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In Wake of Dobbs Decision, CMS Issues Guidance to Hospitals on EMTALA Obligations

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Last week, the Centers for Medicare & Medicaid (CMS) issued guidance to remind hospitals of their ongoing federal obligations under the Emergency Medical Treatment and Labor Act (EMTALA), specifically when treating patients who are pregnant or experiencing a pregnancy loss. The guidance was issued in the wake of the U.S. Supreme Court's recent *Dobbs* decision,[1] which has triggered a number of states to enact legislation prohibiting or restricting access to abortion. Many hospitals and health care providers are seeking clarity on the legal ramifications of treating their patients, specifically pregnant patients in need of emergency medical care. In the guidance memorandum, CMS clarified that if a state law prohibits abortion and does not include an exception for the life and health of the pregnant person—or draws the exception more narrowly than EMTALA's definition of "emergency medical condition" (EMC)—that state law is preempted by EMTALA.

EMTALA Requirements

Medical Screening Examination

Under EMTALA, if an individual comes to a dedicated emergency department (ED)[2] and a request is made by the individual, or on the individual's behalf, for an examination or treatment for a medical condition, the hospital must provide an appropriate ***medical screening examination*** within the capability and capacity of the hospital's ED, including ancillary services routinely available to the ED, to determine whether or not an EMC exists, regardless of the individual's ability to pay for the services. The existence of an EMC is determined by the examining physician or other qualified medical personnel (QMP)[3] and exists if the condition is, or is certain to become, an emergency without stabilizing treatment. For a pregnant patient, this includes conditions such as active labor, abdominal pain due to an ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, including preeclampsia. An EMC also includes medical conditions with acute symptoms of sufficient severity that could jeopardize the health of an individual, such as serious impairment or dysfunction of bodily parts or organs.[4] CMS has stated that being pregnant in and of itself is not an EMC without the need for evaluation and stabilization. CMS has also emphasized that

consideration of an EMC is left to the examining provider's clinical judgment.

Stabilizing Treatment

Upon the determination that an EMC exists, EMTALA requires a hospital, within the capabilities of its staff and facility, to provide such medical treatment necessary to assure, within reasonable medical probability, that no material deterioration of the EMC or the individual is likely to result. This means that if a patient presents to the ED experiencing an EMC and within the physician's clinical judgment, it is determined that an abortion is the appropriate stabilizing treatment necessary to resolve the EMC, the physician and the hospital, if they have the capability and capacity to do so, must provide that stabilizing treatment, regardless of any state law that may prohibit such treatment. EMTALA, as a federal law, preempts state law, which means that when state law and federal law are in conflict, federal law supersedes and affords protection against potential state law liability.[5] CMS noted that EMTALA's preemption of state law could be utilized in a variety of ways, including a potential defense to a state enforcement action against a physician or hospital or in a federal suit seeking to enjoin threatened enforcement.

Texas's Response to CMS Guidance

Texas's trigger law, which prohibits abortions from the time of fertilization, becomes effective 30 days after the publication of the *Dobbs* decision. The State filed suit in the Northern District of Texas to permanently enjoin the U.S. Department of Health and Human Services from enforcing the CMS guidance. The complaint raises several substantive and procedural allegations, the most relevant being that the guidance allegedly "compel[s] healthcare providers to perform abortions" and creates a federal law preemption when EMTALA otherwise states it "do[es] not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of [EMTALA]."[6]

However, Texas state law and CMS's clarification on what actions are permitted to meet EMTALA obligations may not be as misaligned as the complaint alleges. Texas's Human Life Protection Act[7] and abortion criminalization laws create exceptions that allow abortions in limited circumstances. These circumstances generally align with the scenarios under which EMTALA preserves the right of a physician to identify an abortion as "the stabilizing treatment necessary to resolve [the EMC]."[8] Despite the similarities between Texas authority and EMTALA, the State claims the CMS EMTALA guidance illegally preempts state law so as to violate Texas's right to "enforce its criminal laws."[9] However, the complaint may incorrectly distinguish the authority to perform an abortion under limited emergency medical circumstances under state law from the alleged "directive" to do so under the EMTALA guidance. In actuality, the state law and federal guidance may well preserve the same right of clinical decision-making. In Texas, the state law allows an exception for an abortion if "in the exercise of reasonable medical judgment the pregnant female … has a life-threatening physical condition aggravated by, caused by or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment …" or the abortion is performed under "medical advice for the purpose of saving the life of the mother."[10]Similarly, the EMTALA guidance states a physician may identify an abortion as the stabilizing treatment necessary to resolve an EMC. In those situations, and in accordance with the physician's "professional and legal duty," the physician must perform the stabilizing treatment.[11] Therefore, both authorities allow physicians to identify an abortion as a life-saving medical procedure, and neither creates a separate right outside the emergency medicine scenario to perform or induce an abortion.

When EMTALA No Longer Applies

A hospital's EMTALA obligation ends when (1) the physician or QMP has made a decision that no EMC exits, even if an underlying medical condition may be present; (2) an EMC condition exists, and the individual is appropriately transferred to another facility; or (3) an EMC exists, and the individual is stabilized or admitted, in good faith, to the hospital for further stabilizing treatment. Therefore, the obligation of the hospital/provider to provide stabilizing treatment ***under EMTALA*** ceases once one of these three situations arises.

Considering the above, if a pregnant patient is admitted for the purpose of providing stabilizing treatment for an EMC, the hospital's EMTALA obligation has been satisfied, and its preemption of state law would appear to no longer apply to the performance of an abortion for purposes of stabilizing such EMC. For an inpatient pregnant individual with an EMC where it is determined an abortion is necessary to provide stabilizing treatment, this could be a serious concern if the hospital is in a jurisdiction that does not have an exception under state law for life-threatening medical conditions. However, in accordance with Medicare Conditions of Participation (COPs),[12] an argument could be made that, even after EMTALA obligations are met, hospitals have a continuing responsibility to assure that individuals admitted on an inpatient basis receive acceptable care to meet the individual's emergency needs.[13] This means that Medicare COPs would preempt more restrictive state law if the physician determines that an abortion is the most clinically appropriate treatment to meet such emergency needs in an inpatient setting. At this point, neither the CMS guidance nor the Texas complaint addresses any rights or obligations related to physician clinical decision-making or abortion care under the COPs. As with other *Dobbs* decision's impact, this issue will be a developing body of law. Any guidance related to the *Dobbs* decision's impact on a hospital's Medicare COPs obligations has yet to be addressed at this time.

A Conflicting Legal Landscape

The *Dobbs* decision has created a collision between state-specific abortion restrictions and the federal requirement to provide stabilizing treatment in the event of a pregnancy-related medical emergency in the ED setting. Given the number of states that have subsequently passed such legislation, hospitals, ED personnel, and patients will likely face this conflicting legal landscape. As reinforced by CMS's recent guidance, all hospitals and their physicians are obligated to meet the requirements of EMTALA, which includes providing stabilizing treatment when necessary. As stated in the CMS guidance, if the stabilizing treatment chosen by the provider conflicts with state law, EMTALA preempts and protects that provider. However, EMTALA obligations and the protections they afford cease once the EMC is no longer present or the patient is admitted to the hospital.

What Hospitals Should Do Now

- Educate your providers and staff on the requirements of EMTALA.
- Consider additional training on EMTALA requirements in the light of new state legislation.
- Continue to monitor administrative, regulatory, and legislative developments following the *Dobbs* decision, and modify your practices and education accordingly.

ENDNOTES

[1] Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

[2] 42 C.F.R. § 489.24(b).

[3] In the CMS Stakeholder Call, July 12, 2022, CMS noted that qualifying personnel is any non-practitioner operating within their scope and within their state board licensing scope of practice and as approved by the hospital's medical staff bylaws to perform the medical screening examination; *see also, supra* note2.

[4] 42 U.S.C. § 1395dd(e)(1).

[5] 42 U.S.C. § 1395dd(f).

[6] Texas v. Becerra, No. 5:22-cv-00185 (N.D. Tex., 2022).

[7] Human Life Protection Act of 2021, H.B. 1280, 87th Leg. Sess. (Tx. 2021), to be codified as Tex. Health & Safety Code Ann. § 170A.001.

[8] Memorandum from the Dep't of Health & Hum. Serv.; Dir, Quality, Safety & Oversight Grp. and Surv. & Operations Grp. to the State Surv. Agency Dir. on Reinforcement of EMTALA Obligations Specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (Jul. 11, 2022), https://www.cms.gov/files/document/qso-22-22-hospitals.pdf.

[9] *Becerra*, No. 5:22-cv-00185.

[10] *See* H.B. 1280; Tex. Rev. Civ. Stat. Ann. art. 4512.6.

[11] *See* Memorandum, EMTALA Obligations, *supra* note 8.

[12] 42 C.F.R. Part 482

[13] *See* CTR. FOR MEDICAID AND MEDICARE SERV., REV. 191, STATE OPERATIONS MANUAL: APPENDIX V. – INTERPRETIVE GUIDANCE – RESPONSIBILITIES OF MEDICARE PARTICIPATING HOSPITALS IN EMERGENCY CASES (Jul. 19, 2019).

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