After the Ball Drops, Will You Be Ready? Changes to California's Mental Health Law in the New Year

***Linda Garrett**, Esq, Partner, Garrett Law LLP*
***Alicia Macklin**, Esq, Partner, Hooper Lundy & Bookman, PC*
***Mike Phillips**, Esq, Senior Director, Patient Advocacy and Housing Services, Jewish Family Service*

Disclaimer

- This presentation is solely for **educational purposes** and the matters presented herein do not constitute legal advice with respect to your particular situation
- The presentation does not constitute legal advice, or its application to the delivery of emergency health care services
- Attendees should consult with their own legal counsel and/or risk management for advice and guidance

Agenda

- **The LPS Act**
- **EMTALA, AB 451, and Transfers**
- **Implementing AB 2275**
- **On the horizon** – Care Coordination, 30-Day Holds, The CARE Act & Data Collection

The LPS Act – *Why, When, What, and Who?*

LPS Act – Current Law

(emergency hold: 2 step process)

STEP 1

WIC § 5150(a) When a person, as a result of a mental health disorder, is

- a danger to others,
- or to himself or herself,
- or gravely disabled…

LPS Act – Basic Rule (cont.)

STEP 1

WIC§5150(a)

- a peace officer,
- professional person in charge of a facility designated by the county for evaluation and treatment,
- member of the attending staff, as defined by regulation, of a facility designated by the county for evaluation and treatment,
- designated members of a mobile crisis team, or
- professional person designated by the county

LPS Act – Basic Rule (cont.)

STEP 1

WIC§5150(a) (continued)

- may, upon probable cause, take, or cause to be taken,
- the person into custody for a period of up to 72 hours for:
  - assessment, evaluation, and crisis intervention,
  - or placement for evaluation and treatment in a facility designated by the county for evaluation and treatment and approved by the State Department of Health Care Services.

LPS Act – Basic Rule (cont.)

STEP 2

WIC§5151

- (a) If the facility designated by the county for evaluation and treatment admits the person, it may detain the person for evaluation and treatment for a period not to exceed 72 hours. ...
- (b) Prior to admitting a person to the facility for treatment and evaluation pursuant to Section 5150, the professional person in charge of the facility or a designee shall assess the individual to determine the appropriateness of the involuntary detention. This assessment shall be made face-to-face either in person or by synchronous interaction [utilizing] both audio and visual components.

LPS Act vs. Reality

STEP 1: 5150 – "hold and transport" (to designated LPS facility)

BIG GAP

medically clear

find bed

arrange safe transfer

STEP 2: 5151 – "assess and admit" (for evaluation & treatment, if least restrictive)

EMTALA and State Law Tensions

INFORMATION OVERLOAD

California Hospital Association

Application of EMTALA Rules to Psychiatric Patients

Basic Principles:

- CMS considers medical and psychiatric EMCs to be co-equal, without different rules or exceptions
- EMTALA rules and guidance do not address involuntary holds
- County behavioral health policies and directions?
  - *Interpretative Guidelines:* "The existence of a State law requiring transfer of certain individuals to certain facilities is not a defense to an EMTALA violation for failure to provide an MSE or failure to stabilize an EMC therefore hospitals must meet the federal EMTALA requirements or risk violating EMTALA."

Psychiatric EMC v. 5150 Hold

Similarities, but not congruence –

- A 5150 hold is based on **probable cause** by a peace officer or a county-authorized professional as a legal mechanism to take a person involuntarily to a designated facility for an assessment of a behavioral health condition
- Psychiatric EMC is based on a **clinical judgment** of an ED physician or other qualified professional designated by the hospital medical staff

Psychiatric EMC v. 5150 Hold (cont.)

Similarities, but not congruence –

- A psychiatric EMC may not meet the probable cause standard for a 5150 hold
- A 5150 hold does not always mean that a person has a psychiatric EMC
- A determination that a patient's psychiatric EMC is stabilized does not itself alter the status of a 5150 involuntary hold
- Documentation must be clear as to whether the ED physician has determined if the psychiatric EMC is stabilized

Psychiatric EMC v. 5150 Hold (cont.)

The practical reality – stabilized or unstabilized

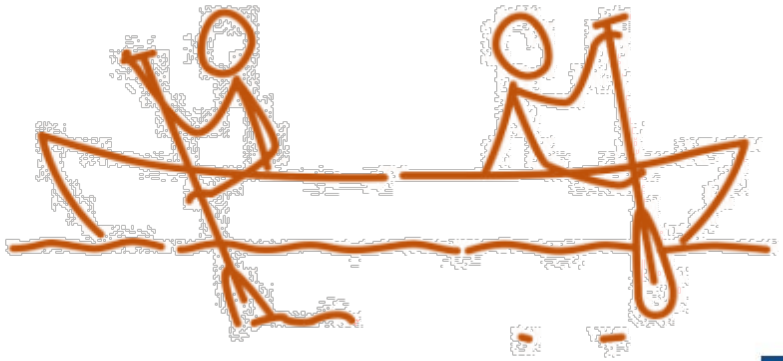
- EMTALA does not recognize involuntary holds, but
- Surveyors often use the 5150 hold as a variable in determining the presence of a psychiatric EMC

- **Responsibility**: ED physician must determine if a psychiatric EMC is stabilized or unstabilized
- **Critical**: medical clearance or a transfer of an ED psychiatric patient does not mean that the psychiatric condition is stabilized

Psychiatric EMC v. 5150 Hold (cont.)

The practical reality – transfer decisions

- **Responsibility**: If the psychiatric EMC is unstabilized, the treating physician determines the transfer decision process
  - EMTALA overrides conflicting state law, except more stringent state laws that do not conflict with EMTALA



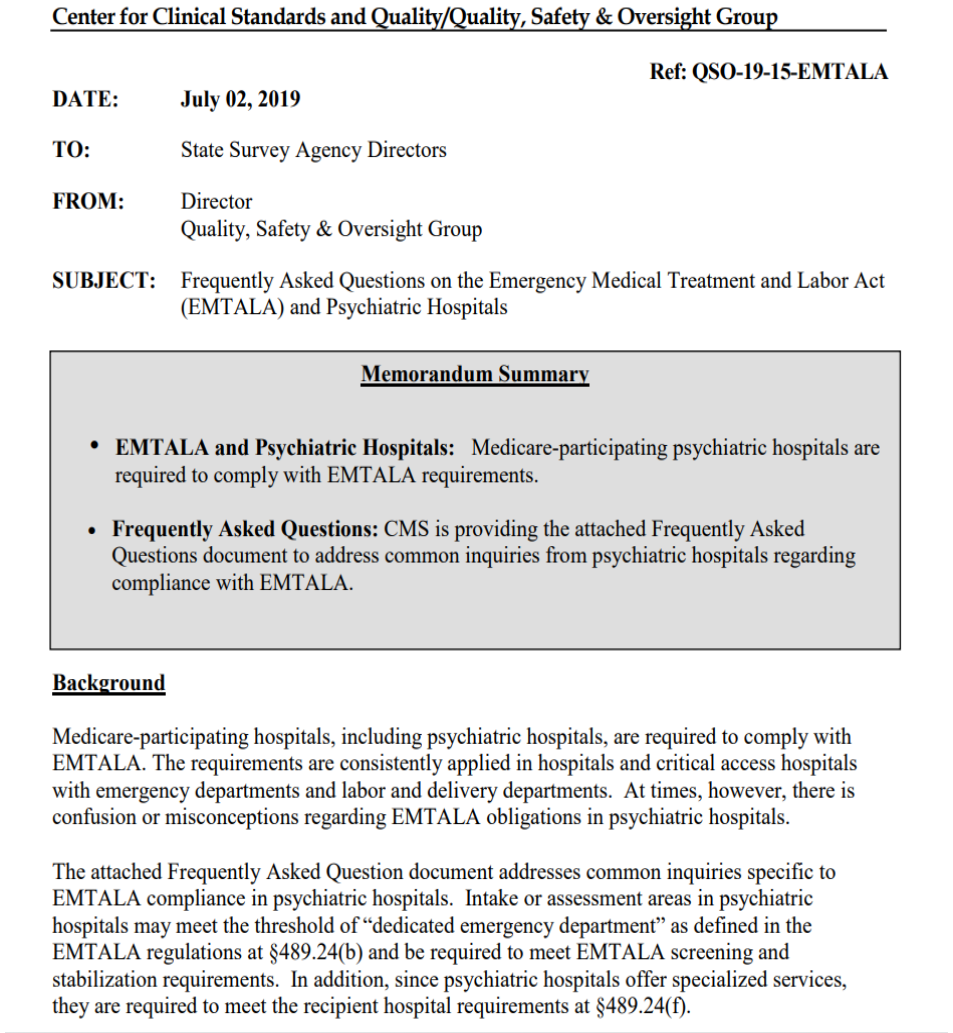
California Hospital Association

Transfer of Psychiatric Patients: Placement

EMTALA: **Accepting Hospital Obligation**

The Trouble with Transfers

- No designated inpatient facility in ~40% of counties
- Limited beds available for specialty populations
- CSUs and PHFs?
  - Restrictions on admissions, medical clearance and service limitations
  - *Generally*, not subject to EMTALA unless Medicare certified



Center for Clinical Standards and Quality/Quality, Safety & Oversight Group

Ref: QSO-19-15-EMTALA

DATE: July 02, 2019

TO: State Survey Agency Directors

FROM: Director
Quality, Safety & Oversight Group

SUBJECT: Frequently Asked Questions on the Emergency Medical Treatment and Labor Act (EMTALA) and Psychiatric Hospitals

Memorandum Summary

- **EMTALA and Psychiatric Hospitals:** Medicare-participating psychiatric hospitals are required to comply with EMTALA requirements.
- **Frequently Asked Questions:** CMS is providing the attached Frequently Asked Questions document to address common inquiries from psychiatric hospitals regarding compliance with EMTALA.

Background

Medicare-participating hospitals, including psychiatric hospitals, are required to comply with EMTALA. The requirements are consistently applied in hospitals and critical access hospitals with emergency departments and labor and delivery departments. At times, however, there is confusion or misconceptions regarding EMTALA obligations in psychiatric hospitals.

The attached Frequently Asked Question document addresses common inquiries specific to EMTALA compliance in psychiatric hospitals. Intake or assessment areas in psychiatric hospitals may meet the threshold of "dedicated emergency department" as defined in the EMTALA regulations at §489.24(b) and be required to meet EMTALA screening and stabilization requirements. In addition, since psychiatric hospitals offer specialized services, they are required to meet the recipient hospital requirements at §489.24(f).

AB 451 – Psychiatric Emergency Medical Conditions

Covered receiving facilities must accept transfers of an individual with a **psychiatric emergency medical condition** from a health facility with an ED and provide **emergency services and care** if the following requirements are met:

1) Treating physician at the sending facility determines patient is **medically stable** and appropriate for treatment in psychiatric setting;
2) Facility has an open bed; and,
3) Facility has appropriate facilities and qualified personnel available to provide the services or care.

Covered Receiving Facilities:

- Psychiatric Units within GACH
- Psychiatric Health Facilities
  - > 16 beds
  - *Not* county owned and operated
- Acute Psychiatric Hospitals

Does Not Include State Hospitals

Health & Safety Code 1317.4b

AB 451 – Psychiatric Emergency Medical Conditions

- What is the impact?
  - GACHs/APHs
  - PHFs
- Penalties for non-compliance?

LPS Act – Another problem with current law: When does the 72-hr clock start?

Two different start times are currently stated in these two separate statutes (causing confusion over the years):

WIC §5150(a) … May, upon probable cause, take, or cause to be taken, the person into custody *for a period of up to 72 hours*….

WIC §5151(a) If the facility designated by the county for evaluation and treatment admits the person, it may detain the person for evaluation and treatment *for a period not to exceed 72 hours*. … (exception for Sat, Sun & holidays in some cases)

Side bar: the "medical screening" step and other issues for another day…

- "Medical screening" was never contemplated in the law, and still isn't addressed in the law, so we still debate …
  - What happens to the "hold" if the patient has an intervening, superseding physical condition/medical emergency that requires admission to inpatient care (e.g., in the ICU)?
  - What "standards" are appropriate for the medical screening exam, i.e., what tests are necessary and which ones simply delay the process?
  - What if the patient refuses diagnostics tests ("I don't want a needle stuck in my arm to draw blood!")

Other problems caused by ignoring the gap in time between WIC 5150 and WIC 5151

- What do we do if we "run out of time" and the person is still a danger to self (DTS), danger to others (DTO) or Gravely Disabled (GD)?
- In reality, we have only had a few options (none of them addressed in the law):
  - "Extend" or "stretch" the hold
  - Ignore the clock (or delay its start until WIC 5151)
  - Write another hold ("serial" or "stacked" hold)
  - Release the patient

AB 2275 – Resolves some of these questions

When? January 1, 2023

How?

1. **One clock start time** (at WIC 5150 aka "step 1")
2. **Addresses "second hold" (at start of Day 4)**
   - law implicitly recognizes "serial" or "stacked" holds
   - if second hold has to be "written," the PRA must be notified
3. **Addresses "third hold" (at start of Day 7)**
   - more due process, e.g. right to advice from attorney, PRA, or other person
   - right to Certification Review Hearing

Assembly Bill 2275

A closer look....

AB 2275 – starts the clock at WIC 5150 (eff. 1/1/23)

<u>WIC §5150 (a)</u> When a person, as a result of a mental health disorder, is a danger to others, or to themselves, or gravely disabled, [identified individuals] may, upon probable cause, take, or cause to be taken, the person into custody for a period of up to 72 hours for assessment, evaluation, and crisis intervention, or placement for evaluation and treatment in a [designated] facility …

AB 2275 – Clock start time

<u>WIC§5150 (a)</u> continued:

The 72-hour period begins at the time when the person is first detained. At a minimum, assessment, as defined in Section 5150.4, and evaluation, as defined in subdivision (a) of Section 5008, shall be conducted and provided on an ongoing basis. Crisis intervention, as defined in subdivision (e) of Section 5008, may be provided concurrently with assessment, evaluation, or any other service.

AB 2275 – Clock start time (cont.)

WIC§5151(a) If the facility designated by the county for evaluation and treatment admits the person, it may detain the person for evaluation and treatment for a period not to exceed 72 hours from the time that the person was first detained pursuant to Section 5150. Saturdays, Sundays, and holidays may be excluded from the period if the State Department of Health Care Services certifies for each facility that evaluation and treatment services cannot reasonably be made available on those days. …

AB 2275 – addresses the "second hold" (at start of Day 4)

WIC§5150 (k) (new subsection)

A facility to which a person who is involuntarily detained pursuant to this section **is transported shall notify the county patients' rights advocate**, as defined in Section 5500, **if a person has not been released within 72 hours of the involuntary detention**.

AB 2275 – addresses the "second hold" (at start of Day 4) (cont.)

WIC§5150 (k)

Note:

- This new subsection implicitly recognizes the passage of time while waiting for medical clearance, finding a bed, and arranging transport.
- "Due process" is addressed by making sure the Patients' Rights Advocate is notified if a **second hold** has to be "written."
  - Responsibility for notification sits with the facility where the patient is involuntarily detained

AB 2275 – addresses the "third hold" (at start of Day 7)

WIC§5256 (b) (new subsection)

When a person has not been certified for intensive treatment pursuant to Section 5250 and remains detained pursuant to Section 5150, a certification review hearing shall be held within seven days of the date the person was initially detained pursuant to Section 5150, unless judicial review has been requested as provided in Sections 5275 and 5276.

AB 2275 – addresses the "third hold" (at start of Day 7) (cont.)

WIC§5256 (b) (new subsection – continued)

The professional person in charge of the facility designated by the county for evaluation and treatment, or an individual designated by the county if the person is not in a designated facility, shall inform the detained person of their rights with respect to the hearing, such as the right to the assistance of another person, including the county patients' rights advocate, to prepare for the hearing, shall answer questions and address concerns regarding involuntary detention, and shall inform them of their rights pursuant to Section 5254.1.

AB 2275 – addresses the "third hold" (at start of Day 7) (cont.)

WIC§5256 (b) (new subsection – continued).

An attorney or county patients' rights advocate shall meet with the person to discuss the commitment process and to assist the person in preparing for the certification review hearing or to answer questions or otherwise assist the person as appropriate. The certification review hearing shall be conducted in accordance with Sections 5256.1, 5256.2, 5256.3, 5256.4, 5256.5, 5256.6, and 5256.7 and the detained person shall be considered a person certified.

AB 2275 – addresses the "third hold" (at start of Day 7) (cont.)

WIC§5256 (b)

Note:

- Third hold (at start of Day 7): If patient still not transported and third hold is written, patient must be offered certification review hearing (because the person is now "considered to be certified"), presumably where they are currently being held.
- If the person is not in a designated facility yet, someone designated by the county must notify the patient of their rights.

AB 2275 – addresses the "third hold" (at start of Day 7) (cont.)

WIC§5256 (b)

Note:

- The patient must be assisted in preparing for the certification review hearing on Day 7 by an attorney or the county Patients Rights Advocate who must meet with the patient to assist and answer questions
  - Presumably, these folks will be allowed in the ED if they come in person? Or, will hospital provide use of their telehealth equipment?
  - And will they have a private area to talk and meet?

AB 227 – Due process rights also apply to minors

WIC§5585.20 (amended)

This part shall apply only to the initial 72 hours of mental health evaluation and treatment provided to a minor.... Evaluation and treatment of a minor beyond the initial 72 hours shall be pursuant to the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000)).

AB 2275 – Summary of To Do's to Implement New Due Process Steps

Day 3

(after initial detainment on 5150) if it looks like a **second** hold will be needed, and the patient has not yet been admitted to a designated LPS facility:

- ❑ Facility must notify the PRA at (or before) the time the second hold is written

AB 2275 – Summary of To Do's to Implement New Due Process Steps (cont.)

Day 6

(towards the end of the second 72-hour hold); if it appears that the patient is still unstable (DTS, DTO, or GD) and that it will be necessary to write a third hold because the patient has not yet been admitted to a designated LPS facility:

- Alert the PRA (who can notify everyone else?).
- Notify the Certification Hearing team that the patient will be held on a third hold and that day 7 will start in ___ hours.
- Notify the "designated" person who will advise the patient of their rights and answer their questions about the hearing.
- Attorney or PRA meets w/person to help prepare for hearing.
- Reasonable attempts made to notify family members unless patient does not want such attempts to be made.

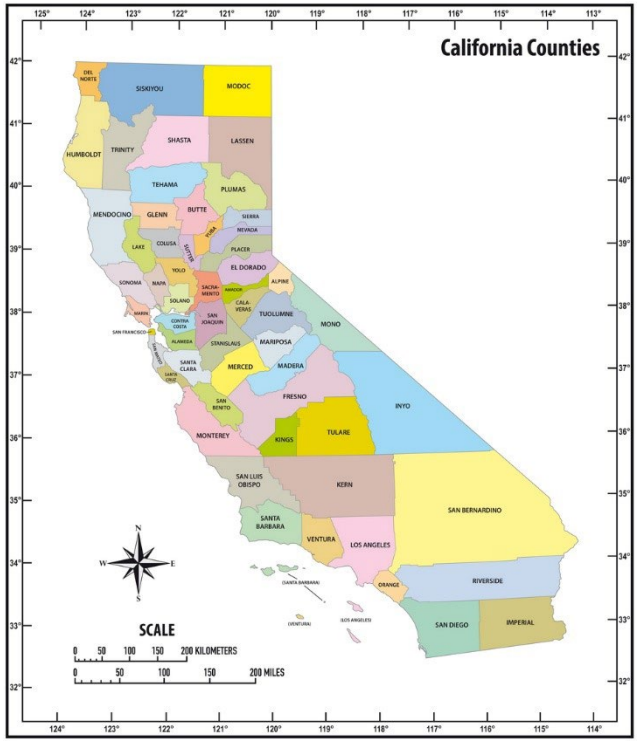
AB 2275 – Summary of To Do's to Implement New Due Process Steps (cont.)

Day 7

(patient is now at the start of their third 72-hour hold)

- Arrange the logistics for use of private room, and individuals coming in person to the hearing, or arrange for use of telehealth equipment
- Conduct the certification review hearing (via telehealth or in person)
- Designated person (?) presents evidence at hearing
- Written documentation of decision provided to patient

Practical Solutions – What One County is Doing



On the Horizon....

California Hospital Association

On the Horizon – Care Coordination (AB 2242)

- New care coordination plan requirements
  - Individuals being discharged from a hold or released from a conservatorship
  - Collaboration between individual, county behavioral health department, health care payer (if different from the county), with input and recommendations from the facility
  - First follow-up appointment with an appropriate behavioral health professional
- The health plan, mental health plan, primary care provider, or other appropriate provider must make a good faith effort to contact the referred individual no fewer than three times, either by email, telephone, mail, or in-person outreach

Assembly Bill 2242

On the Horizon – Data Collection (SB 929)

- Health and Judiciary Committees: the State does not have complete data on involuntary holds in California!
- SB 929 requires reporting on long list of data points **related to involuntary holds**
- Who is responsible?
  - Judicial Council, County Behavioral Health Directors, Designated LPS facilities, and other entities
- DHCS will publish annual reports
- DHCS can implement a plan of correction against **counties or facilities** that fail to submit data in a timely manner!

Senate Bill 929

On the Horizon – 30-Day Holds (SB 1227)

- ***Current law*** (WIC§5270, *et seq.*): if County Board of Supervisors authorizes…
  - Following a 14-day period of intensive treatment, individual may be certified for an additional **30 days of intensive treatment**
  - Certain legal requirements, including certification review hearing, must be followed
- ***New law*** (WIC§5270.55): if individual on 30-day hold remains gravely disabled and unwilling or unable to accept treatment voluntarily, may file petition in superior court for up to an **additional 30 days of intensive treatment**

Senate Bill 1227

On the Horizon – the CARE Act

CalHHS
California Health & Human Services Agency

Community Assistance, Recovery, and Empowerment (CARE) Act

The CARE Act ensures mental health and substance use disorder services are provided to the most severely impaired Californians who too often languish – suffering in homelessness or incarceration – without the treatment they desperately need.

https://www.chhs.ca.gov/care-act/

What would you like to hear more about?!

1. EMTALA compliance
2. The Care Act
3. AB 2275 (changes to the LPS Act)
4. SB 1277 (new 30-day hold)
5. SB 929 (Data collection requirements)
6. AB 2242 (Care coordination)

Contact Information

Linda Garrett
Garrett Law LLP
linda@garrett-law.com
(415) 513-5035

Alicia Macklin
Hooper Lundy & Bookman PC
amacklin@health-law.com
(310) 551-8161

Mike Phillips
Jewish Family Service of San Diego
mikep@jfssd.org
(858) 637-7302

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