

CMS Will Show No Mercy: Ensuring EMTALA Compliance for Psychiatric Patients in the ED

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EMTALA Compliance

CMS' EMTALA EXPECTATIONS

100% COMPLIANT

100% OF THE TIME

This leaves no margin for error!

Largest EMTALA Settlement To Date: \$1,295,000 / 2017

- South Carolina hospital with a psychiatric service.
- Hospital stated that it had a longstanding policy of only accepting voluntary patients in its psychiatric unit.
- Hospital policy provided that if an individual was involuntarily committed and did not have financial resources, the attending physician could write an order for the patient to be evaluated for admission to the state mental health system after the patient was medically stable.

Largest EMTALA Settlement To Date: \$1,295,000 / 2017

- Patients often remained in the ED for long periods of time and did not receive adequate medical screening exams or stabilizing treatment, even though the hospital had on-call psychiatrists and open psychiatry beds.
- Hospital policy promoted use of the involuntary process to transfer patients out to state facilities when the patients lacked financial resources.
- Hospital policy promoted a “selective admission” process which did not comply with EMTALA and promoted disparate patient treatment with no reasonable justification.

Demand For Psychiatric Services Greatly Exceeds Supply

- Community hospitals are seeing more and more patients with mental illnesses.
- A study published in Health Affairs in 2016 found:
 - A 55% jump nationally in ED visits related to mental health from 2002 to 2011, from 4.4 million to 6.8 million, whereas,
 - The number of inpatient psychiatric beds available nationally to serve these patients plummeted nearly 80% from 1970 to 2010, from about 500,000 to 114,000.
- CMS believes if you have an open ED you can provide a basic level of service for the mentally ill.

The Emergency Medical Treatment and Labor Act

EMTALA is the federal law requiring:

- A Medicare hospital with a dedicated emergency department (DED);
- To provide a medical screening examination (MSE);
- For a person presenting to a DED requesting an MSE;
- To determine if an emergency medical condition (EMC) exists and provide necessary stabilizing treatment;
- Before discharging or appropriately transferring the patient.

EMTALA Overview: Care For All

- EMTALA applies to all patients, including those with medical and psychiatric issues.
- EMTALA applies regardless of the payer.
- EMTALA serves as a health care safety net.
- ***CMS places the care provided to patients in the ED with psychiatric conditions as one of their highest priorities.***

EMTALA Overview: DED

- **A hospital has one or more DEDs if:**
 - It has a state licensed ED; or
 - It is held out to the public as providing treatment for EMCs on an urgent basis without requiring an appointment; or
 - During the previous calendar year, and based upon a presentative sample of patient visits, a hospital department or facility provided treatment for EMCs on an urgent basis, without an appointment for at least one-third of the visits.
- ***CMS considers psychiatric intake services as a type of DED covered under EMTALA.***

General EMTALA Requirement

MOST KNOWN EMTALA REQUIREMENTS:

EMTALA requires that any Medicare hospital with a DED provide an individual seeking emergency care with an appropriate MSE, and if an EMC is found to exist, provide stabilizing treatment within its capabilities before transferring or discharging the patient.

Who Can Perform An MSE?

- The hospital “Governing Body” must determine who is qualified to perform an initial MSE, including non-physician personnel, referred to as “Qualified Medical Persons” (QMP).
- QMPs must be identified in the hospital’s Medical Staff Bylaws, Rules and Regulations or other policies which are approved by the Governing Body, as a category of health care practitioner appropriate to perform an MSE.
- A hospital must ensure a specific person is appropriate through education and experience to perform an MSE.

HOT Psychiatric Compliance Issues for CMS

- Did the hospital provide an appropriate MSE?
- Did the hospital provide appropriate stabilizing treatment?
- Did the hospital provide an appropriate transfer or discharge?
- Did a hospital accept a patient with an EMC and in need of psychiatric services when it offered such services when the transferring hospital did not?

Need To Provide An Appropriate MSE For Psychiatric Patients

- A hospital must provide an appropriate MSE within its capabilities, including both medical and psychiatric evaluation, as needed.
- **An MSE is an ongoing process designed to reach reasonable clinical confidence as to whether an EMC exists for a specific patient.**
- Triage is not an MSE!

Need To Provide An Appropriate MSE For Psychiatric Patients

Biggest Problem:

When patients present to the ED with medical issues many hospitals are not providing a mental health type of screening when a patient exhibits symptoms of a psychiatric issue.

Hospitals need to fix this problem!

Need To Provide An Appropriate MSE For Psychiatric Patients

- Who will perform an MSE?
 - ED physician alone.
 - ED physician with assistance of telemedicine.
 - ED physician along with inside / outside consult.
 - Other QMP appropriately designated by a hospital.
- A supervising ED physician ultimately remains responsible for an MSE in the ED.
- Look to resources available to the hospital.

Need To Provide An Appropriate MSE For Psychiatric Patients

- An MSE should include an assessment of whether an individual is suicidal, homicidal or gravely disabled.
 - The phrase “gravely disabled” has been used by CMS/State to imply a danger to oneself due to an inability to appropriately care for oneself, including refusal to take necessary medication.
- Hospitals may use “contract services” to assist with psychiatric MSEs as long as the clinicians working are appropriately credentialed by the hospital.
- **Take threats of suicide or homicide very seriously because you will be scrutinized very closely.**

Need To Provide An Appropriate MSE For Psychiatric Patients

- CMS will hold every hospital responsible for providing an appropriate MSE for psychiatric patients.
- CMS requires a hospital to consider and use all of its available resources to provide an appropriate MSE for a patient that may suffer from a psychiatric condition.
- **You will never win the argument that you are unable to provide an appropriate MSE because you are a small hospital or you do not offer a psychiatric service.**

Medical Patients With Possible Psychiatric Issues

- Not every patient requires a psychiatric evaluation as part of an MSE, however, a physician should listen and observe patients for cues of instability.
- If a patient appears depressed or speaks of depression, evaluate for mental health issues.
- If a patient with no psychiatric history threatens a homicidal or suicidal act, evaluate for mental health issues.
- If a patient seems psychiatrically unstable in any way, evaluate for mental health issues.

Patient Leaves The ED Before Receiving An MSE

- Be very careful as to how a psychiatric patient is “triaged” given that they may be at a higher risk of leaving prior to receiving an MSE.
- CMS will look closely at the condition and needs of the patient upon presentment and what the hospital did to help ensure that the patient received a timely MSE.
- If a patient leaves the hospital before receiving an MSE does the hospital have a responsibility to try to retrieve the patient?

What If An EMC Is Found To Exist?

- If an EMC is found to exist, provide necessary stabilizing treatment, or an appropriate EMTALA transfer.
- *Psychiatric patients expressing suicidal or homicidal thoughts or gestures, if determined dangerous to self or others, are considered to have an EMC.*
- Psychiatric patients are considered stable when they are protected and prevented from injuring or harming themselves or others.

Need to Provide Stabilizing Treatment for Psychiatric Patients

- If an EMC exists, a hospital must provide stabilizing treatment within its capability and capacity.
 - the attending ED physician or other QMP determines whether an EMC exists.
 - look to current capabilities and capacity issues and customary accommodations.
- Treat patients with similar conditions similarly.

Need to Provide Stabilizing Treatment for Psychiatric Patients

- A patient is “stabilized” when no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility.
- If a patient is safe to be discharged home without the expectation of short-term deterioration he/she is stabilized.
- ***For a psychiatric condition, “stabilized” means the patient is protected and prevented from injuring himself or others.***

Need to Provide Stabilizing Treatment for Psychiatric Patients

- A hospital may use chemical or physical restraints for purposes of transferring an individual from one facility to another.
- Be careful, however, because the use of these restraints may not “stabilize” a patient for the length of time needed.
- A hospital should use great care when determining if the psychiatric condition is in fact stable after administering chemical or physical restraints.

Need To Provide An Appropriate Transfer For Psychiatric Patients

- If a hospital cannot “stabilize” a patient it should transfer the patient to a more appropriate hospital when a:
 - Patient requests the transfer (in writing) after being informed of the hospital obligations and of the risks of transfer and acknowledging the same; or
 - Physician certifies the benefits of transfer outweigh the increased risks and a summary of the same; or
 - If a physician is not physically present, the certificate is signed by a QMP after consultation with a physician who agrees and subsequently countersigns;
 - AND the transfer is an “appropriate transfer under EMTALA”.

Need To Provide An Appropriate Transfer For Psychiatric Patients

- As part of “stabilizing” a psychiatric patient, a hospital, when appropriate, should consider use of the “96 Hour Involuntary Hold” process.
- The basic threshold for use of the “96 Hour Involuntary Hold” process is:
 - does the patient suffer from a mental illness?
 - does the patient pose a harm to himself / herself or others?
- **Important: *It is a misnomer that a hospital need not use the “96 Hour Involuntary Hold” process if it does not have a psychiatric service.***

Need To Provide An Appropriate Transfer For Psychiatric Patients

- **An appropriate EMTALA transfer requires:**
 - Transferring hospital provides treatment of EMC within its capabilities and capacity that minimizes health risks; AND
 - Receiving hospital accepts transfer and has capabilities and capacity to treat; AND
 - Transferring hospital sends copies of records related to patient available at the time of transfer and the name and address of any on-call physician who refused or failed to appear within a reasonable time to provide stabilizing treatment; AND
 - Transfer is effectuated via qualified personnel and transportation equipment.
- ED discharge is also considered a type of transfer.

Hospital Transferring Responsibility

- EMTALA places responsibility on transferring hospitals to ensure EMTALA requirements are met.
 - Appropriate methods of transportation must be used.
 - Qualified personnel must accompany when appropriate.
 - Appropriate equipment must be used.
- ***This responsibility places strain on some hospitals given that it is difficult at times to secure ambulance or police transportation for psychiatric patients.***

Transfer of Psychiatric Patients

- Transferring psychiatric patients from one hospital to another can prove challenging given the available resources of a community.
- Transfer by private vehicle is very risky.
- Look to the standard of care for a patient transfer, not necessarily what the patient wants!

Need To Accept A Patient Transfer

- A hospital must accept a patient with an EMC from another hospital when it has a specialized capability and the capacity to treat the patient's EMC.
- The receiving hospital cannot create obstacles to accepting a patient transfer, such as:
 - Proof of insurance / payment;
 - Unreasonable testing demands;
 - Approval of on-call physician; or
 - Bed holds.
- CMS is focused on these patient transfer issues and sees problems with “unnecessary obstacles” put in the way of the transfer of psychiatric patients.

When EMTALA Obligations End

- **EMTALA obligations end for a hospital when:**
 - A physician conducts an appropriate MSE and concludes no EMC exists; or
 - A physician stabilizes a patient's EMC; or
 - A hospital admits a patient in good faith; or
 - A hospital provides all appropriate treatment within its capabilities to the patient and makes an appropriate transfer; or
 - A patient leaves the hospital against medical advice.

Duty To Report To CMS

- In general, a hospital is required to report to CMS/State promptly when it suspects it may have received a patient transfer in violation of EMTALA.
- CMS wants these reports within 72 hours of an occurrence; however, this time period is very hard to achieve given the need to investigate the issue before reporting to CMS.
- Failure to report one of these EMTALA violations could result in termination from the Medicare program.

Can A Hospital Detain A Psychiatric Patient?

- A hospital must have a legal right to detain a competent patient who requests to leave.
- Look to use of “96 Hour Involuntary Hold” process
 - Patient must suffer from a mental illness; and
 - Present a harm to himself / herself or others.
- Law enforcement has greater rights to detain community members.
- ***Is the patient willing to stay voluntarily?***

Boarding Patients

- Many psychiatric patients are having to remain in a transferring hospital ED for long periods of time because of no available hospital to accept the transfer.
- Is the current hospital providing all available “stabilizing” treatment during this time?
- Is the patient free to leave or has a “96 Hour Involuntary Hold” process been started?
- Is the patient aware that they are either “voluntary” or “involuntary” at the current hospital?

Use Of Security Personnel In Patient Care

- CMS does not believe “Security Personnel” provide therapeutic patient care.
- CMS believes health care professionals are responsible for providing patients with therapeutic patient care.
- CMS believes that health care professionals should lead all patient care services.
- Never allow “Security Personnel” to “control” patient care.

Use Of Security Personnel In Patient Care

- Need to clearly define the role of “Security Personnel” in the hospital, and most notably, in the ED.
- ***A hospital must invest in educating all hospital staff on the role of “Security Personnel,” especially in patient care areas, such as the ED.***
- Need to focus efforts on deescalating inappropriate behavior, not “hands-on” engagement.
- Security Personnel should never take the lead for patient care decisions.

Provider Statements As To Why An EMTALA Violation Occurred

- Hospital lacked ability to screen psychiatric patients.
- Hospital lacked ability to provide stabilizing treatment for psychiatric patients.
- Hospital could not locate another hospital to accept the patient for treatment.
- Hospital could not arrange transportation to another hospital before the patient left AMA.

EMTALA Complaint Survey

- CMS/State receive EMTALA complaints regularly.
- CMS must authorize the State to perform an EMTALA survey.
- CMS will authorize a survey to:
 - determine if an EMTALA violation took place;
 - determine whether the violation constitutes an immediate and severe threat to patient health and safety (“Immediate Jeopardy” or “IJ”);
 - determine whether there is any pattern of violation at the hospital; and
 - determine whether the hospital has policies and procedures to address the requirements of EMTALA.
- If the survey team believes an IJ exists, it will contact CMS for confirmation.

EMTALA Complaint Survey

- Must be completed within 5 business days of CMS authorization.
- Focus on the initial allegation of non-compliance and discovery of additional violations.
- If allegation is not confirmed, surveyors still review EMTALA policies and procedures and other EMTALA requirements.
- If allegation is confirmed, the investigation continues with a focus on the last 6 months.
- Look for evidence of review and update of EMTALA policies.
- Possible expansion of survey due to condition level emergency service violations.

Statement of Deficiencies

- After a survey, CMS/State will issue a Statement of Deficiencies (“SOD”) to the hospital.
- Hospital must provide CMS with an acceptable Plan of Correction.
- Hospital must show substantial compliance through a re-survey to remain in the Medicare program.
- No right to appeal SOD or IJ before termination.

EMTALA Complaint Resurvey

- An unannounced, onsite, re-visit survey must take place in order for CMS/State to deem the hospital as being back in substantial compliance under EMTALA.
- A second re-survey can take place upon approval of CMS – however, from a timing perspective it is risky.
- CMS/State will issue a “Letter” stating the hospital is in substantial compliance with EMTALA.
- The new fines went into effect November 2016 for violations after that date.

New EMTALA Fines

- ≥ 100 beds: a maximum fine of \$104,826.00, per incident – up from \$50,000.00 per incident.
- < 100 beds: a maximum of \$52,414.00, per incident – up from \$25,000.00 per incident.
- These new fines up the ante for hospitals.

Preparing Yourself For The Future

- **ACCEPT IT AND PREPARE**: No matter where you are located, your hospital will undoubtedly continue to see more patients in need of psychiatric services.
- **Prepare for the future by taking the following steps:**
 - Annually review EMTALA policies to ensure the best policies and practices and re-educate as necessary.

Preparing Yourself For The Future

- Continually educate your entire ED staff on how to best understand and care for patients with psychiatric issues.
- Continually educate and train hospital security personnel as to their clearly defined role at the hospital.
- Continually educate and train other hospital staff on how to best understand and engage with patients experiencing psychiatric issues.
- Focus on building relationships with other hospitals so that you are able to transfer patients when necessary.

Questions?

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