

one part of the definition of “dedicated emergency department,” as described in more detail below, we are specifying in this final rule that a department or facility that does not otherwise qualify as a “dedicated emergency department” based on State licensure or the way it is held out to the public will nevertheless be considered to be a dedicated emergency department if, during the calendar year immediately preceding the calendar year in which a determination is being made, based on a representative sample of patient visits that occurred during that calendar year, the department or facility provided at least one-third of all its outpatient visits for the treatment of emergency medical conditions on an urgent basis without requiring a previously scheduled appointment. We adopted this definition because we believe it adds the element of objectivity requested by many commenters and thus enables hospitals to know in advance whether they will be subject to EMTALA. We included a reference to a “representative sample” of visits for two reasons. First, we believe any determination under this definition must be based on information that accurately represents the type and mix of services delivered by the department or facility over a period of time, not merely during certain parts of the year. However, we also recognize that the large number of visits provided by some departments or facilities will make it a practical necessity to sampling techniques to obtain information on the type of care furnished instead of attempting to review all records of all visits by all patients during a year. Therefore, we intend to issue instructions, through interpretative guidelines, to our surveyors on how to determine such a representative sample. In addition, we may develop a series of questions and answers for posting on our website that will provide further clarification and guidance to providers.

In response to the comment regarding visits for the care of nonemergency problems, we agree that such visits should not normally be counted as being for the treatment of emergency medical conditions. However, as discussed in section VIII. of this preamble, individuals who suffer an unexpected emergency medical condition after they arrive at the hospital for an outpatient visit but before they begin an outpatient encounter and individuals whose appearance or behavior would cause a prudent layperson observer to believe they need examination or treatment for an emergency medical condition would

be counted toward the “one-third” standard.

*Comment:* One commenter recommended that we use the term “regularly” instead of “a significant portion of the time” in the definition of dedicated emergency department. The commenter opposed the use of additional qualifying criteria (percentages) to determine whether a facility is used “regularly” for the evaluation and treatment of emergency medical conditions and believed that hospitals should have maximum flexibility to determine which part of their facility is appropriate for the delivery of emergency care.

*Response:* As explained in the response to the previous comment, we believe that an objective criterion relating to the percentage of visits for the treatment of emergency medical conditions, such as the one we are including in this final rule for purposes of EMTALA, provides needed predictability for those who are determining dedicated emergency department status. In addition, we believe this objective criterion in the definition of dedicated emergency department, along with the other two criteria in the definition in this final rule, provides the most flexibility for determining dedicated emergency department status, as the commenter suggested.

*Comment:* One commenter suggested that we not include an objective standard of “significant portion of the time” for the determination of a hospital’s “dedicated emergency department.” The commenter believed that an objective standard for “significant” may have the unintended effect of creating a benchmark that some providers might use to avoid their EMTALA obligations. For example, the commenter stated, if the standard for “significant portion of the time” is set at 30 percent, a hospital’s labor and delivery department may determine that its staff spend only 15 percent of their time evaluating and treating outpatients who meet the regulatory definition of emergency medical condition. The commenter stated that if the majority of the staff’s time is spent caring for inpatients in active labor, such a hospital may then decide that its labor and delivery department no longer has to provide an emergency medical screening examination to all women who present with contractions, since the department does not meet the objective criteria of being used a significant portion of the time for the initial evaluation and treatment for emergency medical conditions.

Another commenter did not support the percentage-based definition of dedicated emergency department proposed because the commenter believed “it potentially could result in a patient having or not having EMTALA protections based on a fraction of a percentage point and dependent on the accounting method chosen to determine volume.” Also, the commenter believed that volumes fluctuate by days, weeks, and months, among other things. The commenter stated that fluctuating volume could potentially cause an area or department to move in and out of EMTALA coverage as the volume fluctuates.

*Response:* We agree with the commenters that using objective criteria in the determination of a hospital’s dedicated emergency department may lead to some cases in which the standard is exceeded or not met by a narrow margin. However, this result is an unavoidable consequence of any objective standard. By assessing a facility’s performance over a calendar year, we believe that the effects of seasonal or other variations in utilization will be mitigated.

In response to the comment concerning labor and delivery departments, we would like to clarify that CMS believes that EMTALA requires that a hospital’s dedicated emergency department would not only encompass what is generally thought of as a hospital’s “emergency room,” but would also include other departments of hospitals, such as labor and delivery departments and psychiatric units of hospitals, that provide emergency or labor and delivery services, or both, to individuals who may present as unscheduled ambulatory patients but are routinely admitted to be evaluated and treated. Because labor is a condition defined by statute as one in which EMTALA protections are afforded, any area of the hospital that offers such medical services to treat individuals in labor to at least one-third of the ambulatory individuals who present to the area for care, even if the hospital’s practice is to admit such individuals as inpatients rather than treating them on an outpatient basis, *would be* considered a dedicated emergency department under our revised definition in this final rule. In such cases, whether the department of the hospital chooses to directly admit the emergency patient upon presentation is irrelevant to the determination of whether the department is a dedicated emergency department.