



# KANSAS HOSPITAL ASSOCIATION

## EMTALA & "Bioterrorism"

**February 2004**

The Emergency Medical Treatment and Labor Act Final Rule that became effective November 2003 addressed the application of EMTALA to bioterrorism and "national emergencies."

In the Preamble to the Final EMTALA Rule, the Center for Medicare and Medicaid Services ("CMS") addressed a comment that CMS guidance might be viewed as being inconsistent with a hospital's statutory responsibility to provide screening services under EMTALA. CMS agreed that hospitals should be informed of their EMTALA responsibilities in the event of a "bioterrorist attack or other national emergency." With the passage of Public Law 107-188, the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (not to be confused with the October 26, 2001 U.S. Patriot Act) this legislation amended § 1135 of the Social Security Act to permit the Secretary of the United States Department of Health and Human Services to temporarily waive certain requirements of selected laws. One of these laws is the "Inappropriate Transfer of an Unstabilized Individual" provision under EMTALA. A new section was added to EMTALA at 42 C.F.R. 489.24(a)(2) that indicates that sanctions under EMTALA for inappropriate transfer during a national emergency do not apply to a hospital with a dedicated

emergency department located in an emergency area.

CMS indicates that in the event of a national emergency, CMS would issue appropriate guidance to hospitals.

This is in keeping with CMS's position from 2001 when it issued a letter to regional administrators and state survey agencies. In the November 8, 2001 letter to administrators and state survey agencies, CMS indicated that as a result of the then current anthrax problem, hospitals were seeking clarification regarding the EMTALA obligations when staff encounter situations related to the actual or potential exposure to a biological agent. CMS acknowledged in this letter that patients who present to a hospital emergency department requesting treatment of a possible medical condition must receive a screening examination, and if found to have an emergency medical condition, must receive stabilizing treatment within the hospital's capability and capacity and/or within the providence of a "community response plan developed by a state or local government." CMS concluded that the transfer or referral

of certain categories of patients in bioterrorism situations in accordance with a community plan would not violate the hospital's EMTALA obligations.

One of the components of the amendment to § 1135 of the Social Security Act gives authority to the Health and Human Services Secretary to make a retroactive waiver to the beginning of the national emergency.

The terms "emergency area" and "emergency period" are both defined in the amendment to § 1135. An emergency area is a geographical area in which, and an "emergency period" is the period during which, there exists an emergency or disaster declared by the President of the United States pursuant to the National Emergencies Act (Public Law 94-412) or the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Public Law 93-288) and the public health emergency declared by the Secretary of Health and Human Services pursuant to a special provision of the Public Health Service Act. The term "health care provider" is defined to mean any entity that furnished health care items or services and includes specifically a hospital.

It is recommended each facility review any community protocol in place relating to the transfer of patients during a national

emergency or bioterrorism event and confirm that such community protocols are in place and applicable within the provisions of EMTALA.

Amendments to § 1135 of the Social Security Act can be accessed at [www.ssa.gov/OP\\_Home/ssact/title11/1135.htm](http://www.ssa.gov/OP_Home/ssact/title11/1135.htm).



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The Kansas Hospital Association provides updates to its members on topics of interest. These updates are for general information and educational purposes. The updates do not constitute legal advice. KHA appreciates the assistance of Steve A. Schwarm, Polsinelli Shalton Welte, in the preparation of this update.