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CMS Suspends Non-Emergency Surveys Because of COVID-19, But There's No Pass on EMTALA

By Nina Youngstrom

CMS on March 4 suspended "non-emergency" surveys of compliance with the Medicare conditions of participation to free surveyors to focus on coronavirus and other "serious health and safety threats." That doesn't mean surveyors will ignore other violations, however, and hospitals "won't get a pass" on the Emergency Medical Treatment and Labor Act (EMTALA), a former CMS official tells *RMC*.

"There may be a very narrow, focused survey because of the current health crisis, but you are expected to be in compliance with all Medicare requirements, including EMTALA, the Clinical Laboratory Improvement Amendments and the Life Safety Code," said Mary Ellen Palowitch, who until mid-February was the EMTALA technical lead in the CMS Quality, Safety & Oversight Group and is now with Dentons US LLP in Washington, D.C.

At some point, however, HHS could waive parts of EMTALA and HIPAA in certain circumstances, attorneys said.

In a memo[1] to state survey agency directors, David Wright, the director of the Quality, Safety & Oversight Group in CMS's Center for Clinical Standards, said surveys will be limited to complaints of immediate jeopardy (cases that put patients at risk of death or harm) and alleged infection control concerns, including potential COVID-19, the illness caused by the coronavirus; recertifications required by statute; revisits to resolve enforcement actions; initial certifications; surveys of facilities/hospitals with infection control deficiencies at the immediate jeopardy level in the previous three years; and "surveys of facilities/hospitals/dialysis centers that have a history of infection control deficiencies at lower levels than immediate jeopardy."

The suspension of nonemergency surveys is a first for CMS, Palowitch said. Narrowing their scope allows CMS surveyors to inspect more facilities faster because survey teams will be smaller (one to three members), and to stay fewer days at each facility. "It's a really big change. They are treating it more like complaint surveys so they can be focused," she explained. "I think they are trying to cast a pretty wide net." Because surveyors are now looking through an infection control lens, they're not focused on compliance with other conditions of participation and conditions of coverage, but they won't be blind to them either, Palowitch said. Infection control "touches all parts of the facility," including laundry, pharmacy, waiting rooms, isolation and dietary, and if surveyors "are onsite and identify other deficiencies, they can cite the hospital for that."

This development is a clear sign of CMS's concern about COVID-19's spread in health care facilities, said attorneys Catherine Greaves and Jennifer Siegel, with King & Spalding. "Hospitals and long-term care providers should pay careful attention to the instructions CMS is passing on to its surveyors," Siegel said. A 2017 CMS regulation requires hospitals, long-term care facilities and 15 other types of providers and suppliers to have an emergency preparedness program,[2] which CMS extended to infectious diseases in March 2019. "Hopefully, most facilities are well-positioned to quickly implement any additional control measures that may be required by CMS and COVID-19," Siegel said.

That may not always be the case. Hospitals and other facilities have been dinged in surveys for failing to complete

the drills and exercises required by the emergency preparedness regulation, said Nora O'Brien, CEO of Connect Consulting Services. Drills and exercises are "where the rubber meets the road," she said. They reveal whether providers can put the policies and procedures on their shelves into action, which obviously is critical with the spread of COVID-19. "Most recently, 60% to 70% [of facilities] have some kind of corrections, and some are significant," O'Brien said.

The emergency preparedness regulation requires providers to implement an all-hazards approach to emergency preparedness (e.g., hurricanes, floods, viruses and terrorism), she said. They must do risk assessment and planning; develop policies and procedures; create a communication plan; and do training exercises and testing with employees, residents, volunteers and contractors. One training must be a community-based, full-scale exercise, and the other could be a full-scale drill or tabletop exercise. However, CMS scaled back training requirements to once every two years in its 2019 Regulatory Provisions to Promote Program Efficiency, Transparency and Burden Reduction.

"This is a time to have great relationships with local and state health departments," O'Brien said. "They will be a lifeline to health care providers as the coronavirus spreads because they will offer critical information, planning resources, and vaccine distribution processes when the vaccine will become available."

EMTALA, HIPAA Waivers May Be on the Table

Hospitals also must be vigilant about compliance with EMTALA, "which became an issue with Ebola," Palowitch said. EMTALA requires hospitals with emergency rooms to give medical screening exams to all patients who come to the emergency room and provide stabilizing treatment for emergency medical conditions, regardless of ability to pay. Patients may be transferred if hospitals lack the capacity or capability to treat them, and receiving hospitals must accept transfers unless they lack the capacity or capability.

"Compliance with HIPAA and EMTALA is still crucial and complaints regarding violations of these regulations will still almost certainly be investigated," even if the investigations happen later than usual, Greaves said. It's also possible HHS Secretary Alex Azar will suspend some aspects of HIPAA and EMTALA.

If hospitals need regulatory relief in a crisis, the Sec. 1135 waiver process may come into play, said attorney Sandra DiVarco, with McDermott, Will & Emery LLP in Chicago. The waivers may be made available when "the President declares a disaster or emergency under the Stafford Act or National Emergencies Act and the HHS Secretary declares a public health emergency under Section 319 of the Public Health Service Act," according to the CMS website. That's not the case so far.

1135 waivers aren't blanket waivers, said attorney Gregory Fosheim, with McDermott, Will & Emery LLP in Chicago.

Hospitals would request relief based on the specific circumstances they were experiencing in relation to the crisis. For example, a hospital may turn away patients with broken legs if its ER is overwhelmed with patients being screened for coronavirus or, conversely, divert all suspected infected patients in a community-coordinated manner to a nearby hospital with an isolation unit, he said. A Section 1135 waiver could help ensure that the hospitals are not later faced with claims of EMTALA violations. "The facility-specific nature of the waiver process bears out the local nature of the public health emergency response. That's why public health responses are extremely local," Fosheim said. "If our systems treated public health as solely a federal response, we could lose highly relevant facts and circumstances in an attempt to provide a one-size-fits-all approach."

The HHS Office for Civil Rights reminded covered entities how information may be shared in a Feb. 3 bulletin[3] on HIPAA and the coronavirus. For example, covered entities (CEs) may share protected health information (PHI)

with a patient's family members or friends who have been identified by the patient as involved in their care or without the patient's permission if they are unconscious or incapacitated "if the health care provider determines, based on professional judgment, that doing so is in the best interests of the patient."

Beyond that, Greaves and Siegel said CEs could seek waivers of aspects of HIPAA. For example, hospitals may want to speak to family members or friends involved in the patient's care without their consent or disregard the patient's request to opt out of the facility directory.

CMS, CDC Give Coding Guidance

Compliance professionals are a good clearinghouse for tracking the regulations and other issues that COVID-9 touches on, such as billing, DiVarco said. CMS announced a new Healthcare Common Procedure Coding System (HCPCS) code for providers and labs to use to test patients for SARS-CoV-2 for dates of service on or after Feb. 4, although Medicare administrative contractors won't accept the code until April 1. "This code will allow those labs conducting the tests to bill for the specific test instead of using an unspecified code, which means better tracking of the public health response for this particular strain of the coronavirus to help protect people from the spread of this infectious disease," CMS said. "Healthcare providers who need to test patients for Coronavirus using the Centers for Disease Control and Prevention (CDC) 2019 Novel Coronavirus Real Time RT-PCR Diagnostic Test Panel may bill for that test using the newly created HCPCS code (U0001)." Then, on March 5, CMS announced a second HCPCS code (U0002) that lets labs bill for non-CDC lab tests for SARS-CoV-2/2019-nCoV (COVID-19).

The CDC also released supplemental ICD-10 coding guidance for diagnosing COVID-19. It states that "Diagnosis code B34.2, Coronavirus infection, unspecified, would in generally not be appropriate for the COVID-19, because the cases have universally been respiratory in nature, so the site would not be 'unspecified.'"

Once the dust settles, compliance officers will want to review what bills were dropped for care provided to patients related to COVID-19. "It goes to billing integrity," Fosheim said.

Compliance officers also may work with the multidisciplinary teams assigned to emergency preparedness, DiVarco said. They will be looking at whether the hospital has enough personal protective equipment (e.g., eye protection in addition to masks and gowns), and how open the hospital's visitation policies will be. "If it were measles, there is an understanding, but for these emerging diseases, we are learning as they develop," she said. Compliance professionals can help "synthesize the guidance" and turn it into action plans.

CMS issued two other memos on March 4: Guidance for Infection Control and Prevention Concerning Coronavirus Disease (COVID-19): FAQs and Considerations for Patient Triage, Placement and Hospital Discharge[4] and Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes.[5]

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1 Centers for Medicare & Medicaid Services, "Suspension of Survey Activities," memorandum, March 4, 2020, https://go.cms.gov/2VL1nHq.
2 Nina Youngstrom, "Emergency Preparedness: 'Test Your Plan'; Infectious Diseases Are Added," Report on Medicare Compliance 28, no. 26 (July 22, 2019), http://bit.ly/32KHQs4.
3 U.S. Department of Health and Human Services Office for Civil Rights, "HIPAA Privacy and Novel Coronavirus," *bulletin*, February 2020, http://bit.ly/3ay9Ce1.

4 Centers for Medicare & Medicaid Services, "Guidance for Infection Control and Prevention Concerning Coronavirus Disease (COVID-19): FAQs and Considerations for Patient Triage, Placement and Hospital Discharge," memorandum, March 4, 2020, https://go.cms.gov/3awFhwy.
5 Centers for Medicare & Medicaid Services, "Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in nursing homes," memorandum, March 4, 2020, https://go.cms.gov/2TuXoNO.