

# Nurses as QMPs under EMTALA



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(11-23)

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# Written Resources

- EMTALA, 42 USC 1395dd
- EMTALA Regulations, 42 CFR 489.24
- EMTALA Interpretive Guidelines, CMS State Operations Manual App. V (7/19/19), [https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/som107ap\\_v\\_emerg.pdf](https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/som107ap_v_emerg.pdf)
- Stanger, *EMTALA: Guide for Exams, Treatment and Transfers*, [https://www.hollandhart.com/pdf/HollandHart\\_EMTALA-Guide-for-Exams-Treatment-and-Transfers\\_112018.pdf](https://www.hollandhart.com/pdf/HollandHart_EMTALA-Guide-for-Exams-Treatment-and-Transfers_112018.pdf)
- Stanger, *The On-Call Physician's Liability for Failing to Respond to Emergency Room Call*, <https://www.hollandhart.com/the-on-call-physicians-liability-for-failing-to-respond-to-emergency-room-call>

# Penalties

## EMTALA

- Physicians: \$129,232\* penalty
- Hospital:
  - \$64,618\* penalty
  - Lawsuit for damages.
- Termination and exclusion from Medicare and Medicaid.  
(42 USC 1395dd(d); 42 CFR 1003.103(e); 45 CFR 102.3)

## MALPRACTICE

- Physicians and hospital:
  - Malpractice
  - Negligence *per se*
- Adverse action by hospital to minimize hospital exposure to liability

# EMTALA Penalties

- “[A]ny physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of this section ... is subject to a civil money penalty of not more than [129,232\*] for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in this subchapter and State health care programs.”

(42 USC 1395dd(d)(1)(B))

- \$129,232\* is adjusted periodically for inflation.

(45 CFR 102.3)

# On-Call Obligations

- “[EMTALA] provides for enforcement actions against both a physician and a hospital when a physician who is on the hospital’s on-call list fails or refuses to appear within a reasonable period of time after being notified to appear. Hospitals would be well-advised to make physicians who are on-call aware of the hospital’s on-call policies and the physician’s EMTALA obligations when on call....
- “Both the hospital and the on-call physician who fails or refuses to appear in a reasonable period of time may be subject to sanctions for violation of the EMTALA statutory requirements.”

(Interpretive Guidelines for 489.24(j))

# On-Call Obligations

“There is no EMTALA prohibition against the treating physician consulting on a case with another physician, who may or may not be on the hospital’s on-call list, by telephone, video conferencing, transmission of test results, or any other means of communication.... However, if a physician:

- is on a hospital's on-call list;
- has been requested by the treating physician to appear at the hospital; and
- fails or refuses to appear within a reasonable period of time then the hospital and the on-call physician may be subject to sanctions for violation of the EMTALA statutory requirements.”

(Interpretive Guidelines at 489.20(j))

# Screening Exam: QMP

- “[I]f an individual ... ‘comes to the emergency department’... the hospital must—(i) Provide an appropriate medical screening examination within the capability of the hospital's emergency department ... to determine whether or not an emergency medical condition exists. *The examination must be conducted by an individual(s) who is determined qualified by hospital bylaws or rules and regulations and who meets the requirements of § 482.55 of this chapter concerning emergency services personnel and direction...*”

(42 CFR 489.24(a)(1), emphasis added).

- “(1) The emergency services must be supervised by a qualified member of the medical staff.
- “(2) There must be adequate medical and nursing personnel qualified in emergency care to meet the written emergency procedures and needs anticipated by the facility.”

(42 CFR 482.55)



# Screening Exam: QMP

- “The MSE must be conducted by an individual(s) [1] who is determined qualified by hospital by-laws or rules and regulations and [2] who meets the requirements of §482.55 concerning emergency services personnel and direction. The designation of the qualified medical personnel (QMP) should be set forth in a document approved by the governing body of the hospital.”

(Interpretive Guidelines for 489.24(a))

# Screening Exam: RN as QMP

- “A hospital may, if it chooses, have protocols that permit a QMP (e.g., registered nurse) to conduct specific MSE(s) if the nature of the individual’s request for examination and treatment is within the scope of practice of the QMP (e.g., a request for a blood pressure check and that check reveals that the patient’s blood pressure is within normal range).”

(Interpretive Guidelines for 489.24(c))

- **“Q: Can the MSE be conducted by a Registered Nurse (RN)?**

**A:** Yes. MSEs must be conducted by qualified personnel, which may include ... RNs [1] trained to perform MSEs, [2] acting within the scope of their state licensure law, and [3] as approved by the hospital’s governing body.”

(CMS, *Frequently Asked Questions for Hospitals and Critical Access Hospitals regarding EMTALA* (4/30/20), <https://www.cms.gov/files/document/frequently-asked-questions-and-answers-emtala-part-ii.pdf>)

# Screening Exam: RN as QMP

“A registered nurse with training and experience in emergency care can be utilized to conduct specific medical screening examinations only if—

(i) The registered nurse is on site and immediately available at the CAH when a patient requests medical care; and

(ii) The nature of the patient's request for medical care is within the scope of practice of a registered nurse and consistent with applicable State laws and the CAH's bylaws or rules and regulations.”

(42 CFR 485.618(d))

# Screening Exam: RN as QMP

To perform the MSE as a QMP, the RN must:

1. Be designated as a QMP by the hospital board.
2. Act within the scope of his/her licensure.
3. Be trained/qualified to provide the MSE.
  - Likely limited to specific MSEs.
  - Perhaps guided by specific protocols or policies.

# RN as QMP: Scope of Practice

**“Determining Scope of Practice.** To evaluate whether a specific act is within the legal scope of nursing practice, a licensed nurse shall determine whether:

- i. The act is expressly prohibited by the Nursing Practice Act, or the act is limited to the scope of practice of [APRNs] ... or the act is prohibited by other laws;
- ii. The act was taught as a part of the nurse’s educational institution’s required curriculum and the nurse possesses current clinical skills;

...

(IDAPA 24.34.01.200.01(a))

# RN as QMP: Scope of Practice

## “Determining Scope of Practice. ...

iii. The act is consistent with standards of practice published by a national specialty nursing organization or supported by recognized nursing literature or reputable published research and the nurse can document successful completion of additional education through an organized program of study including supervised clinical practice or equivalent demonstrated competency;

iv. Performance of the act is within the accepted standard of care that would be provided in a similar situation by a reasonable and prudent nurse with similar education and experience and the nurse is prepared to accept the consequences of the act.”

(IDAPA 24.34.01.200.01(a))

# RN as QMP: Training and Policies

- “From a survey perspective, we’d examine records for evidence that [1] the Governing Body has authorized RNs to act as QMPs, [2] policies directing their activity, and [3] then individual personnel records to show some evidence that training related to performing MSEs has been completed. Again, what that training looks like is left largely to the individual facilities.”

(E-mail from Dennis Kelly, Acute and Continuing Care Supervisor, DHW  
(4/26/23))

# RN as QMP: Training and Policies

“CMS’s general approach to non-physician screening is to evaluate...:

1. The level of non-physician approved for each individual department ... such as emergency department, obstetrics, ... etc.;
2. The ... MSE is within the scope of licensure for the individual involved under state standards;
3. The individual non-physician functions under medically approved protocols;
4. The protocols define the limits of the non-physician’s practice in providing an MSE and define objective criteria as to when the MSE must be performed by a physician; and
5. Individuals providing non-physician MSEs are properly qualified, have appropriate competencies, are trained for the role, and are reviewed for quality on a regular basis.”

(J. Moffat, *EMTALA Answer Book* at Q:37 (2023 Ed.))



# RN as QMP: Training and Policies

“The basic qualifications for personnel designated to perform MSEs should be included in medical staff and hospital policies. Limitations on the ability of designated personnel to perform certain types of examinations should be listed in medical staff rules and regulations. The hospital should set forth training and in-service requirements for screening personnel in policies and procedures and maintain records of personnel who complete training and in-service programs. Additional standards may be required for registered nurses who perform MSEs.”

(M. Hackley, *EMTALA: A Practical Primer for Risk Professionals*, Am. Soc. for Health Care Risk Mgmt (ASHRM) (2021))

# RN as QMP: Conflicting Policy?

## Emergency Room MSE Protocol

- Charge nurse with privileges may provide limited MSE.
  - Vital signs
  - Clinical exam to determine emergency v. non-emergency
  - If stable and non-emergent, may allow patient to be seen in clinic.
  - If patient wants to stay in ER, on-call physician will be called.
  - After hours/weekends, charge nurse can only perform RN Qualified Evaluations. All others seen by on-call provider.

## RN Qualified Evaluator Protocol

- RN may provide “Qualified Evaluator Visits” for
  1. SANE Exams.
  2. Determine active labor.
  3. Vital sign assessment.

# Responding to ED: Sending to Clinic for MSE

- “When a physician is on-call for the hospital and seeing patients with scheduled appointments in his/her private office, it is generally not acceptable to refer emergency cases to his or her office for examination and treatment of an EMC. The physician must come to the hospital to examine the individual if requested to do so by the treating physician.”

(Interpretive Guidelines for 489.24(j))

- “On-campus provider-based entities (such as rural health clinics or physician offices) are not subject to EMTALA, therefore it would be inappropriate to move individuals to these facilities for a MSE or stabilizing treatment under [EMTALA].

(Interpretive Guidelines for 489.24(a)(1)(i))

# Responding to ED: Time Limits

“[EMTALA] specifically provides for penalties against both a hospital and the physician when a physician who is on-call either fails to appear or refuses to appear within a reasonable period of time. Thus, a hospital would be well-advised to establish in its on-call policies and procedures specific guidelines – e.g., the maximum number of minutes that may elapse between receipt of a request and the physician’s appearance for what constitutes a reasonable response time, and to make sure that its on-call physicians and other staff are aware of these time-sensitive requirements.

(Interpretive Guidelines at 489.20(j), emphasis added)

# Responding to ED: Time Limits

“[T]here must be a doctor of medicine or osteopathy, a physician assistant, a nurse practitioner, or a clinical nurse specialist, with training or experience in emergency care, on call and immediately available by telephone or radio contact, and available on site within the following timeframes:

(i) Within 30 minutes, on a 24-hour a day basis...

(42 CFR 485.681(d)(1))

# Responding to ED: Reporting Physicians

“If a hospital transfers a patient, the hospital must send the receiving hospital “and the name and address of any on-call physician ... who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment.”

(42 USC 1395dd(c)(2)(C))

# Responding to ED: Using Telehealth

**“1. Q: Can emergency physicians and other health care practitioners conduct medical screening exams (MSEs) under EMTALA via telehealth?”**

**A: Yes. QMPs, including emergency physicians, can perform MSEs using telehealth equipment.... The MSE may be performed solely via telehealth if clinically appropriate.... Regardless of location, the QMP must be performing within the scope of his/her state practice act and approved by the hospital’s governing body to perform MSEs.”**

*(CMS, Frequently Asked Questions for Hospitals and Critical Access Hospitals regarding EMTALA (4/30/20), <https://www.cms.gov/files/document/frequently-asked-questions-and-answers-emtala-part-ii.pdf>)*

# Malpractice Issues

- Claims increasing – especially ER claims
- Held to policy of hospital
- Risk of provider not seeing patient and poor outcome
- Plaintiffs’ attorneys becoming wiser:
  - Informed consent
  - EMTLA
- “Standard of care” geographical area shrinking
  - hospital held to regional/state/nat’l standard
  - other Idaho hospitals polled = NO RN MSEs



# Questions?

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