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ARE YOU COMPLIANT?

ANOTHER DEADLINE APPROACHING RESPONSIBILITIES
UNDER SECTION 1557 OF THE AFFORDABLE CARE ACT (ACA)

Sharon Hall | Vice President, Risk Specialist

For the last several months, individuals responsible for healthcare compliance have been receiving information about the new rules under the ACA. At this point, most organizations should be or are on the way to modifying their practices to comply. While most of the requirements took effect on July 18th, posting of patient notices becomes effective on October 16th, 2016. Also, notice of compliance must be filed with the Office of Civil Rights (OCR).

Consider the following risk management situations that may be avoided with ACA compliance:

- A healthcare provider uses a patient's 10-year-old son as an interpreter to discuss a pregnancy and birth sterilization
- A sight impaired individual is not able to view a hospital's website
- A bariatric sized patient is turned away related to lack of staff & equipment to assist with providing care
- A transgender boy's mom sues the hospital saying he was traumatized by being called a girl

The ACA's purpose is to advance equity and reduce health disparities by protecting vulnerable populations. If you are a provider of healthcare and receive funding from, or

are involved in programs and activities administered by the Department of Health and Human Services (HHS), you are obligated to comply. Indian Health Service programs are included, but physicians who only receive reimbursement under Medicare Part B are excluded from compliance. The final rule prohibits discrimination under section 1557 of the ACA based on race, color, national origin, sex, age, or disability. The definition of sex includes gender identity and sex stereotyping. Federal protection is also extended to transgender patients. The ACA rules are consistent with the Americans with Disability Act (ADA) and Section 504 of the Rehabilitation Act of 1973.

While many organizations have not needed to create new policies and procedures, most have found it necessary to modify existing practices, update written documents, and train staff. It is of utmost importance to incorporate the new discrimination requirements in all areas of the organization. Be sure to review your communications, including websites, social media, and promotional materials. While training is often consistently carried through for professional staff, other employees such as those working in registration areas, billing, imaging and physician offices must also be aware of the rules and the organizational changes.

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So what does this mean for the majority of healthcare providers? Operational policies, procedures, and documents available for patient distribution need to be reviewed to address:

1. Sex discrimination practices – The ACA has extended protections to sex discrimination. This includes areas such as an individual's sex, pregnancy and childbirth, gender identity, and sex stereotyping. Protection for transgender individuals is a new area of consideration for many healthcare providers.
2. Communication equality – While interpreter services have been a long-standing practice in healthcare for the non-English speaking, under the ACA rules communications with disabled individuals must be as effective as those with the non-disabled, and available on a 24/7 basis. Examples of auxiliary aids and services are contained in the final rule for persons with sensory, manual, and speaking disabilities.
3. Access for individuals with disabilities – Note that requirements are in effect for facilities renovated or constructed to comply with the 2010 Americans with Disability (ADA) standards. In addition, equal access to services and technology needs to be considered.
4. Notice of individual rights – Public notice of nondiscrimination must be displayed in noticeable physical building locations, on the covered entity's website, and included in significant publications and communications. The notice must also detail available aids/services, including qualified interpreters and how to obtain one; your grievance procedure, the individual assigned responsibility for handling compliance, and how to access; and the right to file a complaint with OCR or file a civil suit. Aside from these notices, shorter taglines about the availability

of free language assistive services for the top 15 languages in your area are required.

5. Compliance coordinator/Grievance procedures – For covered providers with more than 15 employees, an individual responsible for compliance must be designated and a grievance procedure established. Policies need to include that anyone may file a grievance, a non-retaliation statement, prompt equitable resolution of complaints (written response within 30 days), and the ability to pursue further remedies.
6. Provider agreements and medical staff bylaw provisions include anti-discrimination practices in accordance with ACA requirements.

What happens if an organization is not compliant? The price is high. HHS may suspend, terminate, or refuse to continue further funding. In addition, individuals may file individual or class actions claims in federal court. Because the compliance responsibility follows the federal financial assistance, is it possible that a hospital or clinic may be found liable for an individual practitioner who does not need to comply, e.g. accepts only Medicare B. Therefore, provider compliance with antidiscrimination should be addressed in employment agreements and medical staff bylaws. Insurance coverage may be available for defense and/or indemnity payments depending upon the policy language and how the complaint is filed. Look to your employment practices policies to check for third party coverage, and your directors and officers policies for regulatory defense and coverage for fines and penalties. Most insurance policies require a substantial retention and co-insurance, unless a separate regulatory policy is purchased.

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Do you still have some work to do? The HHS website offers a number of sample documents to assist you, and there are other businesses offering tool kits as well. Links to the HHS website are provided below:

Section 1557 Patient Protection and Affordable Care Act and Final Rule - <http://www.hhs.gov/civil-rights/for-individuals/section-1557>

Training Materials – <http://www.hhs.gov/civil-rights/for-providers/training/index.html>

Sample Grievance Procedure – <http://www.hhs.gov/civil-rights/for-providers/clearance-medicare-providers/example-grievance-procedure/>

Sample Notices, Statement of Nondiscrimination and Taglines and Translated Resources – <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/>

FAQ's and Language Access Requirements – <http://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/top15-languages/index.html> and <http://www.hhs.gov/sites/default/files/resources-for-covered-entities-top-15-languages-list.pdf>

Auxiliary Aids - <https://www.ada.gov/reachingout/t3regl2.html>

Assurance of Compliance Form - <http://www.hhs.gov/sites/default/files/hhs-690.pdf>



The above information is advisory in nature and should not be considered legal advice. It is designed to assist you in your risk management activities and is not intended to be exclusively relied upon or used as a substitute for the healthcare provider's professional loss control and compliance program.

REFERENCES

- HHS Section 1557 ACA
- Health Law News; Hall Render; Heads Up Hospitals! The New Non-Discrimination Rule; May 27, 2016
- Health Law News; Hall Render; Discrimination in Federally Funded Health Care Programs; June 13, 2016, August 2, 2016
- Holland & Hart; Providers Must Post New Nondiscrimination Notices; July 6, 2016
- Holland & Hart; New ACA Nondiscrimination Rules: Assistance for Persons with Disabilities; June 6, 2016