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Can We Share Space and Staff?

A Review of the New CMS Guidance and Other Rules Impacting Hospitals Leasing Space

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Overview

- Summary of Past CMS Guidance
- Details on New CMS Guidance
- Review of Other Legal and Regulatory Issues

Why Now?
New Guidance from CMS

- **May 3, 2019:** CMS issued national draft guidance regarding shared space arrangements after several years of uncertainty
- Guidance is available at: https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/QSO-19-13-Hospital.pdf

History of Uncertainty

- **2000:** CMS indicated Regional Offices (ROs) would take lead on addressing questions concerning shared space and its effect on provider-based status
- **2011:** Chicago Regional Office letter to Indiana hospital
- **2015:** American Hospital Association first requested clarification from CMS about co-location

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Advantages of Co-Location Arrangements

- Space sharing and co-location arrangements can:
  - Enhance patient access and convenience
  - Improve quality of care
  - Mitigate duplication of overhead costs
  - Reduce costs overall by allowing providers the opportunity to share personnel, administrative services, and equipment expenses
- Impact of co-location in rural communities
  - Cost of regulatory compliance for rural hospitals is often higher than for larger facilities
  - Co-location arrangements help to build "critical" mass

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Definitions

- CoPs: Medicare Conditions of Participation
- Co-location: Two hospitals or a hospital and another healthcare entity that are located on the same campus or in the same building and that may share space, staff, or services

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BEFORE:
CMS'S INFORMAL GUIDANCE ON SHARED-SPACE ARRANGEMENTS

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BEFORE: CMS Disapproval of Shared Space Arrangements

- CMS signaled its disapproval of shared space arrangements through informal guidance including:
  - Revoking provider-based status or issuing non-precedential, provider-specific decisions
    - Issued by CMS Regional Offices
  - Making statements in educational webinars that were critical of shared space arrangements
  - Responding negatively when asked for informal guidance

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Mixed Messages

- Potential penalties for violation of provider-based rules are significant
  - May include recoupment of increased payments for all cost report periods subject to reopening or potential False Claims Act liability
  - Costs associated with correcting the problem
  - Issues associated with unutilized space if existing lease/co-location arrangements are no longer permissible

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BEFORE: Core Concepts

- Hospital space required to remain hospital space at all times
- Co-mingling of space among separate providers prevented providers from complying with CoPs
- Co-located hospitals had to demonstrate separate and independent compliance with hospital CoPs

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BEFORE: Separation of Space

- Provider-based (hospital) space should be clearly held out to the public as hospital space and should be distinct and separate from freestanding space
  - Separate clinical space
    - Including exam and procedure rooms
  - Separate patient registration space or waiting areas
- Limited exceptions permitted, such as shared non-clinical areas permitted
  - Including atrium or elevator

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BEFORE: Separation of Operations

- Each hospital must have its own policies and procedures
- Separate staff including:
  - Separate governing body
  - Separate chief medical officer
  - Separate medical staff
  - Separate CEO

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NOW:
CMS'S NEW GUIDANCE ON SHARED-SPACE ARRANGEMENTS

DISTINCT AND SHARED SPACES

Distinct Spaces

- **Requirement:** Hospital must have defined and distinct spaces of operation for which it maintains control at all times
  - Including clinical spaces designated for patient care
- Why are distinct spaces necessary for the protection of patients?
  - Right to personal privacy
  - Right to receive care in safe environment
  - Right to confidentiality of patient records

Shared Spaces

- **Shared Spaces:** Public spaces and public paths of travel utilized by both the hospital and the co-located healthcare entity are permitted
- Sharing or travel through a clinical space of a hospital by another co-located entity is **not acceptable**
  - Clinical Space: Any non-public space in which patient care occurs

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Public Space

- Lobby
- Reception areas (but registration areas must be separate)
- Waiting rooms
- Hallways through separated clinical areas
- Public restrooms
- Cafeterias
- Gift shops
- Elevators
- Main corridors
- Main entrances
- Staff breakrooms and lounge areas

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Clinical Space

- Inpatient units
- Observation units
- Hallways through inpatient/observation units
- Exam rooms
- Nurses stations
- Operating rooms
- PACU
- Emergency Department
- Therapy departments
- Imaging department
- Outpatient clinics
- "Check-in Area" (registration)

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Survey Procedures: Distinct and Shared Space

- When surveying co-located hospitals, surveyor will consider:
  - Designated space(s) of co-located hospital and separation from other hospital or healthcare entity
  - Use of contracted services obtained from co-located entity and outside entities

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Survey Procedures: Distinct and Shared Space

- Surveyors must ask for:
  - Floor plan that clearly distinguishes space used by surveyed hospital from space used by co-located entity
  - List of all contracted services from other co-located or health care entities

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Survey Procedures: Distinct and Shared Space

- Floor plan will be reviewed for CoP compliance:
  - Spaces within co-located hospitals are defined and identified as belonging to hospitals
  - Spaces belonging to another entity are accessed through a public path of travel (and not via travel through clinical areas)
  - Public spaces that are shared by hospital and other entities are identified as belonging to both
- Surveyor will identify locations of required and optional hospital services and departments to determine if there are any shared spaces or services

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CONTRACTED SERVICES

Contracted Services

- **Requirement:** Hospitals are responsible for providing all services in compliance with CoPs
- Services may be provided under contract by or with co-located hospital

Contracted Services

- **Examples of contracted services:**
  - Laboratory
  - Pharmacy
  - Radiology
  - Dietary
  - Food service
  - Maintenance
  - Housekeeping
  - Security
  - Physical plant services (oxygen, medical gas, sprinkler systems, alarm systems)

Survey Procedures: Contracted Services

- Surveyors must survey actual physical location where contracted services are provided if it is physically located on-site
- Surveyors must assess how the governing body ensures compliance with CoPs through QAPI activities

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STAFFING WITH CONTRACTED STAFF

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Staffing

- **Requirement:** Hospitals are responsible for independently meeting staff requirements of CoPs
- If staff is working under arrangement from another entity, must be assigned to work solely for one hospital during specific shift
  - No "floating" between hospitals/entities while on shift
  - No concurrent "on-call" duties
  - No providing services simultaneously

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Nurse Staffing

- Immediate Availability for Nurses:
  - §482.23(b) of Nursing Services Standard requires immediate availability of an RN for bedside care of patient if needed

Medical Staff

- Guidance above for Hospital staff does not apply
- Physicians and non-physician practitioners permitted to move between co-located hospitals if approved medical staff are privileged and credentialed at each hospital
  - But watch for other CMS requirements that could limit this

Administrative Staff

- Directors of Nursing, Pharmacy, and Laboratories
- Under draft guidance, would not be able to "float," be on call, or work simultaneously
- Would patient interests be best served by having single director on these areas?

Survey Procedures: Staffing Contracts

- Surveyors review contracts for staffing services with co-located entities to ensure the following:
  - Adequacy of staff levels
  - Adequate oversight and periodic evaluation of contracted staff
  - Proper training and education of contracted staff
  - Contracted staff have knowledge of and adhere to the quality and performance improvement standards of hospital
  - Accountability of contracted staff related to clinical practice requirements

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Survey Procedures: Staffing Contracts

- Surveyors review staffing levels and schedules to ensure immediate availability for services as required by hospitals
  - May ask for verification that services obtained under contract from co-located entity are not simultaneously furnished there as well
  - May ask to see staffing schedules to verify individuals are not scheduled to work simultaneously for both entities
  - May ask governing body to demonstrate that contracted staff have been oriented and trained on hospital policies and procedures
  - May also ask how performance of contracted staff is monitored

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CONTRACTED CLINICAL SERVICES

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Contracted Clinical Services

- Hospital is "not necessarily required" to notify patients of all services provided under contract or arrangement from another co-located hospital or other healthcare entity

SOURCE: Guidance for Hospital Co-location with Other Hospitals or Healthcare Facilities, CMS. (May 2019)

EMERGENCY SERVICES

Emergency Services

- **Requirement:** Hospitals without emergency departments must have appropriate policies and procedures to address individual emergency needs at all times
- Policies and procedure should include:
  - Identifying when a patient is in distress
  - How to initiate an emergency response
  - How to initiate treatment
  - Recognizing when patient must be transferred to another facility to receive appropriate treatment

Emergency Services

- **Requirement:** Emergency policy and procedures must reflect potential emergency scenarios typical of the patient population a hospital routinely cares for

Emergency Services

- Contracting with a co-located hospital for code teams or rapid response teams to appraise and initiate treatment of patients in an emergency is permitted
  - **BUT ONLY** when the contracted staff are not working or on duty simultaneously at that other hospital
- If a hospital "contracts for emergency services" with another hospital's emergency department, hospital considered to provide emergency services and must meet requirements of EMTALA

Emergency Services

- Appropriate Transfer in an Emergency
  - It is acceptable for a hospital to refer or transfer patients with emergency conditions to co-located hospitals if transferring hospital cannot provide care beyond initial emergency treatment

Survey Procedures: Emergency Services

- Surveyors consider the following:
  - Does hospital respond to its own in-hospital emergencies, with its own trained staff?
  - Does hospital have emergency equipment in the event that patient requires resuscitation?
  - Is hospital staff properly trained in use of emergency equipment?
  - Is emergency equipment properly maintained?
  - Is hospital staff properly trained for appraisal of emergencies, initial treatment, and referral when appropriate?

Survey Procedures: What if a Deficiency is Found?

- If deficiencies are identified, deficiencies will be assessed under particular CoP and the governing body CoP
  - Why? Governing body is responsible for oversight of all contracted services provided in the hospital
- Could also result in deficiency under QAPI CoP

Survey Procedures: What if a Deficiency is Found?

- If other co-located entity providing noncompliant contracted service is CMS-provider or supplier, surveyor files complaint with state agency or regional office regarding that entity for further review

GAPS IN GUIDANCE

Leased Space/ Lessee Specialty Clinics

- CMS has stated in PowerPoint presentation on 6/5/19:
  - "A leased space is not co-location as the tenant is responsible for that space under the terms of the lease agreement with the landlord hospital"
- However, many co-location arrangements are lease arrangements

Timeshare Services

- In the same presentation, CMS also noted that sometimes visiting providers use space, equipment, and supplies within a hospital at particular times (i.e., provider-based specialty clinics staffed by visiting physicians)
- CMS stated that in these cases hospital is responsible for maintaining space and services in compliance with CoP requirements

Other Open Issues

- Grandfathering?
- Shared EMRs
- What services cannot be contracted (i.e., can a hospital contract for all or almost all services?)

OTHER REGULATORY ISSUES AFFECTING HOSPITAL LEASE ARRANGEMENTS

Other Regulatory Issues Affecting Hospital Lease Arrangements

- Fraud and Abuse Laws
- Non-Profit Status
- Reimbursement Rates
- Property Tax Exemptions
- Bond-Financed Space
- State licensure requirements
- Other CMS "Separateness" Requirements

Comments

- Deadline – July 2nd
- Submit comments via email to HospitalSCG@cms.hhs.gov
- Not clear how long CMS will take to review comments and finalize guidance
- If would like our assistance in submitting comments, please contact us

Feedback to AHA

- AHA seeking comments and scenarios from hospitals that describe patient care issues or hardships caused by draft guidance
  - Considering requesting explicit guidance on specialty clinic arrangements
- AHA contacts:
  - Nancy Foster, Vice President of Quality and Safety Policy (Nfoster@aha.org)
  - Mark Howell, Senior Associate Director of Standards and Drug Policy (Mhowell@aha.org)

Questions?

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