EMTALA BACKGROUND AND ON-CALL COVERAGE

Purpose of risk management recommendations

OMIC regularly analyzes its claims experience to determine loss prevention measures that our insured ophthalmologists can take to reduce the likelihood of professional liability lawsuits. OMIC policyholders are not required to implement risk management recommendations. Rather, physicians should use their professional judgment in determining the applicability of a given recommendation to their particular patients and practice situation. These loss prevention documents may refer to clinical care guidelines such as the American Academy of Ophthalmology's *Preferred Practice Patterns*, peer-reviewed articles, or to federal or state laws and regulations. However, our risk management recommendations do not constitute the standard of care nor do they provide legal advice. Consult an attorney if legal advice is desired or needed. Information contained here is not intended to be a modification of the terms and conditions of the OMIC professional and limited office premises liability insurance policy. Please refer to the OMIC policy for these terms and conditions.

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RISK ISSUE

What is EMTALA?

The Emergency Medical Treatment & Labor Act (EMTALA) was enacted by Congress in 1986 to ensure public access to emergency services regardless of ability to pay, insurance status, national origin, race, creed, or color. The Act imposes specific obligations on Medicare-participating hospitals that offer emergency services to provide a medical screening exam (MSE) and provide stabilizing treatment. If the hospital is unable to stabilize the patient, an appropriate transfer should occur. The provisions apply to all individuals, not only Medicare beneficiaries.

BACKGROUND

What is EMTALA's definition of an emergency medical condition?

An emergency medical condition (EMC) is defined as "a condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the individual's health [or the health of an unborn child] in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of bodily organs." "Acute symptoms of sufficient severity" can include severe pain, psychiatric disturbances and/or symptoms of substance abuse.

What is EMTALA's definition of a hospital that provides emergency services?
The Centers for Medicare & Medicaid Services (CMS) define a dedicated emergency department as "a specially equipped and staffed area of the hospital used a significant portion of the time for initial evaluation and treatment of outpatients for emergency medical conditions." This means, for example, that hospital-based outpatient clinics not equipped to handle medical emergencies are not subject to EMTALA and can simply refer patients to a nearby emergency department for care.

What are the three main obligations of hospitals under EMTALA?

1. Any individual who comes and requests a medical screening examination to determine whether an emergency medical condition exists must be accommodated.

2. If an emergency medical condition exists, treatment must be provided until the emergency medical condition is resolved or stabilized. If the hospital does not have the capability to treat the emergency medical condition, an "appropriate" transfer of the patient to another hospital must be done in accordance with the EMTALA provisions.

3. Hospitals with specialized capabilities are obligated to accept transfers from hospitals who lack the capability to treat unstable emergency medical conditions.

A hospital must report to CMS or the state survey agency any time it has reason to believe it may have received an individual who has been transferred in an unstable emergency medical condition from another hospital in violation of EMTALA.

What are the requirements for transferring patients under EMTALA?

- A patient is considered stable for transfer if the treating physician determines that no material deterioration will occur during the transfer between facilities.

- EMTALA does not apply to the transfer of stable patients; however, if the patient is unstable, then the hospital may not transfer the patient unless:
    - A physician certifies the medical benefits expected from the transfer outweigh the risks OR
    - A patient makes a transfer request in writing after being informed of the hospital's obligations under EMTALA and the risks of transfer.

- Prior to transfer:
    1. The transferring hospital must provide ongoing care within its capability until transfer to minimize transfer risks.
    2. Provide copies of medical records.
    3. Must confirm that the receiving facility has space and qualified personnel to treat the condition and has agreed to accept the transfer.
    4. The transfer must be made with qualified personnel and appropriate medical equipment.

What are the penalties for violating EMTALA?

- The Department of Health and Human Services (HHS) Office of the Inspector General (OIG) may impose a civil monetary penalty on a hospital or physician for refusing to provide any necessary stabilizing care for an individual presenting with an emergency medical condition that requires such stabilizing treatment, or an appropriate transfer of that individual if the hospital cannot stabilize the emergency condition.

- HHS OIG may also exclude physicians from participation in Medicare and State health care programs. CMS may also penalize a hospital by terminating its provider agreement.

- Patients who are harmed by a physician's or hospital's failure to provide stabilizing treatment may file a civil suit against the hospital to obtain damages available under the personal injury laws of the state in which the hospital is located, in addition to recouping any equitable relief (court granted remedy requiring a party to act or refrain from a particular act) as is appropriate.

What coverage does my OMIC policy provide for EMTALA violations?

- A few EMTALA provisions apply directly to physicians. For example, a penalty may be imposed on a physician who fails to respond to an emergency when he or she is on-call. A physician who signs a certification in support of an appropriate transfer may be liable for a civil monetary penalty if he or she knew or should have known that the benefits of transfer did not outweigh the risks of transfer, or if he or she misrepresented the patient's condition. Physicians can be excluded from the Medicare program because of repeated cases or a "gross and flagrant" violation.

- OMIC's *Professional Liability* policy under *Additional Benefits* provides coverage for EMTALA Proceedings, which covers legal expenses and fines and penalties up to $100,000 for government actions alleging EMTALA violations. OMIC Policy Coverage

ASSESSMENT

What type of on-call coverage does EMTALA mandate?

Hospital Obligations

- Under most circumstances the medical screening exam and treatment to stabilize the emergency medical condition is provided by emergency physicians.

- When stabilizing treatment requires a consultation, the hospital that provides emergency services must maintain a schedule of medical and surgical specialists on call for the ED.

- Hospitals where ophthalmologists have privileges may mandate on-call responsibilities for their staff.

Physician Obligations When On-call

- If you are on-call at a hospital you must abide by EMTALA laws and regulations and respond within a reasonable amount of time based on hospital policies.

- If you are on-call for an ED and are asked to provide treatment for a patient you terminated, you are still obligated to provide treatment. You do not have to provide outpatient treatment and should inform the ED physician of this and document this in the medical record.

- The on-site treating emergency physician has the primary responsibility for making patient care decisions. If there is a dispute, you should defer to their medical judgment. If they ask you to come to the ED to examine the patient in person when you are on-call, you should oblige.

- It is not acceptable to refer emergency cases to physicians' offices, with exceptions. If the hospital does not have the equipment to determine if an EMC is present, or equipment to stabilize a patient if an EMC exists, then a patient can be transferred to a physician's office if the office has the specialized equipment and capability. On-call physicians must treat and stabilize the patient without regard for their ability to pay. Once the patient is stabilized, the physician can bill for any additional subsequent care visits.

- A physician who is on-call may visit their own patients in the hospital, maintain office hours, perform elective surgery, or serve on-call to more than one hospital, provided each hospital has policies and procedures to address when the on-call physician is not available and there is a back-up plan arranged with the hospital.

- If an on-call physician is unable to treat a condition because it is outside their expertise, they should inform the ED to initiate a transfer to a facility that has a physician with the expertise necessary to treat the condition.

Physician Obligations When Not On-Call

- If you are not on-call, you do not have a legal duty under EMTALA to accept consultations or referrals from the ED. You are not obligated to provide treatment even if they do not have other options. The hospital has a duty to have a back-up plan, which might involve a transfer to another hospital.

Post On-Call Duties

- The hospital must provide the patient with a plan for appropriate follow-up care as part of the discharge instructions. EMTALA doesn't mandate who must provide post-discharge care.

- Serving as an on-call physician may create a physician-patient relationship that would require providing post-discharge care. EMTALA does not address the role of the on-call physician in follow-up care. Patients may reasonably assume that if you provide emergency care and recommend the need for ophthalmic follow-up care, you will provide it. The ED may also provide your name for follow-up care as part of the discharge instructions requirement.

- If you do not intend to provide post-discharge care, inform the ED physician and hospital that you will not provide the follow-up care, so that they can identify alternative sources of care and thus fulfill the hospital's EMTALA duty.

- If you accept patients for post-discharge care, and they don't show up for their appointments, you should follow your no-show/missed appointments procedures, which should include a follow-up call and no-show letter (template below).

- In general, the physician must see the patient for follow-up until the patient is stabilized from the event. Physicians should review the terms of their medical staff bylaws and medical staff rules and regulations to determine their specific responsibilities for follow-up.

RISK RECOMMENDATIONS

- Respond timely when contacted by the ED.
- Defer to the judgment of the ED physician if requested to personally examine the patient.
- Establish clear communication regarding the plan with the ED physician and document discussions.
- Be familiar with your hospital's medical staff bylaws and the conditions or your hospital privileges.
- Document discussions with the ED concerning EMTALA calls.
- Follow your established no-show/missed appointments procedure for patient that are referred to you from the ED and don't show for their appointment

RESOURCES

1. American College of Emergency Physicians. (n.d.). *Understanding EMTALA*. EMTALA Fact Sheet
2. Centers for Medicare & Medicaid Services. (2024). *Emergency Medical Treatment & Labor Act (EMTALA)*. EMTALA.
3. Bitterman RA. EMTALA: *Providing emergency care under federal law*. American College of Emergency Physicians. 2001; Supplement 2004.

4. Warby R, Leslie SW, Borger J. *EMTALA and Patient Transfers*. [Updated 2023 Nov 22]. In: StatPearls [Internet]. Treasure Island (FL): StatPearls Publishing; 2024 Jan-. Available from: https://www.ncbi.nlm.nih.gov/books/NBK557812/

Need confidential risk management assistance?
OMIC-insured ophthalmologists, optometrists, and practices are invited to contact OMIC's Risk Management Department at (800) 562-6642, option 4, or at riskmanagement@omic.com.

This sample letter is provided as a guideline only and should be modified according to the situation. **Be sure to place a copy of the letter in your "On-call" File.** If you do not give this to the patient personally, and the patient's condition warrants a certified letter, send it both certified and through the regular mail. Place the letter and the signed return receipt in the On-call File. Copy the Emergency Department physician.

SAMPLE LETTER: NO-SHOW

(On Physician's Letterhead)

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

(Date)

Dear (Patient):

As you know, Dr. (name) of (name) Hospital's Emergency Department referred you to me. I am an ophthalmologist (eye physician and surgeon). The physician in the Emergency Department physician diagnosed you with an eye condition. This condition could get worse without care. You could lose vision or go blind.

Please make an appointment right away with an ophthalmologist. You may contact your insurance company for ophthalmologists in our area who accept your insurance. Or you could call my office to reschedule an appointment.

Sincerely,

(Physician's Signature & Name)

cc: (name of ED physician)