

# PUBLICATION

---

## CMS to Issue Guidance on Shared Space Arrangements

December 13, 2018

**Patient health and safety is to be the focus of the new lens CMS intends to use for assessing shared space arrangements among providers and free-standing entities. In a November 27, 2018, American Health Law Association (AHLA) webinar titled, *Survey and Certification Issues for Co-Located Clinics – Provider-Based and Freestanding*, the Director of the Quality, Safety and Oversight Group Center for Clinical Standards and Quality at CMS, David Wright, announced that the agency is close to issuing guidance for providers on how they can share space, services and staff with free-standing entities. It is anticipated that the guidance will be in the form of a Quality, Safety and Oversight (QSO) Memorandum that attaches updates to the CMS State Operations Manual that will guide survey and certification reviews.**

To date, there has been minimal substantive guidance from CMS on shared space arrangements. Until the forthcoming QSO Memorandum is released, the only formal guidance available on how CMS might analyze these arrangements appeared in the April 7, 2000 final provider-based regulation. Preamble instructions indicated that sharing of space between provider-based and free-standing entities would be assessed on case-by-case basis by the CMS regional offices, and that the agency's goal was to ensure that these separate entities were easily distinguishable, both to protect the Program from abusive arrangements and ensure beneficiaries were receiving appropriate health care services from a known party.<sup>1</sup> Despite this guidance, which could be construed as offering a flexible analysis, CMS has, for years now, signaled its disapproval of shared space involving hospitals and other entities. The signals have come in the form of non-precedential decisions denying or revoking provider-based status issued by CMS Regional Offices, through statements made by CMS staff in educational webinars, and through informal discussions with CMS staff.

Probably the most notable of the signals came from a speech given by David Ettinger, then-Technical Director of CMS's Hospital Survey and Certification unit, in a May 2015 AHLA webinar. In that speech, Mr. Ettinger expressed a strict and limiting interpretation of the hospital conditions of participation. That interpretation required 100 percent of hospital space to be under the hospital's control on a 24/7 basis. He cautioned that arrangements falling short of this standard implicated potential non-compliance with hospital conditions of participation and of provider-based rules. The interpretation created a significant amount of confusion and concern for hospitals and other providers that the types of arrangements that have long-existed "in the field," such as part-time leases, time-share leases, shared waiting rooms, registration areas and hallways, could be found to be non-compliant.

Hospital associations have [sought](#) clarification from CMS and urged the issuance of guidance on this topic since 2015. In 2017, indications were that CMS's Survey and Certification staff would indeed be providing some formal direction. Now, it would appear that the long-awaited guidance is forthcoming.

While the specifics of the new guidance remain undisclosed, Mr. Wright in the November 2018 webinar stated that CMS would be taking a "fresh" look at hospital shared space arrangements. For survey and certification purposes, the forthcoming guidance is intended to support access to care and to specialty services, particularly in rural areas, and will, therefore, focus on whether arrangements have an adverse effect on patient health and safety (e.g., infection control, quality, privacy, etc.). He stated that the types of arrangements likely to be viewed as problematic from a health and safety perspective include concurrent sharing of staff and routing

patients of one entity through the inpatient unit of the other. While it remains important that the entities involved in a shared space arrangement be in control, separate and distinct in their respective operations, the signals now are that a more lenient approach will be available for analyzing, e.g., shared waiting rooms and hallways, part-time leases, and visiting specialists, so long as health and safety are not affected.

Mr. Wright indicated that the new guidance is in the final stages of clearance at CMS. While a more precise release date is unknown, the guidance is expected to be issued in early 2019, if not before then. We will be monitoring for the release of the new guidance and will provide a summary and commentary through this *Payment Matters* publication.

If you have questions about shared space arrangements, please contact any member of Baker Donelson's [Reimbursement Team](#).

<sup>1</sup> 65 Fed. Reg. 18,434, 18,504, 18,515 (Apr. 7, 2000).