

I. EMTALA WAIVERS FOR DISASTERS

A. 1135 Waiver Basics

1. Through Section 1135 of the Social Security Act (SSA) (Section 1135), the Secretary of Health and Human Services (HHS) (Secretary) may waive certain requirements under Titles XVIII (Medicare), XIX (Medicaid), or XXI (State Children's Health Insurance Program (SCHIP) of the SSA or the implementing regulations for these requirements during an emergency period in an emergency area. This includes certain EMTALA requirements.
2. Healthcare providers still must furnish care in good faith. (SSA § 1135(a).)
3. Healthcare providers will not be reimbursed if there is any determination of fraud or abuse, even if a waiver is in effect. (SSA § 1135(a).)
4. A "health care provider" is defined in Section 1135 as any entity that furnishes healthcare items or services, and includes a hospital or other provider of services, a physician or other healthcare practitioner or professional, a healthcare facility, or a supplier of healthcare items or services. (SSA § 1135(g)(2).)

B. Who Can Declare a "Disaster" or an "Emergency?"

1. The President of the United States:
 - a. Under the Robert T. Stafford Act, the President of the United States may declare a major disaster or emergency.
 - b. Under the National Emergencies Act, the President of the United States may declare an emergency.
2. Secretary of HHS: Under Section 319 of the Public Health Services Act, the Secretary has the authority to declare a public health emergency.
3. The President must declare a major disaster or emergency *and* the Secretary must declare a public health emergency for the Secretary to exercise his or her waiver power under Section 1135. (SSA § 1135(g)(1).)
4. In some circumstances, Regional Offices (ROs) of the Centers for Medicare and Medicaid Services (CMS) may issue "advisory notices" during an emergency or disaster. Such advisory notices do *not* have the same effect as a Section 1135 waiver, and should only be sent after the Secretary has already issued a Section 1135 waiver. (CMS, [Transmittal 454](#) (March 6, 2009).)

C. What Can be Waived?

1. When a major disaster or emergency is declared *and* the Secretary has declared a public health emergency, the Secretary may waive EMTALA sanctions for a hospital with a dedicated emergency department located in an emergency area during an emergency period for the following actions:
 - a. An inappropriate transfer during a national emergency or
 - b. For the direction or relocation of an individual to receive medical screening at an alternate location pursuant to:
 - 1) An appropriate State emergency preparedness plan or
 - 2) In the case of a public health emergency that involves a pandemic infectious disease, pursuant to a State pandemic preparedness plan.
2. Conditions for such a waiver include (42 Code of Federal Regulations Section 489.24(a)(2)):
 - a. The transfer is necessitated by the circumstances of the declared emergency in the emergency area during the emergency period.
 - b. The direction or relocation of an individual to receive medical screening at an alternate location is pursuant to an appropriate State emergency preparedness plan or, in the case of a public health emergency that involves a pandemic infectious disease, pursuant to a State pandemic preparedness plan.
 - c. The hospital does not discriminate on the basis of an individual's source of payment or ability to pay.
 - d. The hospital is located in emergency area during an emergency period.
 - 1) Can be only some hospitals in the emergency area.
 - 2) Can be only hospitals in a portion of the emergency area.
 - e. There is a determination that a waiver of sanctions is necessary.

Section 1135 EMTALA Waiver Toolkit

3. Limits on the waiver.
 - a. A seventy-two-hour period beginning upon the implementation of a hospital disaster protocol, *except that* a hospital must implement its disaster protocol to qualify for an EMTALA waiver. A hospital must notify CMS when it implements its disaster protocol, through the appropriate State Survey Agency. (CMS, [Transmittal 454](#) (March 6, 2009).)
 - b. If a public health emergency involves a pandemic infectious disease (such as pandemic influenza), the waiver will be in effect until the termination of the declaration of the public health emergency. (42 Code of Federal Regulations § 489.24(a)(2).)
4. The Secretary's waiver is *only* a waiver of sanctions under EMTALA. The waiver does *not* apply to actions brought by individuals or hospitals who allege harms due to EMTALA violations. These individuals or hospitals may still sue in the context of a Section 1135 waiver.
5. The sanctions for individual physicians are not waived.
6. The EMTALA responsibilities of receiving hospitals are not waived. However, receiving hospitals are not required to accept a transfer if they do not have capacity to treat the patient.

D. Historical EMTALA Waivers

1. The Secretary of HHS has used the waiver power under Section 1135 in a number of situations, including Hurricanes Katrina, Rita, Gustav, Ike, and Dean, the Iowa floods of 2008, and the North Dakota and Minnesota Floods of 2009. In all of these disasters the Secretary has waived requirements of EMTALA:
 - a. “. . . only to the extent necessary [as determined by the Centers for Medicare & Medicaid Services]¹ to ensure that sufficient health care items and services are available to meet the needs of individuals enrolled in the Medicare, Medicaid and SCHIP programs and to ensure that health care providers that furnish such items and services in good faith, but are unable to comply with one or more of these requirements as a result of the effects of [the disaster], may be reimbursed for such items and services and exempted from sanctions for such noncompliance, absent any determination of fraud and abuse.”¹

¹ Most, but not all, SSA § 1135 waivers contain this language.

2. EMTALA sanctions have been waived: “. . . for the redirection of an individual to another location to receive a medical screening examination pursuant to a state emergency preparedness plan or transfer of an individual who has not been stabilized if the redirection or transfer arises out of [disaster related circumstances].”
3. The waivers were in all cases “in effect for a period of time not to exceed seventy-two hours from implementation of a hospital disaster protocol,” not to exceed the termination of the waiver under Section 1135(e); generally the termination of the declaration of emergency or disaster.
4. The waivers were in all cases “not effective with respect to any action . . . that discriminates among individuals on the basis of their source of payment or their ability to pay.”

II. SAMPLE POLICIES AND PROCEDURES

A. Sample Bylaws on Emergency and Disaster Privileges

1. For the purposes of this Section, an “emergency” is defined as a condition in which serious or permanent harm would result to a patient or in which the life of a patient is in immediate danger and any delay in administering treatment would add to that danger. In the case of an emergency, any practitioner, to the degree permitted by his/her license and regardless of department/section, Medical Staff membership or clinical privileges or allied health professional (AHP) status or practice prerogatives, shall be permitted to do, and shall be assisted by Hospital personnel in doing, everything possible to save the life of a patient or to save a patient from serious harm. All efforts will be made to obtain a Medical Staff member with appropriate clinical privileges. Clinical privileges granted under an emergency situation shall terminate when a Medical Staff member with appropriate clinical privileges becomes available or the emergency ceases.
2. Emergency privileges in case of a disaster will be granted in accordance with the following:
 - a. Consistent with the current Hospital Disaster Credentialing Policy (Hospital Disaster Policy) clinical privileges or practice prerogatives may be granted when the Hospital Incident Command System (HICS) plan has been activated and the Hospital is unable to handle the immediate patient needs. This includes events of a bioterrorism attack or any other type of disaster situation whereby Volunteer Practitioners and AHPs, as those terms are defined in the Hospital Disaster Policy, may require disaster credentialing.

Section 1135 EMTALA Waiver Toolkit

- 1) Security will set up a satellite post in the Medical Staff Services Department or other appropriate area where non-credentialed Volunteer Practitioners and AHPs will check in.
 - 2) Emergency privileging for disaster situations is specialty-specific and Volunteer Practitioners or AHPs shall not carry out any clinical activities for which they do not already hold clinical privileges or practice prerogatives at another hospital.
- b. Procedure:
- 1) Upon presentation to the campus, Volunteer Practitioners and/or AHPs shall be directed to the Hospital Representative responsible for disaster credentialing under the HICS plan. Volunteer Practitioners and/or AHPs must sign in and present required identification as follows: a valid government-issued photo identification issued by a state or federal agency (e.g., driver's license or passport), and at least one of the following:
 - a) A current hospital photo ID badge that clearly identifies the person's professional designation;
 - b) A current license, certificate, or registration to practice;
 - c) Identification indicating that the individual is a member of a Disaster Medical Assistance Team (DMAT), or Medical Reserve Corps (MRC), Emergency System for Advanced Registration of Volunteer Health Professionals (ESAR-VHP), or other recognized state or federal organizations or groups;
 - d) Identification that indicates that the individual has been granted authority to render patient care, treatment, and services in disaster circumstances (such authority having been granted by a federal, state, or municipal entity); or
 - e) Identification of Volunteer Practitioners by current Hospital Medical Staff member(s) who possess personal knowledge regarding the Practitioner's ability to act as a practitioner during a disaster, and of Volunteer AHPs by current Hospital Medical Staff member(s) or AHPs who possess personal knowledge regarding the AHP's qualifications.

Section 1135 EMTALA Waiver Toolkit

- 2) Required documentation on the Disaster Clinical Privileges/Practice Prerogative Approval Form:

The Volunteer Practitioner shall include all of the following information on the Disaster Clinical Privileges/Practice Prerogative Approval Form:

- a) Name of Practitioner or AHP (printed and signed)
 - b) Specialty or AHP Category
 - c) Office Address and Phone Number
 - d) Professional License/Certificate/Registration Number and Expiration Date
 - e) Driver's License or Passport Number and Expiration Date
 - f) Date of Birth
 - g) Name of Professional Liability Insurance Carrier and Limits of Liability
 - h) Name of Professional School and Year of Graduation
 - i) Hospital Affiliation(s) and Staff Status
- c. Verification Process:

The Hospital Representative shall verify professional licenses/certificates/registrations as follows:

- 1) Primary Source Verification: Query the appropriate licensing/certification/registration board online, e.g., ([Medical Board of California](#)– use for MDs, DPMs, and PAs; [California Osteopathic Medical Board](#)– use for DOs; [California Board of Registered Nursing](#) – use for RNFAs, NPs, CNMs, and other RNs; [Board of Behavioral Sciences](#) – use for MFTs and LCSWs; [California Psychology Board](#) – use for clinical psychologists), and print verification if possible.
- 2) If computer access is not available, a copy (if possible) of the Practitioner's or AHP's professional license/certificate/registration and driver's license or other identification shall be made and attached to the Disaster Clinical Privileges/Practice Prerogative Approval Form. If a copier is not available, the Hospital Representative shall perform a visual

Section 1135 EMTALA Waiver Toolkit

verification of the above documents, and document such verification.

- 3) If primary source verification of professional licensure/certification/registration cannot be accomplished at the time of initial credentialing, it must be performed as soon as the immediate situation is under control and completed no later than seventy-two hours from the time the Volunteer Practitioner or AHP presented to the campus. In extraordinary circumstances when primary source verification cannot be completed within seventy-two hours (e.g., no means of communication or lack of resources), it shall be accomplished as soon as possible. In this extraordinary circumstance, the following must be documented:
 - a) Why primary source verification could not be performed in the required timeframe;
 - b) Evidence of the Practitioner's or AHP's demonstrated ability to continue to provide adequate care, treatment, and services;
 - c) Attempt(s) to rectify the situation as soon as possible.
 - 4) The Medical Staff Services Department shall query the National Practitioner Data Bank and other sources as needed as soon as the emergency situation has been contained.
 - 5) Primary source verification shall not be required if the Volunteer Practitioner or AHP has not provided care, treatment and services under the Disaster Clinical Privileges/Practice Prerogative Approval Form, as appropriate.
- d. Who May Grant Disaster Clinical Privileges/Practice Prerogatives:
- As described in these Bylaws, the CEO or Chief of Staff or their designees may grant Disaster Clinical Privileges or Practice Prerogatives. The option to grant Disaster Clinical Privileges or Practice Prerogatives to Volunteer Practitioners and/or AHPs shall be made on a case-by-case basis in accordance with the immediate needs of the Hospital's patients, based on the qualifications of the Volunteer Practitioners and/or AHPs.
- e. Temporary Badges:

Section 1135 EMTALA Waiver Toolkit

So that they may be readily identified, Volunteer Practitioners and/or AHPs shall be issued badges containing the following information:

- 1) Name
- 2) Licensure
- 3) Specialty or AHP category
- 4) Practicing with Disaster Clinical Privileges or Practice Prerogatives, as appropriate

f. Oversight:

The Medical Staff shall oversee the care, treatment, and services provided by a Volunteer Practitioner or AHP who has been granted Disaster Clinical Privileges or Practice Prerogatives. Oversight shall be accomplished whenever possible by partnering the Practitioner or AHP with a current credentialed Hospital Medical Staff member or AHP, as appropriate, to observe or mentor the Volunteer Practitioner or AHP. If partnering is not possible, oversight shall be by clinical record review. A Volunteer Practitioner or AHP may be assigned additional responsibilities by the Medical Staff Officer designated under the HICS plan.

g. Continuation of Disaster Clinical Privileges/Practice Prerogatives:

The Hospital shall make a decision within seventy-two hours regarding the continuation of a Volunteer Practitioner's or AHP's Disaster Clinical Privileges or Practice Prerogatives, based on information obtained regarding the professional performance of the Volunteer Practitioner or AHP.

h. Termination of Disaster Clinical Privileges/Practice Prerogatives:

A Practitioner's or AHP's Disaster Clinical Privileges or Practice Prerogatives shall be terminated immediately in the event that any information received through the verification process or otherwise indicates adverse information or suggests the Practitioner or AHP is not capable of exercising Disaster Clinical Privileges or Practice Prerogatives. Disaster Clinical Privileges and Practice Prerogatives are time-limited and shall expire automatically at the time the CEO or designee declares the disaster to be over, or that the services of

Section 1135 EMTALA Waiver Toolkit

Volunteer Practitioners or AHPs are no longer required.

B. Sample EMTALA Policy Language on Section 1135 Waivers

1. This amendment should be placed at the end of a Hospital's hospital-wide EMTALA policy.
2. Conditions of Amendment to EMTALA Policy: it applies when a major disaster or emergency is declared and the Secretary of HHS has declared a public health emergency.
 - a. Hospital must implement its disaster protocol.
 - b. Hospital must notify CMS through the appropriate State Survey Agency when it implements its disaster protocol.
 - c. The Secretary exercises his or her waiver power under Section 1135 to cover the area in which the Hospital is located.
 - d. The waiver is either limited to a seventy-two-hour period beginning with the implementation of the Hospital's disaster protocol or, in the case of a pandemic infectious disease, until the termination of the declaration of the public health emergency.
3. Amendment Language: **"This EMTALA policy does not apply when the Secretary of HHS declares a public health emergency and a waiver of EMTALA requirements for the area in which the Hospital is located. The waiver of the Hospital's EMTALA requirements applies only for the period during which the waiver is in effect."**

Helpful Websites

EMTALA Basics

- [Social Security Administration, Compilation of the Social Security Laws](#)
- [CMS page on EMTALA](#)
- [American Academy of Emergency Medicine page on EMTALA](#)

EMTALA Waivers

- [HHS, Legal Authority for Implementation of a Federal Public Health and Medical Services Response](#)
- [HHS, HHS Declares Public Health Emergency for Hurricane Katrina](#)

Section 1135 EMTALA Waiver Toolkit

- [HHS, Hurricane Dean: Public Health Emergency Declared](#)
- [HHS, Waiver or Modification of Requirements under Section 1135 of the Social Security Act \(Hurricane Gustav\)](#)
- [HHS, Waiver or Modification of Requirements under Section 1135 of the Social Security Act \(Hurricane Ike\)](#)
- [HHS, Waiver or Modification of Requirements under Section 1135 of the Social Security Act \(Iowa Floods\)](#)
- [HHS, Waiver or Modification of Requirements under Section 1135 of the Social Security Act \(North Dakota Floods\)](#)
- [CMS, Transmittal 454, Influenza Pandemic Emergency Preparedness—Waiver of Certain Medicare Requirements \(March 6, 2009\)](#)

Disasters

- [HHS, Disasters and Emergencies](#)
- [CMS, Hurricane Information](#) (includes links to many waivers)
- [CMS, Pandemic Flu Information](#)
- [CMS, Severe Storm and Flood Information](#) (includes links to North Dakota and Minnesota Flood waivers):