

PUBLICATION

CMS Issues Draft Guidance on Shared Space Arrangements

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On May 3, 2019, the Centers for Medicare and Medicaid Services (CMS) issued a draft of long-awaited guidance for hospitals on how they can share space, services and staff with other co-located hospitals and health care facilities. The Quality, Safety and Oversight (QSO) Memorandum includes draft updates to the CMS State Operations Manual that will guide survey and certification reviews. CMS has issued the guidance in draft and is soliciting comments from stakeholders by July 2, 2019.

Prior sub-regulatory interpretations by CMS staff indicated a restrictive and limited view of co-location arrangements between hospitals and other entities. Through its new guidance, CMS's stated intent is to allow more flexibility related to shared space arrangements while focusing on patient health and safety. However, as discussed below, the proposal appears to be narrower than anticipated.

CMS provides clarification in the draft guidance on how hospitals can share space with other co-located hospitals and health care entities while maintaining compliance with the CoPs, noting that each entity must demonstrate independent compliance. Space could be shared between hospitals co-located with other hospitals or other types of entities, on the same campus or in the same building. An entire hospital could be co-located or only parts of the hospital could be shared with other entities. CMS says the guidance will "provide clarity about how CMS and State Agency surveyors will evaluate a hospital's space sharing or contracted staff arrangements with another hospital or health care entity when assessing the hospital's compliance with the CoPs."

Shared Space Generally Allowed in Public Areas but Not Clinical Areas

The proposed guidance would generally allow shared space arrangements for public areas, such as public lobbies, waiting rooms and reception areas (with separate "check-in" areas and clear signage), public restrooms, staff lounges, elevators and main corridors through non-clinical areas, and main entrances to a building.

However, shared space arrangements would generally not be allowed in clinical areas, due to concerns related to patient privacy, security and infection control. CMS describes clinical space as "any non-public space in which patient care occurs." In addition, travel between entities through a hospital's clinical space would not be allowed. As a general matter, CMS states that "a hospital should not share space where patients are receiving care."

CMS proposes to update surveyor instructions regarding the review of distinct and shared spaces, noting that noncompliance found in one space could be found as noncompliance for the other entity. In addition, sharing of clinical areas between entities could lead to noncompliance related to other CoPs, including nursing, infection control and patients' rights. Compliance with patient privacy rules could also be jeopardized when sharing space used for medical records and patient registration and admission.

Sharing of Contracted Staff and Medical Staff

CMS clarifies that staff may not simultaneously serve two entities. Although one entity may obtain staff under an arrangement with another entity, such staff must work for one entity for a shift and cannot work for another entity during the same shift. Shared staffing provided under contract should ensure adequate oversight,

training and education, and accountability of the contracted staff. CMS proposes to instruct surveyors to review staffing schedules to ensure shared staff are not working at both entities simultaneously and to review contracts to ensure adequacy of oversight, training and accountability of contracted staff.

Medical staff, however, may "float" between two hospitals, but in order to do so, such medical staff should be privileged and credentialed by each hospital.

Emergency Services

CMS clarifies that co-located hospitals without an emergency room may not rely on the other hospital's emergency room to address emergency needs of its own patients. The State Operations Manual currently notes that hospitals without emergency departments must be prepared to address emergency needs. The proposed clarifications to the manual would make clear that a hospital without an emergency room may contract with staff of another hospital for appraisal and initial treatment of patients with emergency needs, provided that the contracted staff do not work simultaneously at another hospital or entity.

Implications and Next Steps

The proposed guidance has been highly anticipated and expected by providers. 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 was close to issuing guidance that would take a "fresh" look at hospital shared space arrangements. Mr. Wright spoke again about the anticipated guidance at an AHLA meeting in March.

The proposed CMS guidance is helpful in clarifying that common waiting rooms, registration areas (subject to certain restrictions), restrooms, staff lounge areas and public hallways are permissible. Significantly, however, the draft guidance is narrower and provides less flexibility than many had expected. For instance, prior sub-regulatory interpretations in 2015 and 2016 indicated that block lease arrangements of clinical space with other health care entities, including physicians, were not allowed. Those interpretations appeared to preclude hospitals from leasing clinical space to specialists and other physicians on an occasional basis to facilitate access to care. More recently, there had been signals that CMS might relax this ban, but nothing in the new proposal appears to change the prior interpretations.

The proposed guidance has broad ramifications and affects most, if not all, hospitals. That is particularly so as it relates to the block lease question. Hospitals should consider seeking clarification on this point from CMS during the public comment period and provide any other feedback they may have related to the proposed updates to the State Operations Manual. Comments are due to CMS by July 2, 2019.

If you have questions about shared space arrangements or submitting comments to CMS in response to the proposed guidance, please contact any member of Baker Donelson's [Reimbursement Team](#). We will be monitoring for the release of the final guidance and will provide updates as they are available.