

Same-Sex Spouses: Proposed CMS Rule Requires Same Consideration As Opposite-Sex.

On December 12, 2014 the US Centers for Medicare & Medicaid Services (CMS) published proposed new regulations to require healthcare providers that participate in Medicare and Medicaid to treat same-sex spouses the same as opposite-sex spouses.

The new regulations are not mandatory at this time.

CMS is still accepting public comments until February 10, 2015.

We have made CMS's announcement available at <http://www.nursinglaw.com/CMS121214.pdf>

CMS's proposed regulations apply to hospitals, long-term care facilities, hospices, ambulatory surgical centers and community mental health centers.

The new regulations do not change the definitions under state laws of who is a surrogate decision-maker.

The regulations say that when state law gives surrogate decision-making authority to the spouse, caregivers must give a same-sex spouse the same consideration as an opposite-sex spouse, assuming the same-sex marriage is valid in the jurisdiction where it was celebrated.

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The US Centers for Medicare & Medicaid Services (CMS) intends to bring its regulations in line with the US Supreme Court's 2013 ruling which struck down as unconstitutional the US Defense of Marriage Act.

After that ruling, Federal statutes and regulations may no longer draw any distinction between same-sex unions which are valid marriages under applicable state law and traditional opposite-sex marriages.

Surrogate Healthcare Decision Makers

CMS's focus at this time is its regulations dealing with surrogate decision-making for incapacitated patients who cannot make their own decisions.

Federal regulations already guarantee the right of a surrogate decision-maker identified and given authority by state law to participate in the patient's care, and guarantee the patient's right to have his or her surrogate decision-maker participate.

Under the proposed new regulations, where state law gives the spouse the right to participate in the patient's care, and gives the patient the right to have his or her spouse participate, a same-sex spouse to whom the patient is validly married must be treated the same by the patient's caregivers as an opposite-sex spouse.

The operative language in each of the new regulations for each provider class is:

The same-sex spouse must be afforded treatment equal to that afforded to an opposite-sex spouse if the marriage is valid in the jurisdiction in which it was celebrated.

CMS is expressly disclaiming any intention as a Federal agency to contradict or to expand upon state laws which identify and rank surrogate decision-makers and define their authority.

Under state laws the first priority is usually a court-appointed guardian, then the person named in a healthcare power of attorney, then the spouse, then an adult child, then a parent and lastly a sibling.

Conflicts among family members are resolved in favor of honoring the incapacitated patient's wishes as expressed by the person with a higher priority.

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EMTALA: Hospital Did Not Fail To Stabilize The Patient.

An eighty-two year-old patient who was herself a retired physician was admitted to a rehab facility after surgery to repair a fractured hip.

During her stay in rehab she woke up one morning feeling nauseous and began vomiting blood. The rehab facility physician believed she had an upper GI bleed for which she needed to be hospitalized.

She was immediately taken to the E.R. at the acute care hospital located on the same medical campus.

She was evaluated and monitored in the hospital's E.R. for about two hours and then was moved upstairs to the same hospital's ICU.

Complications resulted in her passing in the early hours of the next morning.

The US Emergency Medical Treatment and Active Labor Act (EMTALA) outlaws transfer of a patient to another facility or discharge home before the patient has been stabilized in the E.R.

Whether or not this patient was stabilized, she was never transferred or discharged from the hospital.

UNITED STATES DISTRICT COURT
PUERTO RICO
December 2, 2014

The US District Court for the District of Puerto Rico found no violation of the US Emergency Medical Treatment and Active Labor Act (EMTALA).

The law's stabilization requirement is satisfied by admission of an emergency department patient as an inpatient for inpatient hospital treatment.

It is illegal to transfer a patient to another facility, or to discharge the patient outright, before the patient has been stabilized in the E.R. This patient was never transferred or discharged. ***Ceballos v. Doctor's Hosp.***, __ F. Supp. 3d __, 2014 WL 6769959 (D. Puerto Rico, December 2, 2014).