

Article

HHS issues final rule on the ACA's anti-discrimination provisions

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McKnight's

Effective July 18, skilled nursing facilities (together with certain other healthcare providers) had to start complying with a new anti-discrimination rule issued in May by the Department of Health and Human Services. It implements the prohibition on discrimination under Section 1557 of the Affordable Care Act. This article highlights some key provisions of the rule to help SNF providers in their compliance efforts.

Section 1557 prohibits certain healthcare entities from discriminating in health programs and activities on the basis of race, color, national origin, age, disability, and sex. The rule was enacted to help to advance equity and reduce health disparities by protecting those who have been most vulnerable to discrimination in the healthcare context. Certain notices are not required to be sent out until October 24, 2016.

The rule applies to entities that provide health-related services or health-related insurance coverage and whose programs or activities receive federal financial assistance, including among other entity types, any health program or activity, any part of which receives funding from HHS including nursing facilities. Moreover, if any part of an entity's health-related activities or programs receives federal financial assistance as defined by the rule, then all of that entity's programs and activities are subject to the rule's requirements.

The rule's requirements are:

- General non-discrimination
 - The rule prohibits denial of benefits and exclusion from participation in covered healthcare programs and discrimination under any health program or activity that receives the applicable federal financial assistance. While this prohibition is to be applied broadly, the rule does include several limitations. For example, it incorporates the exclusions in the Age Act, the rule does not apply to discrimination against employees by healthcare employers, and although HHS encourages covered healthcare programs to voluntarily implement nondiscrimination policies on the basis of religion or sexual orientation, discrimination on these grounds are not prohibited by the rule.
 - Further, although HHS declined to include a blanket religious exception, compliance with the provision is not required if its application would violate applicable federal statutory protections for religious freedom.
 - The Rule permits sex-specific programs or activities where the covered healthcare program can show an "exceedingly persuasive justification." This means that a covered program must demonstrate that the exclusion of one sex is substantially related to the achievement of a health-related or scientific goal through objective evidence and empirical data.
- Individuals with Limited English Proficiency (LEP)
 - The rule requires covered healthcare programs to take reasonable steps to facilitate effective communications to individuals with limited English proficiency through language assistance via a qualified translator or interpreter. Reliance on unqualified staff or persons accompanying an individual with LEP for interpretation is generally prohibited.
 - Automated translation is not permitted unless reviewed and edited by a qualified translator. Language assistance must be available in a timely manner.

- HHS also encourages, but does not require, covered healthcare programs to implement a written language access plan that facilitates providers' ability to meet their obligations under the rule. This could address how the entity will determine an individual's primary language, identifying a service for accessing qualified interpreters when the need arises, types of language assistance services that may be required under particular circumstances and documents for which translations should be routinely available.
- Individuals with disabilities
 - The rule specifies several sets of requirements geared towards ensuring equal healthcare access for the disabled. In addition to meeting accessibility standards in construction, disabled individuals must be provided with effective communication (such as through auxiliary aids and services, which includes the provision of qualified interpreters, qualified readers, audio recordings and Braille materials).
 - Finally, all health programs or activities provided through electronic and information technology must be made available to individuals with disabilities. HHS encourages covered healthcare programs to consider the standards set forth in the Web Content Accessibility Guidelines (WCAG) 2.0.
 - Covered healthcare programs are also required to make reasonable modifications to avoid discrimination based on disability, except where modifications would fundamentally alter the nature of the health program or activity, or would be an undue financial or administrative burden.
- Equal program access on the basis of sex
 - The rule also requires that individuals be provided with equal access to health programs and activities without discrimination on the basis of sex.
 - The term "on the basis of sex" is defined to include gender identity, which refers to an individual's internal sense of gender, whether or not that gender is the same which the individual was assigned at birth. Single-sex access facilities, such as restrooms, are not prohibited, but covered healthcare programs must treat individuals consistent with their gender identities.
 - The rule does not prohibit discrimination based on sexual orientation. However, HHS stated that it supports prohibiting sexual orientation discrimination as a policy matter. In the meantime, the OCR will evaluate complaints based on sexual orientation discrimination to determine whether the complaint involves discriminatory sex stereotyping.

The rule requires that each covered healthcare program provide notice of its compliance with the rule's various policies and requirements, as well as how to file grievances and a complaint with OCR. By October 24, 2016, covered healthcare programs must post short statements in the top 15 non-English languages spoken in the state in which the entity is located or does business (referred to as "taglines") to notify individuals with limited English proficiency that free language services are available in these languages.

The notices and taglines must be included in significant publications and communications; conspicuous physical locations; and a conspicuous location on its website. In addition, notices and taglines in at least the top two non-English languages in the relevant state must be posted in significant publications and communications that are small-sized, such as postcards and tri-fold brochures.

Enforcement and penalties

Covered healthcare programs employing 15 or more persons are required to designate an employee to coordinate its efforts to comply with the rule, including the investigation of communicated grievances and adopt grievance procedures for alleged violations of the rule.

Several enforcement mechanisms are provided for under the rule: First, each covered healthcare program must keep records and compliance reports to submit to OCR as OCR deems necessary.

If an entity fails to provide the OCR with the requested information in a timely, complete and accurate manner, OCR may penalize the entity by suspending or terminating its federal financial assistance.

Second, HHS may file an administrative enforcement action against a covered health care program. Third, an individual may file a complaint with the OCR for a violation of the prohibition against discrimination, and the OCR will then initiate an investigation.

Finally, the rule allows an individual or entity to bring a private civil action in federal court to challenge a Section 1557 violation. Compensatory damages are available and attorney's fees may also be appropriate.

Conclusion

The new Rule is expansive and creates new requirements for many entities. Because the rule extends sex discrimination protections to healthcare programs and activities and includes gender identity as a prohibited basis of discrimination, nursing facilities need to review their current policies to ensure that they are in compliance and make any necessary modifications. Because of the detailed notice requirements, nursing facilities should evaluate and make necessary changes to comply with the rule's notice provisions.

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