

CMS Reinforces Certain EMTALA Obligations

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On September 17, 2021, the Department of Health and Human Services (HHS) Secretary Xavier Becerra announced a three-pronged response from HHS following Texas' passage of SB 8, which is a law that became effective on September 1, 2021, that to some extent restricts abortions in Texas. As part of that three-pronged response, in addition to awarding additional Title X funds to providers to enable access to reproductive health care services, the HHS Office for Civil Rights (OCR) and Centers for Medicare & Medicaid Services (CMS) issued guidance and a memorandum, respectively, reinforcing certain existing requirements that OCR and CMS enforce.

CMS issued its September 17, 2021 memorandum (the "Memorandum") to remind hospitals of their existing Emergency Medical Treatment and Labor Act (EMTALA) requirements, particularly as it pertains to patients who are pregnant or are experiencing pregnancy loss. The policy in the Memorandum became effective immediately.

The Memorandum reminds hospitals and physicians that they have three general obligations under EMTALA: (1) *screen* any individual (including women in labor) seeking emergency care to determine whether an emergency medical condition exists; (2) *stabilize* the individual within the hospital's capability, unless transfer is merited or requested in accordance with the law; and (3) *transfer* the individual, as merited or requested in accordance with the law. According to the Memorandum, a hospital cannot cite a state law or practice as the basis of a transfer. "EMTALA requires that a person in labor may be transferred only if the individual or their representative requests the transfer, or if a physician or other qualified medical personnel signs a certification, with respect to the person in labor, that 'the benefits of the transfer to the woman and/or the unborn child outweigh its risks.'" A physician's professional and legal duties under EMTALA preempt any directly conflicting state law or mandate.

The Memorandum also includes a reminder that emergency medical conditions may include, but are not limited to, "ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features," which may require a course of

stabilizing treatment that includes medical or surgical intervention. According to OCR's September 17, 2021 guidance, "[l]awful abortions under the Church Amendments also include abortions performed in order to stabilize a patient when required under" EMTALA; OCR's guidance pertains to nondiscrimination protections under the Church Amendments, which protects health care personnel from employment discrimination related to, among other things, the performance of lawful abortions.

If CMS were to receive a complaint against a physician or hospital that alleges violations of EMTALA, and CMS's subsequent investigation finds EMTALA violations, the physician could be subject to exclusion from Medicare and Medicaid programs and/or civil monetary penalties, and the hospital could be subject to termination of its provider agreement and/or civil monetary penalties. Therefore, it is important for physicians and hospitals to recognize and meet their obligations under EMTALA.