

CMS Issues New ASC Guidelines

The Centers for Medicare and Medicaid Services (CMS) recently published clarifications and new proposals for existing Ambulatory Surgical Center (ASC) guidelines. In May 2010, CMS issued a clarification regarding the requirement that ASCs have separate waiting areas from other office space tenants and the possibility of a waiver for the requirement. CMS has also proposed an amendment to current patient rights disclosure guidelines that would waive the requirement to disclose patient rights prior to the date of the procedure in emergency situations. These new changes are proposed in an attempt to protect the health and safety of the patient.

TO SHARE OR NOT TO SHARE...

In 2009, CMS published guidelines clarifying an existing definition that ASCs are independent entities and may not, among other things, share waiting rooms with other building tenants (i.e. other physician practices).¹ Under this rule, ASCs that shared office space with other practices either have to renovate their office space to include a separate waiting area or move locations.

On May 21, 2010, CMS released a memorandum which clarified their stance on patient waiting rooms. CMS stated that although the definition of an ASC remains the same, they would be willing to grant waivers to *existing* ASCs who have been cited for noncompliance of this regulation.² The waivers may only be issued if compliance with the regulation would impose undue hardship on the ASC and the waiver will not adversely affect the health and safety of patients.³

To be eligible for a waiver, the ASC must take steps to provide a temporary separate waiting area that is in compliance with CMS's fire and building code requirements for ASCs. Additionally, new ASCs and ASCs without shared waiting areas prior to the memorandum are not eligible for the waiver and it will only be valid until the ASC is able to renovate their space to comply with regulation.⁴

PROPOSED GUIDELINES: MORE PROBLEMS THAN SOLUTIONS?

CMS guidelines for ASC disclosures to patients, originally introduced in 2008, were purported to protect patients' interests by requiring ASCs to provide written and verbal notice of the patient's rights to the patient or his/her representative in a manner they could easily

understand and "in advance of providing care to the patient."⁵ Concerns regarding the amount of paperwork that would be required of the patient on the day of their procedure prompted a revision of the rules in 2009 to include a statement that patient rights information must be presented to him/her "in advance of the date of the procedure."⁶

The most recent revision has caused the current concern: what about the patients who receive same-day treatment (i.e. patients who are examined and referred for surgery on the same day)? In an attempt to alleviate this problem, CMS has proposed an exception to the rule when the ASC provides same-day service or when the physician referral is received on the same day as the patient's exam and delay in providing treatment would be detrimental to his/her health.⁷ This exception would only apply if the patient came to the ASC on the same day as his/her exam with a written referral signed and dated by the physician and there is written documentation in his/her record that the procedure must be performed as soon as possible to protect the health and safety of the patient.⁸

CMS has also proposed to reorganize the rule to make the advance notice requirement applicable to physician ownership disclosure and the ASCs advance directives. From the revised text, however, it is unclear if the emergency exception will apply to these notices as well.⁹ CMS will be accepting comments on the proposed modifications until June 22, 2010.

^{1,2} "Ambulatory Surgical Centers – CMS Issues New Guidance on Shared Waiting Rooms and Proposes Modification to Same-Day Disclosure Rules" Bass Berry Sims, PLC, Health Law Update (Jun. 3, 2010), 4.

³ "Ambulatory Surgical Center (ASC) Waiting Area Separation Requirements" by Director, Survey and Certification Group, Letter to State Survey Agency Directors State Fire Authorities, May 21, 2010.

⁴ "Ambulatory Surgical Center (ASC) Waiting Area Separation Requirements" by Director, Survey and Certification Group, Letter to State Survey Agency Directors State Fire Authorities, May 21, 2010.

^{5,6} "Medicare Program; Ambulatory Surgical Centers, Conditions for Coverage" 75 Fed. Reg. Page 21207 (Apr. 23, 2010).

⁷ "Medicare Program; Ambulatory Surgical Centers, Conditions for Coverage" 75 Fed. Reg. Page 21207 (Apr. 23, 2010).

⁸ "Medicare Program; Ambulatory Surgical Centers, Conditions for Coverage" 75 Fed. Reg. Page 21207 (Apr. 23, 2010).

⁹ "Ambulatory Surgical Centers – CMS Issues New Guidance on Shared Waiting Rooms and Proposes Modification to Same-Day Disclosure Rules" Bass Berry Sims, PLC, Health Law Update (Jun. 3, 2010), 4.



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