

triggered—it is not meant for hospital staff, including volunteers, to be “interpreting” the prudent layperson standard. Rather, we foresee that in cases in which hospital staff or other individuals at the hospital have witnessed the behavior of the individual upon his or her presentation to the hospital, the prudent layperson standard will be applied to the facts (the appearance and behavior of the presenting individual) to determine if EMTALA had been triggered.

Comment: One commenter stated that EMTALA should apply only in situations where the prudent layperson believes the individual needs emergency examination or treatment, and not simply examination or treatment at some later date or time.

Response: We proposed the prudent layperson standard to apply to presentments both inside and outside the dedicated emergency department. Therefore, for presentments inside the dedicated emergency department, the proposed standard is that the prudent layperson observer would believe, based on the individual’s appearance or behavior, that the individual needs examination or treatment for a *medical condition*. For presentments on hospital property outside the dedicated emergency department, the prudent layperson would believe the individual needs examination or treatment for an *emergency medical condition*. However, we do agree with the commenter that the standard is that the prudent layperson would believe that the individual needs the examination or treatment at the time of the presentment (when the hospital is on notice of the individual’s existence on hospital property), and not at a later date or time.

Comment: One commenter describes a scenario where an individual with a bad cough and wheezing visits a family member in the dedicated emergency department. The commenter believed that, even though the individual may need examination or treatment, the hospital should have no duty to offer or provide care unless that individual actually asks for care. The commenter indicated that in such a case it should not matter whether a prudent layperson observer would believe that the individual *needs* care.

Response: We agree with the commenter that the prudent layperson standard should not be applied so broadly as to mandate EMTALA screenings for individuals who are fully capable of making a verbal request for examination or for a medical condition, but elect not to do so. Inherent in such a standard is not only the notion that the individual’s appearance or behavior

would lead a prudent layperson observer to believe that the individual needs examination or treatment for a medical condition, but a belief by the prudent layperson that there has been no verbal request only because the individual’s medical condition, or some other factor beyond the individual’s control, such as a language barrier, makes a verbal request impossible. We are not revising the final rule based on this commenter’s concern because we believe it is not feasible to attempt to codify all of the various conditions and circumstances under which a verbal request would not be possible. However, we will keep this concern in mind as we develop interpretative guidelines or other instructional material for State surveyors.

3. Determination of “What May Be an Emergency Medical Condition”

Comment: Several commenters did not agree with the language used in the regulatory standard for EMTALA applicability outside the dedicated emergency department that the presenting individual requests examination or treatment for *what may be* an emergency medical condition. One commenter stated that the universe of conditions that may be emergency medical conditions is extraordinarily broad and recommended that this standard be clarified to avoid unnecessary and excessive EMTALA obligations to individuals presenting outside of dedicated emergency departments. The commenter recommended that EMTALA is triggered outside of the dedicated emergency department only when the individual “requests examination or treatment for what more likely than not is an emergency medical condition.”

Response: When we proposed the “what may be an emergency medical condition” language in the definition of “come to the emergency department” at § 489.24(b), we did so to clarify that an emergency medical condition would not actually have to *exist* upon examination of such an individual presenting outside the dedicated emergency department. Instead, the individual presenting (or the prudent layperson observer) must believe he or she needs emergency care. We do not believe it is necessary to adopt the commenter’s suggested clarifying language. We believe we have provided sufficient explanation about “what may be an emergency medical condition” both in our response above and in the preamble to the proposed rule (67 FR 31473).

Comment: One commenter requested that CMS clarify that the proposed standard language “such a request

would be considered to exist if the individual requests examination or treatment for *what the individual believes* to be an emergency condition” (67 FR 31473) (emphasis added), is an objective standard. The commenter was concerned about our enforcement of this standard; specifically, the concern was that the determination as to whether an EMTALA obligation has been triggered would hinge on a subjective belief that an emergency medical condition exists.

Response: EMTALA is triggered when there has been a *request* for medical care inside the dedicated emergency department or for emergency care on hospital property outside the dedicated emergency department. The request can only be made by or on behalf of the individual or the request from the individual would be considered to exist if a prudent layperson would believe the individual needs emergency care. We believe this standard for when EMTALA is triggered is based on objective criteria; that is, the act of the individual or someone acting on his or her behalf requesting medical care for what the individual believes or what the person accompanying the individual believes to be an emergency medical condition. It is also objective when the prudent layperson standard is considered in determining whether, based on the appearance, signs, and symptoms of the individual presenting to the hospital, a prudent layperson would believe that the individual has a medical condition (in the dedicated emergency department) or an emergency medical condition (in a nondedicated emergency department).

4. Other Issues

Comment: One commenter requested that we clarify that, although it may be appropriate for staff of the dedicated emergency department to leave the department in order to provide emergency medical treatment to an individual who has presented on hospital property outside the dedicated emergency department, it is not required that an emergency department “physician” leave to respond and provide treatment to an individual.

Response: Under these circumstances, EMTALA requires that the hospital must provide treatment to the individual within its capabilities; if the hospital lacks, for instance, sufficient specific staff, the hospital should must provide alternative means of treating such an individual, within its capabilities, or provide an appropriate transfer. Or if the hospital decides to send other medical staff rather than physician staff to an emergency patient who has presented on hospital property