



## COVID-19 Update: CMS issues new 1135 blanket waivers

March 31, 2020

On March 30, 2020, the Centers for Medicare and Medicaid Services (CMS) issued [new blanket 1135 waivers](#), making what CMS describes as “sweeping regulatory changes” to the health care system.

The waivers granted by CMS are blanket waivers that apply nationwide without further action by providers. CMS expressly states that “these waivers DO NOT require a request to be sent to [CMS] or that notification be made to any of CMS’s regional offices.”

Waivers for various provider categories have been issued and are described by CMS in [provider-specific fact sheets](#), including for hospitals, home health agencies (HHAs), skilled nursing facilities (SNFs), hospices, end-stage renal disease (ESRD) facilities, laboratories and physicians.

Hospitals should note the following important points regarding the hospital waivers:

### EMTALA

CMS waived enforcement of the Emergency Medical Treatment and Labor Act (EMTALA) screening requirement at 42 USC 1395dd(a) to prevent the spread of COVID-19 but must be consistent with a state’s emergency preparedness or pandemic plan.

- Similar language was included in the original 1135 waiver authorization by HHS but required additional action by CMS. As noted above, this new waiver by CMS is a blanket waiver that applies nationwide without further application by hospitals to CMS.
- The blanket waiver is of the screening requirement at 42 USC 1395dd(a), which will allow a hospital to redirect / transport patients from the hospital/emergency department to off-campus sites to conduct screening there. Note that other

provisions of EMTALA (42 USC 1395dd(b)-(i)), including the requirement to provide necessary stabilizing treatment under (b) and restricting transfers until stabilized under (c) are not waived.

### **Non-hospital buildings and temporary expansion sites**

CMS is waiving the Physical Environment requirements (42 CFR 482.41) to allow hospitals to use non-hospital buildings for patient care and quarantine sites. However, the use of non-hospital buildings is conditioned on such locations being “approved by the State.” CMS is also waiving the provider-based rules (42 CFR 413.65) to allow hospitals to operate any location meeting the conditions of participation as hospital locations. CMS notes that this also permits hospitals to change the status of current provider-based department locations.

### **Waivers for “surge facilities”**

Numerous waivers apply to reduce burdens at the expanded alternative site locations, which are described in the waivers as “surge capacity sites” and “surge facilities.” These include:

- Waiver of the requirement at 42 CFR 482.28(b)(3) to have a current therapeutic diet manual approved by the dietitian and medical staff readily available to all medical, nursing and food service personnel at these locations.
- Waiver of the requirement at 42 CFR 482.12(f)(3) to have written policies and procedures for staff to use when evaluating emergencies at these locations.
- Waiver of the requirements at 42 CFR 482.15(b) to develop and implement emergency preparedness policies and procedures, and 42 CFR 482.15(c)(1)-(5) for emergency preparedness communication plans to contain specified elements, at these locations.

### **Discharge planning**

CMS is waiving certain discharge planning requirements, including:

- Requirements to provide information regarding discharge planning, as outlined in 42 CFR 482.43(a)(8), 42 CFR 482.61(e) and 42 CFR 485.642(a)(8). Under this waiver, CMS recognizes that a hospital may not be able to assist patients in using quality measures and data to select a nursing home or home health agency, but the hospital must still work with families to ensure that the patient discharge is to a post-acute care provider that is able to meet the patient’s care needs.
- Requirements at 42 CFR §482.43(c) for patients to be discharged home and referred for HHA services, or for those patients transferred to a SNF for post-hospital extended care services, or transferred to an IRF or LTCH for specialized hospital services. CMS did not waive the requirement that patients must be discharged to an appropriate setting with the necessary medical information and goals of care.

### **Medical staff and workforce issues**

CMS is waiving numerous requirements related to hospital workforce requirements, including:

- *Medical Staff Requirements:* CMS is waiving the requirements at 42 CFR 482.22(a)(1)-(4) to allow for physicians whose privileges will expire to continue practicing at the hospital and for new physicians to be able to practice in the hospital before full medical staff/governing body review and approval, in order to address workforce concerns related to COVID-19.
- *Physician services:* CMS is waiving the requirements at 42 CFR 482.12(c) that Medicare patients be under the care of a physician, as long as this is not inconsistent with a state’s emergency preparedness or pandemic plan.
- *Anesthesia services:* CMS is waiving the requirements at 42 CFR 482.52(a)(5), 42 CFR 485.639(c)(2), and 42 CFR 416.42 (b)(2), that a certified registered nurse anesthetist (CRNA) is under the supervision of a physician. CRNA supervision will be at the discretion of the hospital or Ambulatory Surgical Center, and state law and may be implemented so long as they are not inconsistent with a state’s emergency preparedness or pandemic plan.
- *Respiratory care services:* CMS is waiving the requirement at 42 CFR 482.57(b)(1) that hospitals designate in writing the personnel qualified to perform specific respiratory care procedures and the amount of supervision required for personnel to carry out specific procedures, but must be consistent with a state’s emergency preparedness or pandemic plan.

- *Sterile Compounding*: CMS is waiving hospital sterile compounding requirements to allow used face masks to be removed and retained in the compounding area to be re-donned and reused during the same work shift in the compounding area only. CMS will not be reviewing the use and storage of facemasks under these requirements.

This is only a summary of a partial list of the numerous blanket waivers granted. The CMS fact sheet for hospitals provides a full list of all blanket waivers applicable to hospitals that have been granted to date.

Separately on March 30, 2020, HHS issued [waivers to the physician self-referral \(Stark\) law](#).

# Authors

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