THE SULLIVAN GROUP

TSG NEWSLETTER

SAVING LIVES - REDUCING RISK

CMS Reverses Its Position On Applying The Nondiscrimination Patient Transfer Provision To Inpatients!

In April 2008 CMS proposed to amend Sec. 489.24(f) to add a provision that when an individual covered by EMTALA is admitted as an inpatient and remains unstabilized with an emergency medical condition, a receiving hospital with specialized capabilities has an EMTALA obligation to accept that individual, assuming that the transfer of the individual is an appropriate transfer and the participating hospital with specialized capabilities has the capacity to treat the individual. Although this was only a proposed rule, CMS characterized it as a "clarification" and did not ask for public comment on the issue.

As we mentioned in our most recent newsletter, this was a surprise since in 2003 CMS published an EMTALA final rule that established that EMTALA did not apply to inpatients! We provided a numbered list showing the convoluted thought process that led to this conclusion. In the newsletter we wrote "CMS does not appear to be looking for comments on this change. In fact, characterizing it as a "clarification" implies that CMS considers the issue closed."

We commented that this did not seem like a 'clarification', but a major policy change that would have a dramatic impact on the US medical system, and further that this change would very likely need further evaluation after implementation.

CMS clearly overstepped on this issue and received a barrage of negative feedback. The final rule on this issue was published in the Federal Register on August 19, 2008 in Volume 73, No. 161, pages 48654-48668.

The relevant language in the final rule is on page 48656 and can be found by going to the federal register home page; in the 2008 search box simply put "page 48656". The comments and response are very interesting.

The bottom line is that CMS has reversed its position on this 'clarification'. The Non-discrimination provision will not apply to inpatients. The relevant language from the final rule follows.

"Finally, as stated previously, due to the concerns that commenters raised, we are not finalizing the proposed policy. Rather, we are finalizing a policy that a hospital with specialized capabilities is not required under EMTALA to accept the transfer of a hospital inpatient. Although we believe that the language of section

1867(g) of the Act can be interpreted as either applying or not applying to inpatients, after reviewing the comments raised by many commenters, we have serious concerns about the impact the proposed policy would have had on patient care and the possibility that it may overburden many hospitals that are currently having difficulties providing sufficient emergency care."

"As stated previously, in this final rule, rather than adopting the proposed regulation language, we are clarifying the EMTALA regulations at § 489.24(f) with respect to hospital inpatients by stating that once an individual is admitted in good faith by the admitting hospital, the admitting hospital has satisfied its EMTALA obligation with respect to that individual, even if the individual remains unstabilized, and a hospital with specialized capabilities does not have an EMTALA obligation to accept an appropriate transfer of that individual. We encourage the public to make CMS aware if this interpretation of section 1867(g) of the Act should result in harmful refusals by hospitals with specialized capabilities to accept the transfer of inpatients whose emergency medical condition remains unstabilized, or any other unintended consequences."

TSG apologizes for any confusion this may have caused. However, when CMS provides a 'clarification' in general it makes its way into the final rule intact. Regardless; given the precarious state of the US health care system, this reversal is the correct result!

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