

Summary of HHS's Final Rule on Nondiscrimination in Health Programs and Activities

On May 18, 2016, HHS published its final rules implementing the anti-discrimination provisions of the Affordable Care Act § 1557. This is the first of several alerts discussing aspects of the new rule: this alert focuses on those provisions requiring language assistance for persons with limited English proficiency; future alerts will cover rules related to sex discrimination and persons with disabilities. The new language assistance rules build on but extend beyond HHS's 2003 Guidance Regarding Limited English Proficient Persons, 68 F.R. 47311 ("LEP Guidance").

Application. 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 or 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)). Protected individuals include those with limited English proficiency, i.e., "an individual whose primary language for communication is not English and who has a limited ability to read, write, speak or understand English." (45 C.F.R. § 92.4). For such persons, the new rules specifically require that covered entities "take reasonable steps to provide meaningful access to each individual with limited English proficiency ... likely to be encountered in its healthcare programs or activities." (45 C.F.R. § 92.201(a)). The reasonableness of the steps depends on the particular circumstances of each case, including the nature and importance of the healthcare program or activity and particular communication at issue. (45 C.F.R. § 92.201(b); 81 F.R. 31412). Additional factors may include, but are not limited to:

the length, complexity, and context of the communication; the prevalence of the language in which the individual communicates among those eligible to be served or likely to be encountered by the health program or activity; the frequency with which a covered entity encounters the language in which the individual communicates; whether a covered entity has explored the individual's preference, if any, for a type of language assistance service ...; the cost of language assistance

services and whether a covered entity has availed itself of cost-saving opportunities; and all resources available to the covered entity, including the entity's capacity to leverage resources among its partners or to use its negotiating power to lower the costs at which language assistance services could be obtained.

(81 F.R. 31416). Along with other appropriate actions, covered entities 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)). The foregoing elements do not need to be written in non-English languages, although HHS will publish a translation of a notice that complies with the rule. (81 F.R. 31398-99). HHS has published a sample notice, which is available [here](#). Covered entities are not required to use the sample notice.

In addition to the foregoing statements, covered entities must post a short statement ("tagline") written in at least the top 15 languages spoken by individuals with limited English proficiency in the relevant state informing persons that language assistance services are available free of charge. (45 C.F.R. § 92.4 and 92.8(d)(1)). HHS has published a sample tagline, which is available [here](#). Providing the taglines in the 15 most prevalent languages does not, by itself, satisfy a covered entity's obligation to provide meaningful access to patients who speak other languages; instead, covered entities must still respond appropriately if a patient who speaks a different language seeks services. (81 F.R. 31400).

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).

2. Interpreters. Covered entities must offer a qualified interpreter to an individual with limited English proficiency when oral interpretation is a reasonable step to provide meaningful access. (45 C.F.R. § 92.201(d)(1)). A "qualified interpreter" generally means one who, via a remote interpreting service or in person, (1) Adheres to generally accepted interpreter ethics principles, including client confidentiality; (2) has demonstrated proficiency in speaking and understanding both spoken English and [the relevant] spoken language; and (3) is able to interpret effectively, accurately, and impartially, both receptively and expressly, to and from such language(s) and English, using any necessary specialized vocabulary, terminology and phraseology.

(45 C.F.R. § 92.4). The interpreter need not be licensed as an interpreter under state law, but must have the relevant proficiency. Simply having above average familiarity with speaking or understanding the relevant foreign language does not necessarily qualify him or her as an interpreter. (81 F.R. 31391).

A covered entity that provides a qualified interpreter through video remote interpreting services shall provide:

1. 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;
2. A sharply delineated image that is large enough to display the interpreter's face and the participating individual's face regardless of the individual's body position;
3. A clear, audible transmission of voices; and
4. Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the video remote interpreting.

(45 C.F.R. § 92.201(f)). In providing an interpreter, a covered entity may **not**:

1. Require an individual with limited English proficiency to provide his or her own interpreter;
2. Rely on an adult accompanying an individual with limited English proficiency to interpret or facilitate communication, except: (i) in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no qualified interpreter for the individual with limited English proficiency immediately available; or (ii) where the individual with limited English proficiency 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;
3. 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 qualified interpreter for the individual with limited English proficiency immediately available; or
4. Rely on staff other than qualified bilingual/multilingual staff to communicate directly with individuals with limited English proficiency.

(45 C.F.R. § 92.201(e)). **"Qualified bilingual/multilingual staff" means:**

a member of a covered entity's workforce who is designated by the covered entity to provide oral language assistance as part of the individual's current, assigned job responsibilities and who has demonstrated to the covered entity that he or she: (1) Is proficient in speaking and understanding both spoken English and at least one other spoken language, including any necessary specialized vocabulary, terminology and phraseology, and (2) is able to effectively, accurately, and impartially communicate directly with individuals with limited English proficiency in their primary languages.

3. Translators. Covered entities must use a qualified translator when translating written content in paper or electronic form. (45 C.F.R. § 92.201(d)(2)). A "qualified translator" is one who:

(1) adheres to generally accepted translator ethics principles, including client confidentiality; (2) has demonstrated proficiency in writing and understanding both written English and at least one other written non-English language; and (3) is able to translate effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary, terminology and phraseology.

(45 C.F.R. § 92.4). A qualified interpreter may not necessarily qualify as a translator. (81 F.R. 31392). HHS cautioned against the use of automatic translation technologies without the involvement of a qualified translator. (81 F.R. 31417). Surprisingly, the regulations and accompanying commentary provide little guidance on when and which documents should be translated.

4. 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](#).

5. Language Access Plan. **Although not required**, the regulations confirm that developing and implementing an effective written language access plan that is appropriate to a covered entity's particular circumstances is an important factor in evaluating a covered entity's compliance under the rules.

(42 C.F.R. § 92.201(b)(2); 81 F.R. 31414). In its commentary, HHS noted:

effective language access plans often, among other components, address how the entity will determine an individual's primary language, particularly if the language is an unfamiliar one; identify a telephonic oral interpretation service to be able to access qualified interpreters when the need arises; identify a translation service to be able to access qualified translators when the need arises; identify the types of language assistance services that may be required under particular circumstances; and identify any documents for which written translations should be routinely available.

(81 F.R. 31415). The 2003 LEP Guidance contains an outline for establishing a language assistance plan. (68 F.R. 47319-21). Additional assistance may be obtained through the government's website, www.LEP.gov.

6. Timeliness and Costs. Language assistance provided per the regulations must be provided free of charge, be accurate and timely, and protect the privacy and independence of the individual. (45 C.F.R. § 92.201(c)). "Language assistance is timely when it is provided at a place and time that ensures meaningful access to persons of all national origins and avoids the delay or denial of the right, service, or benefit at issue." (81 FR 31416). Covered entities will likely need to prepare in advance if they are to provide the required assistance in a timely manner. (81 F.R. 31412).

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).

Relation to Other Laws. The ACA discrimination rules are in addition to, and do not supersede, other applicable state or federal anti-discrimination statutes. (45 C.F.R. § 92.3). 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.

Conclusion. 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 limited English proficiency 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 interpreter and, as appropriate, translator services. Although the new regulations are burdensome, it may help to remember that:

safe and quality health care requires an exchange of information between the health care provider and patient for the purposes of diagnoses, treatment options, the proper use of medications, [and] obtaining informed consent.... This exchange of information is jeopardized when the provider and the patient speak different languages and may result in adverse health consequences and even death. Indeed, the provision of health care services, by its "very nature[,] requires the establishment of a close relationship with the client or patient that is based on sympathy, confidence and mutual trust," which cannot be established without effective communication.