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FOULSTON SIEFKIN ISSUE ALERT

Legal Affairs: Patient Visitation Rights

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On January 18, 2011, hospitals, including critical access hospitals, face new federal obligations related to patient visitors. While publicity surrounding the regulations has focused on characteristics of the visitor, the regulations are broader than simply stating who can visit a patient. The regulations also impact visitation restrictions that may be based upon clinical criteria.

In April 2010 President Obama issued a Presidential Memorandum on Hospital Visitation in which he requested that the Department of Health and Human Services draft regulations to ensure that hospitals respect the rights of patients to designate visitors. On November 19, 2010[1] the Center for Medicare and Medicaid Services issued final regulations which modified the patient rights[2] and provision of services [3]Conditions of Participation to provide for visitation rights. "Basic human rights—such as your ability to choose your own support system in a time of need—must not be checked at the door of America's hospitals," said HHS Secretary Kathleen Sebelius. "Today's rules help give 'full and equal' rights to all of us to choose whom we want by our bedside when we are sick."[4] The regulations have been publicized as providing gay, lesbian, and transgender partners the right to visit hospital patients. But the final rules are broader than what has been publicized. The final regulations refer to the term "support person" rather than using other more formal relationship terms to ensure that visitation is not restricted to persons with formal legal relationships. The regulations also impose additional obligations on hospitals to develop or modify policies related to general visitation, including identifying situations when visitation may be restricted.

Under the new Patient Visitor Rights Condition of Participation, hospitals cannot restrict, limit or deny visitation privileges based upon race, color, national origin, religion, sex, gender identity, sexual orientation or disability and must ensure that all visitors have full and equal visitation consistent with the patient's preferences. Patients must be given notice of their visitation related rights. Patients must be informed of their right to consent to have visitors of their choice, and their right to withdraw that consent. Visitors of choice may include spouses, domestic partners (including same-sex domestic partners), family members, friends or other individuals regardless of category of acquaintance. The regulation commentary states that patients should have full participation

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[1] 75 F.R. 70831-70844
[2] 42 C.F.R. 482.13(h)
[3] 42 C.F.R. 485.635(f)
[4] www.allgov.com/Top_Stories/ViewNews/Gay_Partners_Gain_Medicare_Hospital_Visitation_Rights_101201

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in designating who may and who may not visit them. Patients must also be informed of any clinical restrictions or limitations on the right to have visitors.

Hospitals must develop specific policies on visitation. These policies must describe the rights provided to patients, must describe clinically necessary or other reasonable restrictions or limitations on a patient's right to have visitors, and must describe the reasons for clinical restrictions and limitations. Because hospitals have an obligation to inform patients of their rights, the hospital's policies should demonstrate how the patient will be informed of their rights and how the process will be documented. Further, while the circumstances which trigger clinical restrictions or limitations may be generally described in the policy, clinical circumstances vary for each patient and may evolve over the course of treatment. Thus, the hospital's obligation to inform patients of their rights continues if clinical circumstances warrant visitation restriction.

There are many situations where visitation is not permissible or recommended, or where visitation may be subject to some form of supervision. Visitation restrictions during a flu outbreak are often imposed. Persons in custody of law enforcement generally are not permitted to receive visitors for security reasons. Children or adults who have been the subject of mandatory abuse reporting may need visitor restrictions or some other level of supervised visitation to protect them from the alleged abuser. Other situations that may give rise to visitation restrictions include court orders, a patient's need for rest, minimum age requirements, and substance abuse treatment protocols. The regulatory comments discuss these situations, along with issues of care delivery, infection control, and circumstances when visitation may interfere with care of other patients. The comments further state that all these reasons for restricting visitation may be considered as clinically reasonable in light of the hospital's overall goal of advancing the care, safety and well-being of its patients. CMS does warn, however, that the burden is on the hospital to prove that visitor restrictions are reasonable and necessary to provide safe patient care.

Perhaps the most complicated issue that a hospital will face when implementing the new regulations is determining when visitors can remain with the patient during medical procedures. Comments to the regulations discuss a JAMA article, "Restricted Visiting Ours in ICUs: Time to Change,"[5] for the premise that open visitation helps patients by providing a support system and by creating a better working relationship between patients, staff and family members. The regulatory comments state that the unwritten policy of "clearing the room" during treatment interventions should be given additional thought. While the comments acknowledge that there are valid considerations for "clearing the room" (such as patient preference for privacy, the impact of the intervention on the visitor, space limitations, need for aseptic technique, and infection control), hospitals must now be sensitive to the needs of patients who request that a visitor remain in the room to provide comfort and support during an intervention. Hospitals should make a "best effort" to accommodate such requests if the clinical situation permits. When drafting visitation polices, the clinical aspects of acceptable visitation restrictions should be included on the global level and information more specific to each patient should be conveyed as the need arises. Documentation of patient discussion around visitation restrictions should be maintained.

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[5] JAMA. 2004; Vo. 292, pp. 736-737.

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Prior to the implementation date, hospitals should focus on incorporating the visitation regulatory requirements into their hospital patient rights policies and training staff on the implications of the regulations. Specifically, by January 18:

- hospitals should have written policies and procedures regarding visitation rights and reasonable, clinically necessary restrictions;
- hospitals should inform patients or their support person of their visitation rights and restrictions or limitations on visitation rights;
- hospitals should inform patients of their right to chose who may visit them and their right to restrict or withdraw consent for an individual to visit;
- hospitals must ensure full and equal visitation regardless of formal relationship status, race, color, national origin, religion, sex, gender identity, sexual orientation, or disability; and
- hospitals should assure that there is adequate documentation that the patient is informed of any specific alteration in visitation rights when specific clinical situations warrant.

For Further Information

If you have questions or want more information, you should contact your legal counsel to ensure compliance with the new rule. If you do not have regular counsel, Foulston Siefkin LLP would welcome the opportunity to work with you to specifically meet your business needs. Marta Linenberger is available to assist you. Marta Linenberger can be reached at 785-233-3600 or **mlinenberger@foulston.com** . If you are looking for general health care counsel you may contact Scott Palecki at (316) 291-9578 or **spalecki@foulston.com**.

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