DOJ BARRIER-FREE HEALTH CARE INITIATIVE

INTRODUCTION

On July 26, 2012, with further amendment on August 14, 2012, the Department of Justice announced that its Civil Rights Division will be partnering with U.S. Attorneys' offices across the country to make sure that people with disabilities have access to medical information in an understandable format.[1] This initiative - the Barrier-Free Health Care Initiative - is a multi-phase plan that initially will focus on discrimination against members of the public who are deaf or hard of hearing before moving on to other issues, such as ensuring physical access to medical buildings. Overall, the Initiative is intended to "focus and leverage" resources in order to send a single message: "disability discrimination in health care is illegal and unacceptable."

Of course, health care providers already know this. However, health care providers may not know the scope of their obligations under the Americans with Disabilities Act ("ADA")[2] toward the deaf or hard of hearing or how to handle situations where special communication procedures are necessary. Ramped-up enforcement efforts (and the related levy of compensatory damages and civil penalties) are anticipated. After more than a decade of ADA enforcement against hospitals and physician practices, it is worthwhile, especially now, to review the basics of Title III and certain practices that amount to unlawful discrimination.

BACKGROUND: TITLE III OF THE ADA

Title III of the ADA prohibits a "public accommodation" from discriminating against any individual on the basis of disability in the full and equal enjoyment of its goods, services, facilities and privileges. Hospitals and the professional offices of health care providers are places of "public accommodation," even if they are privately owned. As such, these providers are required to make available auxiliary aids and services when necessary to ensure effective communication, remove structural barriers and make reasonable modifications to policies, practices and eligibility criteria that would otherwise prevent disabled individuals from having access to goods and services. Qualifying aids and services must be provided free of charge.

PHASE 1: ENSURING EFFECTIVE COMMUNICATION

The Initiative's first priority is to ensure that individuals who are deaf or hard of hearing have medical information provided to them in a manner that they can understand. Since 2001, over 35 health care providers have entered into settlements or consent decrees for violating this requirement (under the ADA or Section 504 of the Rehabilitation Act of 1973, which imposes substantively equivalent requirements on health care providers who participate in federal health insurance programs). Resolutions have included requirements to hire a coordinator of deaf and hearing services, revise policies and procedures, establish a contract with a qualifying interpreter service, train staff and various reporting obligations. These agreements provide an opportunity for others in the health care industry to avoid a similar fate.

KEY LESSONS LEARNED

- It's not *just* about patients. Health care providers have an obligation to provide auxiliary aids and services to patients and their "companions" when necessary in order for those individuals to have the equal opportunity to participate in and benefit from the facility's services. A patient's companion could be an individual designated by the patient to communicate on the patient's behalf regarding care, legally authorized to make health care decisions on behalf of the patient or such other person with whom staff would ordinarily and regularly communicate concerning the patient's medical condition, including a member of the patient's family or patient surrogate. Companions take part in communications and decisions regarding the goods and services offered by health care providers and must be provided access to effective communication to equally participate.

- Avoid relying on family and friends to translate medical information. While this may be appropriate on some occasions (such as, time-sensitive, life-threatening situations), the DOJ believes family and friends are limited in their ability to facilitate communication due to confidentiality issues, potential emotional involvement and other factors. Minors, in particular, should never be relied upon to interpret or otherwise facilitate communication except in an urgent, emergency situation. Note, however, that a patient may decline a professional interpreter and instead choose to communicate through a family member. This should be fully documented in the patient's record.

- Arrange for qualified interpreters. Not all interpreters are qualified to interpret in all situations. Pay attention to your state's laws, if any, regarding requirements for interpreters. For example, in Michigan, interpreters are required to be certified through the National Registry of Interpreters for the Deaf or through the State by the appropriate division.

- Not every communication requires an interpreter. Auxiliary aids and/or services are necessary during critical communications. Examples of critical communications include, but are not limited to, obtaining the patient's medical history; explaining medical procedures; diagnoses or treatment; obtaining informed consent; and discussing finances, end-of-life care or discharge planning.

BEST PRACTICES

- Develop, adopt and educate staff on formal policies and procedures for communicating with patients or their companions who are deaf or hard of hearing. Without formal guidelines in place, it may appear that medical information is not being offered to these individuals in a manner that they can understand.

- Establish business relationships with individuals or agencies that can provide qualified interpretation services, and maintain a list of such contacts in a location readily accessible to staff and health care personnel. Entering into a contract with such individuals and services can assist in securing availability and timeliness of interpreter services. The DOJ expects in-person interpreters to be made available in a "timely manner," and personnel should document attempts to secure an on-site interpreter, particularly when encountering difficulty or delay.

- Consider investing in the technological capabilities to provide video remote interpreting ("VRI") services. The DOJ endorses VRI as providing "immediate, effective access to interpreting services." Staff should also be trained to operate this technology effectively.

POSSIBLE FOCUSES IN THE FUTURE

The DOJ has indicated that the Initiative also plans to target businesses that own or operate medical buildings that do not provide physical access for disabled individuals. In this area, the DOJ has published guidelines explaining accessibility standards under the ADA. These guidelines can be found at: http://www.ada.gov/adastd94.pdf.

Similarly, the DOJ may target enforcement against health care providers who treat patients with a disability differently than other patients due to a limited availability of accessible equipment. For example, in a 2005 settlement agreement, a hospital was penalized for violating the ADA when it required a patient with a disability to wait significantly longer than other patients for an outpatient exam because the examination room with an accessible table was occupied. Health care providers may need to remain aware of not only the presence of accessible equipment and facilities but also the way in which equipment and facilities are used.

Ultimately, the Barrier-Free Health Care Initiative is a warning bell for the health care industry to pay attention to Title III of the ADA and think critically about how medical care is being delivered in relation to individuals with disabilities.

If you have any questions or would like additional information about this topic, please contact Laura M. Napiewocki at 586.753.0496 or lnapiewocki@hallrender.com or your regular Hall Render attorney.

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[1] Department of Justice, Office of Public Affairs, Justice News, July 25, 2012, Justice Department Announces Americans with Disabilities Act Barrier-free Health Care Initiative by US Attorney's Offices Nationwide - accessed at http://www.justice.gov/opa/pr/2012/July/12-crt-931.html,; http://ada.gov/usao-agreements.htm

[2] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1991). as amended thereafter.