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FINAL RULE PROHIBITING DISCRIMINATION IN FEDERALLY FUNDED HEALTH CARE PROGRAMS – PART II: EQUITY IN COMMUNICATION

On May 13, 2016, the Office of Civil Rights ("OCR") of the Department of Health and Human Services ("HHS") issued a final rule ("Final Rule") implementing Section 1557 of the Patient Protection and Affordable Care Act ("ACA"). A copy of the Final Rule is available here. The rule is scheduled to become effective on July 18, 2016.

The Final Rule will affect approximately 900,000 physicians and 133,000 facilities, including hospitals, home health agencies and nursing homes, in addition to hundreds of thousands of laboratories, insurers, health professional training programs and public health programs ("Covered Providers"). Failure to comply can result in loss of funding, and those who believe they have experienced prohibited discrimination have the right to sue either individually or as part of a class action.

Because the Final Rule imposes numerous requirements on Covered Providers, we have begun issuing a series of articles on the Final Rule. This second article focuses on meaningful access for and effective communication with persons with Limited English Proficiency ("LEP").

BACKGROUND

Section 1557 of the ACA provides that an individual shall not, on the basis of race, color, national origin, sex, age or disability be excluded from participation in, denied the benefits of or subjected to discrimination under any health program or activity that receives federal financial assistance. The Final Rule implements Section 1557 and applies to the following entities:

- All health programs and activities that receive federal financial assistance through HHS, including Medicaid, Medicare and the Children's Health Insurance Program ("CHIP");
- All programs that receive meaningful use payments, advance premium tax credits and federal funding for clinical research;
- Health programs and activities administered by HHS, including the federally facilitated marketplace;
- Health programs and activities administered by entities established under Title I of the ACA, such as state-based marketplaces; and
- Indian Health Service Programs.[1]

The Final Rule directly applies to physicians who accept Medicare and Medicaid reimbursement or meaningful use information technology funding. However, the Final Rule does not apply to physicians who only receive reimbursement under Medicare Part B.

MEANINGFUL ACCESS FOR INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY

An individual with LEP is a person whose primary language for communication is not English and who has a limited ability to read, write, speak or understand English. The Final Rule specifies that the prohibition on national origin discrimination requires Covered Providers to take reasonable steps to provide meaningful access to individuals with LEP who are eligible to be served or likely to be encountered within the Covered Provider's health programs or activities. HHS noted meaningful access is key because clear provider-to-patient communication is necessary for a patient-centered treatment approach.

The Final Rule does not provide a list of requirements that must be met to in order to claim reasonable steps were taken. Instead, the Final Rule offers flexibility in that regard and states that evaluations of whether a Covered Provider has taken reasonable steps to provide meaningful access will be fact-specific and will consider factors such as (i) the importance of the program, activity and communication; and (ii) the operations and capacity of the Covered Provider. The Final Rule does state that, in assessing compliance, HHS would take into account whether an entity has developed and implemented an effective language access plan; however, the Final Rule does not require development or implementation of a language access plan.

INFORMATION AND ACCESS TO SERVICES

Notice Requirement. Covered Providers are required to post notices that specify:

- The Covered Provider does not discriminate on the basis of race, color, national origin, sex, age or disability in its health programs and activities;
- The Covered Provider makes available auxiliary aids and services, including qualified interpreters and information in alternative formats for individuals with disabilities, free of charge and in a timely manner;
- The Covered Provider makes available language assistance services, including translated documents and oral interpretation, free of charge and in a timely manner when necessary;
- How to obtain the aids and services above;
- Identification of and contact information for the individual handling grievances;
- The availability of a grievance procedure and how to file a grievance; and
- How to file an OCR discrimination complaint.

In addition to the notice, Covered Providers must also post taglines that alert individuals with LEP to the availability of language assistance services. The Final Rule requires the taglines, which provide information on accessing language services, to be posted in at least the top 15 non-English languages spoken in the state in which the Covered Provider is located or does business. Taglines and translated sample notices in 64 languages are available here.

The notice and taglines should be posted in (i) significant publications and communications; (ii) physical locations where the entity interacts with the public; and (iii) on the Covered Provider's website accessible from the homepage. For small-sized significant communications, the Final Rule requires posting of nondiscrimination statements and taglines in at least the top two non-English languages spoken by individuals with limited English proficiency in the state.

Language Assistance Services. Covered Providers may provide language assistance services through the use of "qualified bilingual/multilingual staff" or "qualified interpreters."

- Qualified Bilingual/Multilingual Staff. The Final Rule defines "qualified bilingual/multilingual staff" as a member of the Covered Provider's workforce who (i) has been designated to provide oral language assistance as part of the individual's job responsibilities; (ii) has demonstrated he/she is proficient in speaking and understanding both spoken English and at least one other spoken language, including any necessary specialized medical vocabulary or terminology; and (iii) is able to effectively, accurately and impartially communicate directly with individuals with LEP in their primary language. The Final Rule specifies an individual who may be qualified bilingual/multilingual staff is not necessarily qualified to interpret or translate for individuals with LEP, and there may be instances in which it would not be appropriate for qualified bilingual/multilingual staff to interpret if it could create a conflict of interest. For example, HHS noted that a bilingual nurse who is competent to communicate in Spanish directly with Spanish-speaking individuals with LEP may not be a "qualified interpreter" if serving as an interpreter would pose a conflict of interest with the nurse's treatment of the patient.
- Qualified Interpreter for an Individual with Limited English Proficiency. A "qualified interpreter" for an individual with LEP means an interpreter who (either remotely or on site) (i) adheres to generally accepted translator ethics, including confidentiality; (ii) has demonstrated proficiency in writing and understanding both written English and at least one other written language; and (iii) is able to translate effectively, accurately and impartially to and from such language and English using any necessary specialized vocabulary or terminology.

Ad Hoc Interpreters. The use of incompetent or ad hoc interpreters, such as family members, friends and children, can have negative implications because complicated medical terminology may be lost in translation. Covered Providers are prohibited from requiring an individual with LEP to provide his or her own interpreter**.** There are limited situations in which a Covered Provider may rely on an adult accompanying an individual with LEP to interpret, and Covered Providers are prohibited from relying on minor children to interpret or facilitate communication except in the event of an emergency.

Other Considerations. Language assistance services must be provided free of charge, be accurate and timely and protect the privacy and independence of the individual with LEP. There is no definition for "timely"; rather, a determination of whether language assistance services are timely will depend on the specific circumstances of each case. In the event video remote interpreting services are used, video

interpretation must be in real time, and low-quality video images are unacceptable. In the proposed rule, it was noted that OCR expects that most entities will, at a minimum, have the capacity to provide individuals with LEP with qualified interpreters remotely, given the widespread commercial availability of relatively low-cost language assistance services such as remote oral interpretation via telephone.

The Final Rule provides that LEP individuals may decline the services of an interpreter; however, the Covered Provider may still use language services to assist their communication with the patient.

ENFORCEMENT

The ACA empowers HHS to notify an offender and suspend, terminate or refuse to continue federal funding to any organization that does not address noncompliance.

In addition to other enforcement procedures, Covered Providers should be aware that individuals may bring individual or class action claims directly against them in federal court. HHS has concluded that Section 1557 provides a new anti-discrimination cause of action for damages arising from alleged violations, including discrimination in the form of disparate impact. Comments in the Final Rule indicate that remedies in these lawsuits could include compensatory damages and an award of attorneys' fees and costs.

COMPLIANCE

In the Final Rule, HHS reiterated its stance that it will apply a flexible standard to determine whether appropriate and meaningful access has been provided to individuals with LEP and persons with disabilities.

The Final Rule goes into effect July 18, 2016, and the first round of notice requirements must be compliant within 90 days. Covered Providers are required to file an Assurance of Compliance with OCR as a condition of any application for federal financial assistance. Covered Providers must provide notice to beneficiaries and the public stating that the Covered Provider does not discriminate under Section 1557 and how to file a discrimination complaint with OCR.[2]

Covered Providers with more than 15 employees must designate an employee responsible for compliance and adopt a grievance procedure. Covered Providers may amend their existing grievance procedures to specifically address the additional nondiscrimination requirements required under the Final Rule.

PRACTICAL TAKEAWAYS

Any health care entity or individual provider potentially impacted by this Final Rule should first evaluate whether it is covered by these new requirements.

Covered Providers should:

- Review current policies, procedures and publications to identify necessary modifications prior to the applicable deadlines with regard to the provision of language assistance services;
- Consider implementing a language access plan. HHS has developed a language access plan that can be used as a model available here;
- Create a notice and post it as required (HHS has provided a sample notice for use); and
- Use U.S. Census data and other resources to identify the top 15 languages in the state or states they serve and then use the translations available on the HHS website to create the required taglines.

To review part one of our series regarding sex discrimination, click here.

If you have questions about this topic or would like assistance in compliance with the new requirements under Section 1557, please contact:

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- Your regular Hall Render attorney.

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Please visit the Hall Render Blog at http://blogs.hallrender.com/ or click here to sign up to receive Hall Render alerts on topics related to health care law.

[1] In response to comments by tribal organizations, including requests for exclusion from coverage, HHS clarified the definition of IHS programs and pointed to exceptions and defenses that may be raised by tribes.

[2] HHS has provided a model notice with the Final Rule.