Coppersmith Briefs

Waiver of Government Impediments to Expansion of Beds, Structures, and Workforce: Where Things Stand Today

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In Executive Order 2020-16, issued March 26, 2020,[1] Governor Ducey instructed Arizona hospitals, in order to prepare for the expected surge of COVID-19 patients, to "evaluate their current capacity and develop a plan to increase their bed capacity by 50% by April 24, 2020, with the first 25% implemented by April 10, 2020 . . . ." To make these increases happen, Arizona hospitals likely will have to make choices that would, under normal circumstances, violate both state hospital regulations and the federal Medicare Conditions of Participation. In addition, hospitals will need to populate the new capacity with physicians and nursing staff, scarce resources in this difficult period.

Hospitals will do what needs to be done to comply with the Governor's instruction and prepare to care for patients during the expected surge of COVID-19 patients. However, it is fair to be concerned about potential post-emergency consequences of violating state and federal regulations, including payment impacts. This Client Alert focuses on which regulations have been waived and which need to be waived in order to protect hospitals as they prepare to meet the immediate challenges and fulfill their patient care missions.

1. BED EXPANSION THROUGH THE USE OF TEMPORARY AND REPURPOSED STRUCTURES

Hospitals in Arizona and other states are putting up tents to screen patients who otherwise would be seen in the emergency department. They are also actively looking for structures like hotel rooms, dormitory space, gymnasium space, surgery center space and the like to repurpose as patient care areas. Both state and federal regulations must be bypassed to make these plans work.

A. Federal Response

[1] https://azgovernor.gov/executive-orders

The Centers for Medicare and Medicaid Services (CMS) has responded to emergency expansion needs with big waivers of current conditions of participation and other rules that would impede expansion into unorthodox patient care spaces. On March 30, CMS announced its "Hospital Without Walls" initiative.[2] That initiative followed up on the broad waivers issued on March 26 in response to requests from the Arizona Hospital and Healthcare Association and other states' hospital associations.[3] Here is a list of CMS actions from both waiver sets:

- Most importantly, CMS is allowing hospitals to provide services in other health care facilities and at sites not currently part of a licensed facility.
- Hospitals may set up temporary expansion sites (presumably tents or other temporary structures) to address urgent expansion inpatient and outpatient service needs.
- CMS is waiving EMTALA enforcement to allow hospitals, psychiatric hospitals, and critical access hospitals (CAHs) to screen patients seeking emergency services at locations offsite from the hospital campus to prevent the spread of COVID-19. CMS is also waiving requirements that hospital have written policies and procedures for appraisal of emergencies at off campus hospital departments in these temporary off-campus locations.
- CMS is waiving the "physical environment" condition of participation[4] to allow non-hospital buildings/space to be used for patient care and quarantine sites, provided that the location is approved by the state to ensure that safety and comfort for patients and staff are addressed. According to CMS, "[t]his allows for increased capacity and promotes appropriate cohorting of COVID-19 patients."
- CMS is also waiving the skilled nursing facility (SNF) physical environment rule[5] to allow non-SNF buildings to be temporarily certified as SNFs to address needs for isolation of Covid-19 positive patients. CMS says it hopes this waiver will help free up hospital inpatient beds.
- CMS is waiving current rules so that ambulatory surgical centers (ASCs) may temporarily enroll with Medicare as hospitals and provide hospital services during the emergency. According to CMS, "ASCs that wish to enroll to receive temporary billing privileges as a hospital should call the COVID-19 Provider Enrollment Hotline to reach the contractor that serves their jurisdiction, and then will complete and sign an attestation form specific to the COVID-19 PHE. See https://www.cms.gov/files/document/providerenrollment-relief-faqs-covid-19.pdf for additional information."

[2] *See* https://www.cms.gov/files/document/covid-hospitals.pdf
[3] *See* https://www.cms.gov/newsroom/press-releases/cms-news-alert-march-26-2020
[4] 42 C.F.R. §§ 482.21. 485.623.
[5] 42 C.F.R. § 483.90.

- CMS is also allowing other entities, like freestanding emergency departments, to enroll in Medicare as ASCs and then convert their enrollment to hospital status during the emergency.
- CMS is waiving provider-based department rules during the emergency to allow hospitals to operate as part of the hospital any location that meets the Medicare conditions of participation for hospitals.
- Hospitals also may change the status of their current provider based department locations to address patient care needs during the emergency.
- CMS is allowing CAHs flexibility to establish surge locations in areas not otherwise considered "rural."
- CMS is allowing hospitals to house acute care inpatients in excluded distinct part units, so long as the unit's beds are appropriate for acute care inpatients. CMS states that IPPS hospital should bill for care provided in these units and "annotate the patient's medical record to indicate the patient is an acute care inpatient being housed in the excluded unit because of capacity issues related to the disaster or emergency."
- Similarly, CMS is allowing hospitals with excluded distinct part inpatient psychiatric units to relocate inpatients from the excluded unit to an acute care bed and unit when necessary during the emergency. CMS states that hospitals should continue to bill for inpatient psychiatric services under the IPF PPS for these patients "and annotate the medical record to indicate the patient is a psychiatric inpatient being cared for in an acute care bed because of capacity or other exigent circumstances related to the COVID-19 Public Health emergency." Note: CMS insists that the acute care beds are safe and appropriate for psychiatric patients and staff based on an assessment of the acute care bed and location.
- CMS is also allowing hospitals to relocate inpatients from an excluded distinct part rehabilitation unit to an acute care bed and unit, so long as the acute care beds are appropriate for providing intensive rehabilitation care and patients continue to get that care. Again, CMS states that hospital should continue to bill for inpatient rehabilitation services under the Inpatient Rehabilitation Facility Prospective Payment System and annotate the medical record to indicate the patient is a rehabilitation inpatient being cared for in an acute care bed because of capacity or other exigent circumstances related to the emergency.

B. Arizona Response

Executive Order 2020-16 invited Arizona hospitals to submit requests to the Director of the Arizona Department of Health Services (ADHS) requesting consideration of regulatory waivers needed to expand and provide services during the emergency. Arizona hospitals submitted a series of waiver requests on March 31, including numerous requests paralleling the federal waivers.

Presumably, ADHS will act quickly on the requests. The ADHS Director, Dr. Cara Christ, has made clear that she plans to nearly double Arizona's hospital capacity, working with the Department of Emergency and Military Affairs (DEMA) to reopen St. Luke's, converting a specialty hospital, using or building large facilities to house patients who no longer need acute care, and enlisting ambulatory surgery centers (for space, staff and equipment).[6]

In order to give hospitals assurance that they will not be violating ADHS rules in taking the steps needed to increase hospital capacity, numerous waivers will be needed. These include the waiver of requirements that various services (surgical, emergency, intensive care, perinatal, pediatric) must be provided in designated areas; emergency services requirements; multi-organized service unit rules, and environmental standards.

2. STAFFING THE NEW BEDS

Of course, the new beds hospitals are putting in place are only useful if they are staffed. To find and deploy appropriate staffing, hospitals need waivers of both state and federal regulations. Practitioner licensure issues dominate here.

A. Federal Response

Key staffing issues involving staffing issues are largely a matter of state law and regulation. However, CMS has responded with some key waivers and a grab bag of other relaxed or waived requirements. Specifically:

- CMS has issued a blanket waiver relaxing the Stark rules to allow hospitals to provide benefits to medical staff members such as "multiple daily meals, laundry service for personal clothing, and child care services during work hours." The waiver does not relieve hospitals or physicians from all Stark requirements, but there are some significant assists.[7]
- CMS is waiving the Medical Staff provisions in the Medicare conditions of participation to allow physicians whose privileges will expire to keep working at the hospital or CAH during the emergency.[8]
- CMS is also allowing new physicians to practice in the hospital or CAH prior to Board approval. This appears to be essentially an affirmation of temporary privileges, however.[9]

[6] https://www.azcentral.com/story/news/local/arizona-health/2020/03/27/arizona-hospitals-scramble-find-8-000-beds-before-coronavirus-surge-covid-19/2923170001/

[7] *See* https://www.cms.gov/files/document/covid-19-physicians-and-practitioners.pdf

[8] 42 C.F.R. §§ 482.22, 475.627(a).

[9] *Id.*

- CMS is waiving the requirements SNFs and Nursing Facilities may not employ persons for longer than four months unless they meet the training and certification requirements in federal regulation.
- CMS is simplifying the Medicare provider enrollment process, with the goal of attracting local private practice clinicians in nonessential medical and surgical areas – who may not be Medicare certified – to help in the hospital.
- CMS is relaxing the rules for resident services provided under the direction of a teaching physician in teaching hospitals, specifically so that teaching physicians can supervise residents virtually through audio/video technology.
- For home health and hospice, CMS is waiving the requirement for an onsite visit every two weeks.

B. Arizona Response

The Governor's Executive Order 2020-17 is the leading edge of the state response to date. Beyond that, ADHS has instructed state professional boards to identify ways to make it easier to bring providers into the workforce to assist in the Emergency.

- Executive Order 2020-17 (Continuity of Work)[10] contains a series of waivers applicable to health care professional boards, including

    - Licensure boards are to defer renewal requirements for licenses with expiration dates between March 1 and September 1, 2020 by 6 months from the expiration date, *unless* the requirements can be completed online.

    - Licensure board will defer timing requirements for continuing education by 6 months *unless* the requirements can be completed online.

    - Suspension of licensure board rules preventing or limiting online or other alternative continuing education.

    - Licensure boards must "make every attempt" to put in place electronic or remote format examinations for licensure where feasible, and unless prohibited by federal provisions, the

[10] *See* note 1, above.

licensure board is to issue a 6-month provisional license to applicants who have met all other requirements.

- Licensure boards are permitted to waive fees.

- ADHS Administrative Order 2020-01 (Emergency Measures for COVID -19)[11] instructed health care professional boards to identify professional license requirements that need to be waived in order to address the emergency and to establish requirements for licensing out-of-state providers who will be able to provide services under their out-of-state licenses. To date:

  - The Arizona Board of Osteopathic Examiners has updated its application for temporary licensure and made it available online for expedited processing.[12] The application does not require the applicant to hold another state license, so it will be useful for retired as well as out-of-state osteopathic physicians.

  - The Arizona State Board of Nursing has established a "48-hour emergency license" for applicants who have job offers to start within 7 days.[13] We believe the "48 hour" phrase indicates that the application will be processed within 48 hours. Again, the application does not require another state license, so that nurses who have been out of the workforce may apply.

  - At this writing, the Arizona Medical Board (AMB) has not yet taken action to address licensure issues to help get physicians into action during the emergency. Given the circumstances, we expect that the AMB will make decisions about its response imminently.

- To remove impediments to providers caring for COVID-19 patients in hospitals, waiver of certain state rules will be important. Executive Order 2020-16 gave providers the opportunity to submit requests for regulatory waivers. As of this writing, significant requests have been submitted, but not yet processed at ADHS. Updates will be forthcoming when ADHS acts on the requests.

[11] https://www.azdhs.gov/documents/preparedness/epidemiology-disease-control/infectious-disease-epidemiology/novel-coronavirus/adhs-admin-order-2020-01.pdf
[12] https://www.azdo.gov/Licensure/Licensure
[13] https://www.azbn.gov/news-and-events/48-hour-emergency-temporary-license

Karen Owens' practice focuses on health care administrative, regulatory, operations, and litigation matters. She regularly represents health care systems, hospitals, clinics, and other institutions in matters of quality management, medical staff peer review, practitioner credentialing, hospital and medical staff structure, and confidentiality. She also counsels hospitals and health care entities about Medicare certification, state licensure, EMTALA compliance, and many other regulatory matters touching clinical operations.