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## **CMS Announces Waiver of Waiting Area Requirements for Certain ASCs**

The Centers for Medicare & Medicaid Services (“CMS”) clarified its requirements for ASC waiting areas, including the prohibition on the sharing of waiting areas with other entities, in a May 21, 2010 memorandum to state survey agency directors.

### **Background**

When taken together, several provisions of the Medicare ambulatory surgical center regulations require ASCs to have waiting areas separated from other entities.

For purposes of Medicare certification, 42 C.F.R. § 416.2 defines “ambulatory surgical center” as a “distinct entity” that operates “exclusively” for the purpose of providing surgical services. This definition has been interpreted to prohibit an ASC from sharing space with another entity. For an ASC that is adjacent to the office of the physicians who practice in the ASC, CMS permits certain common, non-clinical spaces, such as a waiting area, to be shared by the ASC and the office. However, it does not permit sharing of such spaces during concurrent or overlapping hours of operation. In fact, CMS’s interpretive guidance states:

[I]f a physician owns an ASC that is located adjacent to the physician’s office, the physician’s office may ... use the same waiting area, as long as the physician’s office is closed while the ASC is open and vice-versa. The common space may not be used during concurrent or overlapping hours of operation of the ASC and the physician office.<sup>1</sup>

In addition, 42 C.F.R. § 416.44(a)(2) specifically requires that an ASC have a separate waiting area for visitors and for patients who have not yet begun preoperative preparation. CMS has stated that the waiting area “may not be shared with another healthcare facility or physician office.”<sup>2</sup>

As part of the ASC, a waiting area is required to meet the provisions applicable to Ambulatory Health Care in the National Fire Protection Association’s Life Safety Code 101-2000 edition (“LSC”).<sup>3</sup> These provisions require that an ASC, including the ASC’s waiting area, be separated from other tenants and occupancies by walls having not less than a 1-hour fire resistance rating.<sup>4</sup> Although these provisions allow certain sections of ASCs to be classified as other occupancy types that are subject to lesser fire protection requirements, ASC waiting areas are not eligible for this allowance.

If an ASC has a waiting area that is not appropriately separated from another entity, it may be cited for violations of 42 C.F.R. § 416.2 and 42 C.F.R. § 416.44(b).

<sup>1</sup> See State Operations Manual, Appendix L, Guidance for Surveyors: Ambulatory Surgical Centers (emphasis added).

<sup>2</sup> Id.

<sup>3</sup> See 42 C.F.R. § 416.44(b).

<sup>4</sup> See Life Safety Code §§ 20.3.7.1, 21.3.7.1.

## **Waiver of Waiting Area Requirements**

In its May 21, 2010 memorandum, CMS acknowledged that, in certain cases, it may be a substantial hardship for an ASC to bring its waiting area into compliance with the LSC requirements. Accordingly, CMS announced that it will consider issuing waivers to existing ASCs that share a waiting area with other building occupants and have been cited for a lack of appropriate separation under the LSC.

As a condition of any waiver, CMS will require the following fire protection measures:

- The ASC must assure that fire protection for the waiting area is appropriate for the occupancy to which it was designed.
- The ASC's visitors and patients using the waiting area must be separated from other occupants in a shared waiting area by a temporary partition (unless the ASC is "temporally" distinct from the other occupancy).
- The partition must not block or obstruct the visibility of exits, must be flame resistant, and must be located at least 18 inches below sprinkler deflectors.
- Signage must be posted that clearly identifies the distinct separate ASC waiting area.

CMS will also require any additional measures appropriate for the individual ASC's circumstances.

Existing ASCs that currently do not have a waiting area shared with other entities are not permitted to modify their current arrangement to introduce a shared waiting area and will not be eligible for a waiver if they do so. In addition, ASCs applying for a new Medicare agreement (including new ASCs as well as ASCs that have undergone a change of ownership without assumption of the previous owner's Medicare supplier agreement) will not be eligible for a waiver.