



The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
Bureau of Health Care Safety and Quality
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Circular Letter: DHCQ 09-11-524

TO: Hospital Chief Executives, Chief Nursing Officers, and Emergency Department Directors
Long Term Care Facility Administrators
Interested Parties

FROM: Alice Bonner, Director, Bureau of Health Care Safety and Quality

DATE: November 3, 2009

RE: Waiver or Modification of Federal Requirements Under Section 1135 of the Social Security Act

As you may know, pursuant to Section 1135(b) of the Social Security Act (the Act) (42 U.S.C. §1320b-5), the U.S. Secretary of Health and Human Services, Kathleen Sebelius, has issued authority to waive or modify certain requirements of the Act, including provisions related to Medicare, Medicaid or the Children's Health Insurance Program (CHIP), the Emergency Medical Treatment and Active Labor Act (EMTALA), and the Health Insurance Portability and Accountability Act (HIPAA). In most cases, specific waivers must be requested, and will be decided by the Centers for Medicare & Medicaid Services. A copy of the document signed by Secretary Sebelius (the Waiver Authority) which describes the waiver or modification of requirements is attached for your information, **Attachment A**. The Secretary's Waiver Authority becomes effective at 5:00 p.m. Eastern Standard Time on October 29, 2009, and has retroactive effect to October 23, 2009.

Waiver of Certain HIPAA Requirements

The Secretary's waiver included a waiver of certain HIPAA requirements, which becomes effective automatically when a hospital activates its "disaster protocol." For, at most, 72 hours following a hospital's activation of its disaster protocol, sanctions and penalties arising from noncompliance with the following HIPAA privacy regulations will be waived:

- Requirements to obtain a patient's agreement to speak with family members or friends or to honor a patient's request to opt out of the facility directory;

- Requirement to distribute a notice of privacy practices; and
- The patient's right to request privacy restrictions or confidential communications.

How Individual Healthcare Providers Can Ask CMS for Assistance or a Waiver

With respect to other waivers health care providers must submit waiver requests to the Centers for Medicare and Medicaid Services (CMS). Information about your facility and justification for requesting the waiver will be required.

CMS will review and validate the 1135 waiver requests utilizing a cross-regional Waiver Validation Team. The Team will review waiver requests to ensure that they are justified and supportable. Massachusetts health care providers can submit requests by sending an email directly to the CMS Northeast Consortium Regional Office, with email copies to the CMS Boston Regional Office, the DPH-Division of Health Care Quality and the DPH-Bureau of Emergency Preparedness using the following email addresses:

CMS Northeast Consortium Regional Office: ROPHIDSC@cms.hhs.gov

CMS Boston Regional Office: Richard.Shaw@cms.hhs.gov

DPH-Division of Health Care Quality: DPH.DHCQ@massmail.state.ma.us

DPH-Bureau of Emergency Preparedness: DPH.EmergencyPreparedness@state.ma.us

Additional information on the CMS waiver review and approval process is provided in **Attachment C** and is also available on the CMS flu website at <http://www.cms.hhs.gov/H1N1/>

Questions may also be directed to:

Richard Shaw, Chief
Certification & Enforcement Branch
Northeast Consortium Division of Survey & Certification
JFK Building Room 2275
Government Center
Boston, MA. 02203
617-565-4487
Richard.shaw@cms.hhs.gov

Please note that providers must resume compliance with normal rules and regulations as soon as they are able to do so. In all cases, the waivers or modifications that a provider was operating under are no longer authorized after the termination of the emergency period, which is also described in Attachment A, the Waiver.

Federally certified/approved providers must operate under normal rules and regulations, unless they have sought and have been granted modifications under the 1135 waiver authority from specific requirements.

Use of Alternate Space within Facilities

This letter does not affect the information or procedures contained in Circular Letter DHCQ 09-09-522, dated September 25, 2009. That Circular Letter includes guidelines for the use of alternate space within facilities for the treatment of ambulatory patients presenting with influenza-like illness (ILI). No waiver is necessary if the procedures in that Letter are followed. However, if a facility wishes to relocate individuals who come to the Emergency Department to an **alternative off-campus site** in accordance with a state emergency or pandemic preparedness plan, an EMTALA waiver is required. The attached Fact Sheet published by the Centers for Medicare & Medicaid Services (CMS) provides additional information about EMTALA waivers in **Attachment B**.

Thank you for your ongoing efforts to meet the health care needs of Massachusetts residents. Please contact us by email at DPH.DHCQ@massmail.state.ma.us if you have any questions or if we can be of any further assistance.

Attachments

Attachment A: Copy of the Waiver Authority signed by Secretary Sebelius

Attachment B: Copy of the CMS Fact Sheet on EMTALA & Surges in Demand for ED Services During a Pandemic

Attachment C: Copy of document Requesting a 1135 Waiver, released by CMS on 10/27/09