Managing Patients Who Cannot Be Transferred

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Our policyholders face enormous obstacles as they strive to deliver high quality patient care. Many organizations are struggling to overcome challenges related to staff shortages, supply shortages and lack of bed space in their communities. This month we have invited a guest author, an attorney colleague, to address an issue that many of our policyholders have encountered over the past several months. We trust that this article will provide valuable, strategic insight into this all too common problem.

A 29-year-old male is admitted to a community hospital following an accident. After a diagnostic workup, the emergency department (ED) physician determines that the patient is suffering from a subdural hematoma. The consulting neurologist views the CT scan and recommends neurosurgery, which the community hospital cannot perform. The ED physician makes numerous calls to surrounding hospitals but is unable to find one that will accept the transfer due to patient surges and staff shortages. As the facility has no available beds, the patient is kept in the ED. The medical team attempts to stabilize the patient while he awaits transfer to a higher level of care. In this case, the community hospital is not capable of providing adequate patient care and necessary treatment and intervention.

EMTALA Considerations

Congress enacted the Emergency Treatment and Labor Act (EMTALA) to ensure that hospitals provide, at a minimum, an appropriate medical screening and any necessary stabilizing treatment for ED patients, regardless of the patient's ability to pay. EMTALA imposes a legal duty upon hospitals, not individual physicians, and does not create a private right of action against an individual.

In effect, EMTALA imposes two duties on hospitals. First, when an individual comes to a hospital's ED requesting examination and treatment, the hospital is required to provide an appropriate **medical screening examination** within its capability to determine if an **emergency medical condition (EMC)** exists.

Second, if the hospital determines that an emergency medical condition exists, the hospital must provide further medical examination and treatment of the individual to **stabilize** the patient or arrange for a transfer to another medical facility. A patient is "stabilized" within the context of EMTALA only when the hospital has provided such medical treatment of the condition necessary to assure, "within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during … transfer" of the patient from the hospital.

A hospital may not **transfer** an unstable patient unless (1) the patient requests the transfer in writing after being informed of the hospital's obligations under the statute, or (2) a physician certifies that the medical benefits of treatment at another facility outweigh the increased risks to the individual.

Analysis and Best Practices

In the given scenario, it appears that the first prong of EMTALA was satisfied – screening was performed and an EMC was identified. While the facility was not able to provide the required treatment, the medical team attempted to stabilize the patient until they could transfer him.

In order to satisfy EMTALA requirements, a hospital must show that it made "reasonable" efforts to transfer under the circumstances. In order to do this, evaluation and documentation must focus on three phases of the patient encounter: (1) pre-event information tracking, (2) simultaneous and continuous evaluation, and (3) post-event assessment and documentation.

Pre-Event Information Tracking

- **Establish context.** Establish in what context the facility or region are operating at any given time. Determine if the jurisdiction is currently under a statewide or local state of emergency. This can be done by a quick search of executive orders and should be tracked by the risk management department.
- **Refer to the emergency management plan.** Note whether a facility wide, local, regional, or state emergency management plan is in place. The plan may provide plausible contacts for solutions in dealing with transfers (e.g., a regional facility contact list using a hub-and-spoke model to help community hospitals obtain additional assistance from larger regional facilities). The plan may also list alternative facilities that are more capable of stabilizing the patient pending transfer to a higher level of care. This alone would satisfy the transfer requirement under EMTALA.
- **Determine staffing capacity.** Determine and document the current facility's staffing capacity as well as whether the facility or region is operating under a conventional, contingency, or crisis staffing strategy. Information as to these qualifications can be found by referring to the Centers for Disease Control and Prevention or local public health department websites.
- **Consult policies and procedures.** Organizational policies and procedures, bulletins, and other institutional documentation can help clarify facility operational standards during potential surge situations.

Simultaneous and Continuous Evaluation

- **Communicate with the patient.** While patient management efforts are underway, it is important to communicate with the patient and family about ongoing efforts to stabilize the patient and find a reasonable transfer. Document these conversations in the medical record.
- **Document efforts to transfer.** Accurately document in the medical record all efforts and attempts to transfer the patient, even if those efforts are unsuccessful. This documentation should include the list of facilities contacted and their responses. If possible, obtain a written response from the potential receiving facility regarding the basis of their denial to accept the patient.
- **Attempt to stabilize the patient.** While coordination for transfer is occurring, thoroughly document in the medical record all efforts to stabilize the patient. Documentation may also include a reasonable assessment of transferability. An appropriate physician should adequately document if the patient is too unstable to transfer, and discuss this with the patient and family.
- **Address feasibility of transfer.** Document a clear explanation of the feasibility of transfer in the medical record. While EMTALA suggests that transfer can occur anywhere in the United States, it may not be reasonable or safe to transfer a critical patient outside of your region. Document factors such as distance, mode of transfer, and consent of the patient or family to transfer. Assess the patient's status at the time of transfer, being mindful of the estimated time for transfer to effectuate proper coordination with the receiving facility.

Post-Event Assessment and Documentation

- **Monitor adverse events.** Following the event, maintain and monitor all adverse event reporting. Post-event medical record access data can create additional issues in the event a lawsuit is filed. Accordingly, secure or lock the medical record to limit access after the event. Collect and store any additional documentation regarding the event in anticipation of litigation.
- **Know the law.** When evaluating pre-suit liability, it is important to understand if any emergency statutes or COVID-related immunity statutes apply. Some states have heightened standards of care in the context of providing emergency medical care. Many states have enacted legislation in response to the COVID-19 pandemic that provide broad immunity in certain circumstances. In some cases, immunity under the Public Readiness and Emergency Preparedness Act may apply.
- **Consult with an attorney.** Engage specialty counsel early in the crisis assessment process. Crisis management attorneys and litigators can work with your organization to not only prepare for crises but also to better respond to crises after they occur.

Click here to learn more about Healthcare Crisis Management

We hope you found this RisKey helpful. If you have questions or would like further resources on this topic, please contact your Coverys Risk Management Consultant.

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