

New ACA Nondiscrimination Rules: Assistance for Persons with Disabilities

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On May 18, 2016, HHS published its final rules implementing the anti-discrimination provisions of the Affordable Care Act § 1557. This is the second of three alerts discussing various aspects of the new rules. This alert focuses on the rules ensuring protections for individuals with disabilities. The first alert – published on May 26 – focused on the rules' requirement for language assistance for persons with limited English proficiency. The third and final alert – to be issued in the near future – will cover rules related to sex discrimination.

Relationship to Other Laws. The final rules are consistent with existing directives implementing the requirements already existing under the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504"). Nothing in the new rules should be interpreted to invalidate or limit the rights, remedies, procedures, or legal standards available to disabled persons under the ADA or Section 504. Accordingly, entities must ensure compliance with existing laws in addition to the new ACA rules, including state laws that may be more restrictive than the ACA regulations.

Application. As explained in the first alert, the new rules apply to any entities ("covered entities") that operate a health program or activity that receives federal financial assistance under programs operated by HHS, including but not limited to Medicaid or Medicare parts A, C and D, but excluding Medicare Part B. (45 C.F.R. § 92.2(a); 81 F.R. 31383). Among others, the rule applies to hospitals, clinics, medical practices, solo practitioners, nursing homes, or other healthcare entities that participate in federal programs other than Medicare Part B. (81 F.R. 31384-85). Covered entities are not required to comply if doing so would violate applicable federal statutory protections for religious freedom and conscience. (45 C.F.R. § 92.2(b)). Also, the regulations do not apply to employment discrimination. (45 C.F.R. § 92.101(a)(2)).

Requirements. The rules generally prohibit covered entities from discriminating on the basis of race, color, national origin, sex, age, or disability in healthcare programs or activities. (45 C.F.R. § 92.101(a)). Specifically, covered entities may not:

- i. Deny an individual any service, financial aid, or other benefit provided under the program;
- ii. Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
- iii. Subject an individual to segregation or separate treatment in any

matter related to his receipt of any service, financial aid, or other benefit under the program;

- iv. Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;
- v. Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or other benefit provided under the program;
- vi. Deny an individual an opportunity to participate in the program through the provision of services or otherwise afford him an opportunity to do so which is different from that afforded others under the program.

(45 C.F.R. § 92.101(b)(1) and 80.3(b)(1)).

Specific Protections for Individuals with Disabilities. Protected individuals include individuals with a disability, *i.e.*, "a physical or mental impairment that substantially limits one or more major life activities of such individual." (45 C.F.R. § 92.4). For such persons, the new rules specifically require that covered entities must do the following:

- i. Take appropriate steps to ensure that communications with individuals with disabilities are as effective as communication with others (45 C.F.R. § 92.202(a));
- ii. Provide appropriate auxiliary aids and services to persons with sensory, manual, or speaking skills, such as alternative formats and sign language interpreters, where necessary for effective communication (45 C.F.R. § 92.202(b));
- iii. Post a notice of individuals' rights, stating that the covered entity provides appropriate auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternate formats, free of charge and in a timely manner (45 C.F.R. § 92.8(a)(2));
- iv. Ensure that buildings and facilities are compliant with the 2010 Americans with Disabilities Act Standards for Accessible Design for new construction or alteration of buildings and facilities (45 C.F.R. § 92.203);
- v. Make all programs and activities provided through electronic and information technology accessible to individuals with disabilities, unless doing so would impose undue financial or administrative burdens or would result in a fundamental alteration in the nature of the covered entity's health program or activity (45 C.F.R. § 92.204(a)); and

- vi. Make reasonable changes to policies, practices, and procedures where necessary to provide equal access for individuals with disabilities unless the covered entity can demonstrate that making the changes would fundamentally alter the nature of the health program or activity (45 C.F.R. § 92.205).

Effective Communications. Rather than define what constitutes "communications with individuals with disabilities that are as effective as communications with others," the rules adopt the communication standards found at 28 C.F.R. § 35.160 through 35.164. Those standards are as follows:

- i. The covered entity shall not require an individual with a disability to bring another individual to interpret for him or her.
- ii. The covered entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except (a) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or (b) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.
- iii. The covered entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.
- iv. A covered entity that chooses to provide qualified interpreters via video remote interpreting (VRI) services shall ensure that it provides—
 - a. Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blurry, or grainy images, or irregular pauses in communication;
 - b. A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;
 - c. A clear, audible transmission of voices; and
 - d. Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

(28 C.F.R. § 35.160).

Appropriate Auxiliary Aids and Services. The rules provide a lengthy list of auxiliary aids and services that shall be provided to persons with impaired sensory, manual, or speaking skills:

(1) [q]ualified interpreters on-site or through video remote interpreting services . . .; note takers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, text telephones, videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing; (2) [q]ualified readers; taped texts; audio recordings; Braille materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs; large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision.

(45 C.F.R. § 92.4).

A "qualified interpreter" for an individual with a disability generally means one who, via a remote interpreting service or in person,

(1) Adheres to generally accepted interpreter ethics principles, including client confidentiality; (2) is able to interpret effectively, accurately, and impartially, both receptively and expressly, using any necessary specialized vocabulary, terminology and phraseology.

(45 C.F.R. § 92.4). Examples of qualified interpreters include sign language interpreters, individuals who represent or spell in the characters of another alphabet, and individuals who represent or spell by using a small number of handshapes (45 C.F.R. § 92.4). The interpreter need not be licensed as an interpreter under state law, but must have the relevant proficiency. (81 F.R. 31391).

Additional General Requirements. In addition to the actions set forth above, covered entities also must do the following:

1. Notice to Public. Within 90 days of the effective date of the regulations (*i.e.*, by October 16, 2016), covered entities must notify program beneficiaries and the public of their rights as described below.
 - a. **Written Notice and Taglines.** Covered entities must provide written notice that contains the following

information:

1. The covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities;
2. The covered entity provides appropriate auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternate formats, free of charge and in a timely manner, when such aids and services are necessary to ensure an equal opportunity to participate to individuals with disabilities;
3. The covered entity provides language assistance services, including translated documents and oral interpretation, free of charge and in a timely manner, when such services are necessary to provide meaningful access to individuals with limited English proficiency;
4. How to obtain the aids and services described above;
5. If applicable, identification of, and contact information for, the employee responsible for coordinating the covered entity's compliance as described below;
6. If applicable, the availability of the grievance procedure described below and how to file a grievance; and
7. How to file a discrimination complaint with OCR.

(45 C.F.R. § 92.8(a) and (b)(1)). HHS has published a sample notice, which is available [here](#). Covered entities are not required to use the sample notice. Additional requirements relevant to persons who are not proficient in English are discussed in our prior alert. The required notice and taglines must be posted in a conspicuously-visible font size in the following locations:

1. In significant publications and significant communications targeted to beneficiaries, enrollees, applicants, and members of the public, except for small-sized publications described below. (42 C.F.R. § 92.8(f)). The OCR warns that it will interpret "significant communications and significant publications" broadly. (81 F.R. 31401). HHS declined to provide a list of such communications, but confirmed they would include outreach, education, and marketing materials; patient

handbooks; notices requiring a response from individuals; and written notices such as those pertaining to rights or benefits. (81 F.R. 31402). Significant communications would likely also include those that were considered "vital documents" under HHS's LEP Guidance, e.g., consent and complaint forms, written notices of eligibility criteria, rights, denial, loss or decreases in benefits or services; applications to participate in services or programs; etc. (81 F.R. 31402).

2. In conspicuous physical locations where the entity interacts with the public. (45 C.F.R. § 92.8(f)).
3. In a conspicuous location on the covered entity's website accessible from the home page of the covered entity's website. (45 C.F.R. § 92.8(f)). A covered entity may satisfy this obligation by including a prominent link on its home page to the notice, and links written in non-English languages to taglines. (81 F.R. 31396).

Covered entities have discretion in determining the exact size, location, and manner in which they post the notice and taglines so long as they satisfy the regulatory standards. (81 F.R. 31398). They may be combined with other notices if the combined notice clearly informs individuals of their civil rights per the regulations. (45 C.F.R. § 92.8(h)). They may be included at the beginning of significant documents, or as a separate insert or on a webpage. (81 F.R. 31401). Ultimately, the test will be "whether the content is sufficiently conspicuous and visible that individuals seeking services ... could reasonably be expected to see and be able to read the information." (81 F.R. 31397).

b. **Written Notice—Small Publications.** For significant publications and significant communications that are small-sized (e.g., postcards, pamphlets and tri-fold brochures), the covered entity must post in a conspicuously-visible font size the following information:

1. The covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities; and
2. Taglines in at least the top two languages spoken by individuals with limited English proficiency in the relevant state, presumably Spanish and one other non-English language. (45 C.F.R. § 92.8(b)(2), (d)(2), and (g); 81 F.R. 31399). HHS has published a sample nondiscrimination statement and tagline, which are available [here](#).

2. **Covered Entities with 15+ Employees.** If a covered entity employs 15 or more persons, they must also do the following:
 - a. **Responsible Employee.** The covered entity must designate at least one employee to coordinate and carry out the responsibility to comply with the anti-discrimination efforts, including the investigation of any complaints, grievances or alleged violations. (45 C.F.R. § 92.7(a)).
 - b. **Grievance Procedures.** The covered entity must adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of grievances alleging any violations of the regulations. (45 C.F.R. § 92.7(b)). HHS has published a sample grievance procedure, which is available [here](#).

Enforcement. If HHS determines that a covered entity has violated the rules, HHS may require the entity to take remedial action or impose compensatory damages as allowed by other anti-discrimination statutes. (45 C.F.R. § 92.6, 92.301(b)). Injured individuals may also assert a private cause of action to recover damages from a covered entity. (81 F.R. 31440).

Conclusion. As stated in our first client alert, in most cases, the ACA regulations will require covered entities to take additional steps to comply. Covered entities should immediately evaluate their policies and processes for interacting with individuals with disabilities and, where necessary, modify them to comply with the new, heightened standards by July 18, 2016. Among other things, they will need to prepare the required notices and taglines by October 16, 2016, and arrange for appropriate and timely auxiliary aids and services.

For questions regarding this update, please contact:

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