EMTALA, A GROWING CONCERN IN HOSPITAL RISK MANAGEMENT

By: David R. Johnson

I. INTRODUCTION

Today, more than ever, hospitals are at risk for EMTALA[1] enforcement – both by the federal government and through private lawsuits. EMTALA is the federal statute which was designed to prevent "patient dumping" -- the transfer of patients who cannot pay for emergency department services. As interpreted by most courts, EMTALA applies to all patients, regardless of pay classification. Hospitals must carefully evaluate the requirements of managed care programs in the context of the strict mandates of EMTALA.

II. HISTORY OF THE EMTALA STATUTE

In 1994, the Health Care Financing Administration (HCFA) passed rules and regulations that delineated certain aspects of EMTALA and appeared to impose additional requirements. In 1998, HCFA issued "Interpretive Guidelines and Investigative Procedures" for investigating whether or not hospitals have complied with EMTALA.

The Guidelines underscored that hospitals were not permitted to make verification, courtesy or pre-authorization calls to third-party payors before completing medical screening examinations and stabilizations required by EMTALA. According to the guidelines, hospitals which make pre-authorization calls are deemed to be in violation of the law.

III. OVERVIEW OF THE LAW

EMTALA applies to all hospitals that participate in the Medicare program. There are four fundamental EMTALA principles:

1. A hospital must provide an appropriate medical screening examination for any patient.

2. If a hospital determines a patient requires emergency medical treatment, it must provide such treatment – to the extent that it is able to do so – as is necessary to stabilize the medical condition.

3. A hospital may not transfer any patient in an unstabilized medical condition unless either the patient requests the transfer (after being the recipient of a specific informed consent) or a physician certifies that the risks of transfer are outweighed by the potential benefits.

4. Hospitals are precluded from inquiring about a patient's insurance or ability to pay before providing the initial screening examination or before stabilizing any emergency condition.

The Guidelines emphasized the requirements of complying with EMTALA notwithstanding the dictates of any managed care organization. Specifically, the Guidelines provided:

- A hospital may not refuse to screen an enrollee of a managed care plan because the plan refuses to authorize treatment or to pay for such screening and treatment.

- The managed care plan cannot refuse to screen and treat or appropriately transfer individuals not enrolled in the plan who come to a plan hospital that participates in the Medicare program.

- It is not appropriate for a hospital to request or a health plan to require prior authorization before the patient has received a medical screening exam to determine the presence or absence of an emergency medical condition or until an existing emergency medical condition has been stabilized.

- Once an emergency medical condition has been determined not to exist or the emergency medical condition has been stabilized, EMTALA no longer applies and prior authorization for further services can be sought.

- A managed healthcare plan cannot deny a hospital permission to treat its enrollees. It may only state what it will or will not pay for.

- Regardless of whether a hospital will be paid, it is obligated to provide the services specified in the statute and the regulation.

On December 15, 1998, the Office of Inspector General and the Health Care Financing Administration issued a Special Advisory Bulletin and requested comments on it. The Bulletin suggests that the following practices be established:

- No prior authorization before screening or stabilization.

- No financial responsibility or advanced beneficiary notification forms.

- Qualified medical personnel must perform the medical screening examination.

- Well trained individuals should respond when a patient inquires about financial liability for emergency services.

- Make sure that patients voluntarily leaving the hospital are well informed of the care to which they are entitled and the risks of leaving the hospital.

Roberts v. Galen of Virginia, Inc., United States Supreme Court

On January 21, 1999, the United States Supreme Court issued its first decision involving EMTALA in the case of

[1] EMTALA (Emergency Medical Treatment and Active Labor Act) 42 U.S.C. §1395dd was enacted in 1986 and is also known as the COBRA (Consolidated Omnibus Budget Reconciliation Act) law. The statute was amended in 1988 and 1989 to add more specific provisions pertaining to on-call physicians in general, as well as the practice of obstetrics.

Roberts v. Galen of Virginia, Inc., 119 S.Ct. 685 (1999). The limited issue which came before the Supreme Court was whether the plaintiff must establish that the hospital, in transferring the patient, was motivated by financial considerations or, alternatively, whether EMTALA liability may arise simply because an unstable patient is transferred, regardless of the motive for the transfer. The court held that a hospital could be liable under EMTALA regardless of its motivation.

As a result of the court's holding, it is clear that EMTALA transfer cases may be based on simply an inappropriate transfer, without consideration of whether the transferring hospital was improperly motivated. The ruling increases the potential for future EMTALA lawsuits based upon patient transfers.

IV. KEY PROVISIONS OF EMTALA

A. Medical Screening Requirement

EMTALA provides that any individual who comes to a hospital with an emergency room and requests treatment is entitled, at the very least, to an appropriate medical screening. Hospitals are required to provide such an examination to all patients, even if they are neither scheduled nor referred, and regardless of their ability to pay. This requirement has been extended to patients seeking emergency treatment anywhere on the hospital campus, as well as patients who have entered hospital-owned or operated ambulances.

The 1998 Guidelines emphasize that the extent of medical screening required of a patient varies with the patient's symptoms. While certain presenting symptoms require "only a brief history and physical examination" others might entail "a complex process that also involves performing ancillary studies and procedures such as (but not limited to) lumbar punctures, clinical laboratory tests, CT scans, and/or diagnostic tests and procedures."

B. Stabilization Requirement

If a person is found to have an "emergency medical condition," the hospital is required to stabilize that condition without regard to whether or not the person can pay for such services. The term "emergency medical condition" includes any condition presenting a danger to the health or safety of either the patient or an unborn fetus. It also includes:

- Any condition which might result in the risk of impairing or causing the dysfunction of a bodily organ if treatment is not properly provided
- Undiagnosed, acute pain sufficient to impair normal functioning
- Pregnancy with contractions
- Symptoms of substance abuse such as alcohol ingestion
- Psychiatric problems such as severe depression, suicidal attempts or ideation, or other impaired states.

EMTALA violations can also arise from delayed treatment of emergency conditions. Most frequently, this occurs when an on-call physician fails to appropriately respond.

C. Transfer Provisions

EMTALA forbids transfer of patients who have not been stabilized, unless their transfer is medically justified. Patients may be transferred if they provide an informed consent and if the attending physician certifies that the benefits of transfer outweigh the risks. Transfer of unstable patients is not permitted simply to accommodate physician preferences or for the convenience of the doctor.

Transfers must also involve specific communications between the transferring and receiving facility. Acceptance of the transfer by the receiving hospital must occur prior to commencement of the transfer. The transfer must be in an appropriate medical transfer vehicle. When transferring a patient, the hospital must send to the receiving hospital all medical records pertaining to the patient.

Hospitals have obligations under EMTALA to accept the transfer of patients if the hospital has specialized capabilities needed by the patient and the transferring hospital is less able to care for the patient. Patients must be accepted for transfer without regard to their means or ability to pay, and without regard to the patient's third-party payor.

D. Prohibition on Insurance-Related Delays

EMTALA specifies that a hospital may not delay examination or treatment while it discerns whether or not a third-party payor will approve providing such care to the patient. The statute states:

"A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (A) of this section or further medical examination and treatment required under subsection (B) of this section in order to inquire about the individual's method of payment or insurance status."

Although a hospital may obtain information during the routine registration process about a patient's third-party payor, it may not obtain advance approval for the screening examination or stabilization required by EMTALA. Hospitals may be cited for violating the statute if preliminary calls are made to insurance companies or employers prior to complying with the EMTALA requirements. The law cannot be avoided by directing the patient to call the third-party payor.

V. ENFORCEMENT PROVISIONS

EMTALA is enforced by the HCFA and the Office of Inspector General (OIG). HCFA can impose the ultimate sanction of terminating a hospital's ability to receive Medicare or Medicaid funds. The OIG has the ability to fine hospitals or individual doctors for violations of the EMTALA statute.

EMTALA also provides a private cause of action which permits "any individual who suffers personal harm as a direct result of a participating hospital's violation of [EMTALA]" to bring a suit against the hospital. It is a claim separate and distinct from allegations of medical malpractice. In the event a medical malpractice case includes an EMTALA claim, effectively defending the lawsuit involves approaches unique to this type of a claim.

David Johnson is the President of Thomson, Rhodes & Cowie, P.C., a full service Pittsburgh based law firm that concentrates in healthcare, commercial, corporate, employment, litigation, estate planning and administration, employee benefits, and real estate law. For more information on this subject, please contact David R. Johnson at 232-3400 or e-mail at drj@trc-law.com.