensing agencies in Iowa and Nebraska that hospital-employed registered nurses can be authorized to perform a medical screening examination on behalf of an acute hospital or a CAH, if that hospital’s governing board identifies registered nurses as “qualified medical personnel” (QMPs).

The Centers for Medicare and Medicaid (CMS) commentary to the proposed regulations explains that CAH Conditions of Participation are more detailed than those for acute hospitals, and therefore more demanding. The rule change is designed to level the playing field between the two types of Medicare-certified providers. CMS acknowledges that patients come to both types of facilities in nonemergency conditions, and that both types of facilities should be allowed to permit RNs to

perform medical screening examinations of those patients.

The proposed regulations formally acknowledge the authority of appropriately trained and experienced RNs to perform medical screening examinations and confirm that the on-call physician, PA or NP does not have to come to the CAH to perform the medical screening examination. However, a registered nurse with training and experience in emergency care may conduct a specific medical screening examination only if:

1. The registered nurse is on-site and immediately available at the CAH when a patient requests medical care; and
2. The nature of the patient’s request for medical care is within the RN’s scope of practice and consistent with applicable state laws.

Public comment on these proposed regulations closes October 10, 2006. If adopted as written, these regulations will provide support under Federal Medicare law for the conventional practice of most CAHs in Iowa and Nebraska that do not staff their emergency departments with 24-hour physician and/or mid-level staffing on-site. The proposed regulations will also support CAHs’ reliance upon RNs to perform medical screening examinations for obstetri-

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cal patients to determine the progression of labor.

The EMTALA definition of “labor” will be updated by final regulations effective October 1, 2006. The new definition authorizes non-physician practitioners to certify false labor, enabling patients presenting with symptoms of labor to be discharged to home without a physician exam and without violating EMTALA. The new definition expands the list of personnel recognized as being capable of certifying false labor to include nurse-midwives and other “qualified medical personnel, operating under his or her scope of practice as defined in hospital medical staff bylaws and State law.” CMS has commented that the effect of this change is to provide hospitals with greater flexibility in staffing and to allow a single, uniform policy on personnel authorized to determine whether an individual has an emergency medical condition. CMS also suggests that this change will ensure greater patient access to necessary services as a result of expanding the pool of personnel capable of assessing signs of labor¹.

The new definition of “labor” will require most acute hospitals and CAHs to review their EMTALA policies and/or medical staff bylaws to update the definition, and to reconsider the identification of QMPs authorized to perform medical screening examinations on obstetrical patients complaining of symptoms of labor.

The Inpatient Prospective Payment System (IPPS) final regulations published August 1, 2006, CMS made a recommendation concerning the obligations of specialty hospitals, and other hospitals that do not operate a dedicated emergency department (DED), to accept appropriate transfers. In comments to the 2007 IPPS Final Rule, CMS noted that the EMTALA rules make it clear that hospitals with a DED and specialized capabilities must accept appropriate transfers, but application of EMTALA to

hospitals that do not have DEDs had been unclear. The final rule indicates that all Medicare participating hospitals with specialized capabilities, including specialty hospitals, must accept appropriate transfers of unstable individuals, regardless of whether such hospitals have a formal emergency department. CMS advises that hospitals without formal emergency departments will not have to establish a DED. Further, CMS will not impose on such hospitals EMTALA obligations relating to individuals who come to the hospital as their initial point of entry into the health care system seeking a medical screening examination. This classification suggests that specialty hospitals should review their policies concerning the acceptance of transfer patients.

Recent CMS EMTALA citations in Iowa and Nebraska have identified problems in the screening and discharge or transfer of patients with suicidal ideation or threats. It should be presumed that any such complaint must be fully addressed in the screening process to ensure patient safety prior to discharge or during transfer. Generally, suicidal complaints are presumed to establish an emergency medical condition. It is very important to justify within the medical record the discharge of a mental health patient who has had suicidal ideation or threats. Such a patient should not be discharged to home or transferred by private vehicle without an express finding of stabilization.

Examples of documentation of stabilization include appropriate patient medications, a recant of the complaint, and objective signs of stabilization over an extended observation period. Documentation of information from family members concerning a recent change in medications, medical history and events that contributed to the patient’s mental health crisis at hand may be important to support of the conclusion that the patient’s condition has been stabilized. Efforts to de-escalate the patient’s condi-

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¹ The new definition of “labor” was promulgated as a final rule as a part of the Inpatient Prospective Payment System (IPPS) regulations published on August 1, 2006. It had been published as a proposed regulation in April, 2006, as a result of recommendations by the Technical Advisory Group (the “EMTALA TAG”) established by CMS to review issues related to EMTALA and its implementation. At one of its three meetings in 2005, the EMTALA TAG heard testimony from representatives of physician and non-physician professional associations regarding the competence of practitioners other than physicians to certify false labor.

tion with “talk” therapy should also be documented. The fact that a mental health patient will be discharged into the care of an adult family member who resides with the patient, is familiar with the patient’s mental health condition and “danger” signs and has been provided detailed discharge instructions may also support a discharge following suicidal ideation or threats.

The use of a private vehicle should also be carefully documented if there is any question of patient stability. Patients and family members have the right to refuse a recommended ambulance transfer, in which event the refusal should be documented on a standard Refusal of Examination/Treatment form, referencing ambulance transfer as the refused treatment and disclosing elopement as a risk of private vehicle transfer in the case of a mental health patient.

In some instances, however, the transferring physician may conclude that the patient’s mental health condition has stabilized, and an ambulance is unnecessary. In such cases, it is very helpful to document the presence of two adults accompanying the patient in a private vehicle to prevent the patient’s elopement. It would also be important to document if either such adult has emergency medical training as well as to observe the patient for a period of time following the administration of medications and prior to transfer, to ensure that there will not be an adverse reaction to the medication during the transfer.

Some of the recent citations involving mental health patients have occurred at hospitals that have implemented a new electronic medical record system in the ED. It seems that the electronic prompts relating to such patients do not necessarily encourage the level of documentation required to satisfy EMTALA surveyors. Special care should be taken in mental health cases even if the prompts must be circumvented or augmented to ensure the level of documentation described above.

Barbara E. Person

Baird Holm Gains New Associate

Baird Holm is pleased to announce that Andrew Kloeckner has joined the Health Care Section of the firm. Andy’s strong interest and education in taxation and tax-exempt organizations make him a valuable asset to the firm’s health care practice.

Andy joins us as a first year associate after receiving his Juris Doctor, *magna cum laude*, from Creighton University School of Law. He was a member of Moot Court and received nine CALI Excellence for the Future Awards, meaning he received the top grade in nine law school classes. He graduated law school with a concentration in Business, Taxation and Commercial Transactions and holds a Bachelor of Science in Business Administration, with an emphasis in accounting, *summa cum laude*, from Creighton University.



Health Law Forum Scheduled for October 27th

The Health Law Forum is less than a month away!

Please plan to join us on Friday, October 27th for a full day of presentations and networking with health care colleagues. This year’s Forum has been approved for 5.25 hours of Continuing Legal Education (CLE) credit. By now you should have received a brochure in the mail.

The Forum, which will be held at the Marriott Regency, will begin with a continental breakfast from 8:00 – 8:30 a.m. There will be a complimentary luncheon at noon. Educational presentations will end at 3:30 p.m. followed by a reception.

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Questions? Ideas?

We welcome your questions, ideas and suggestions.

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