



Non-Discrimination under the Affordable Care Act: A Broad Impact on Healthcare Providers

By: Meghan N. Cox and Emily A. Crow

Reprinted with Permission from [Jefferson County Medical Society](#)

October 2016

The Affordable Care Act ("ACA") prohibits certain entities who administer health programs or activities from discriminating on the basis of race, color, national origin, sex, age, or disability. Six years after the adoption of the ACA, regulations have finally been implemented to provide guidance for enforcing the ACA's anti-discrimination provisions.

The regulations became effective July 18, 2016, but provisions affecting health insurance plan benefit design do not take effect until the first day of the first plan year beginning on or after January 1, 2017. There are also posting requirements, explained in more detail below, which go into effect October 16, 2016.

The purpose of the regulations is to reduce health disparities by protecting some of the populations who have been the most vulnerable to discrimination in the health care context. The regulations are consistent with existing federal civil rights laws and make clear these civil rights standards will be employed in implementing the ACA's anti-discrimination provisions.

Who is Subject to the Regulations and What is Prohibited?

Not all entities subject to the ACA are subject to the regulations, which apply to "any entity that operates a health program or activity, any part of which receives federal financial assistance," including funding from the Department of Health and Human Services ("HHS") or any other Executive Agency. For purposes of the regulations, federal financial assistance includes grants, property, Medicaid, Medicare Parts A, C, and D payments, and tax credits and cost-sharing subsidies under Title I of the ACA.

This means hospitals, health clinics, physicians' practices, nursing facilities, residential or community-based treatment facilities, and other similar health care providers who accept and/or treat Medicare (Parts A, C, or D) or Medicaid patients are subject to the regulations. Even those entities who do not accept Medicare or Medicaid patients may be subject the regulations if the entity receives other forms of federal financial assistance.

Under the regulations, these entities cannot deny health services or health coverage or otherwise discriminate in the provision of health services or health coverage based on an individual's race, color, national origin, sex, age, or disability.

Prevention of National Origin Discrimination

In order to prevent national origin discrimination, entities subject to the regulations must "take reasonable steps" to provide language assistance services to individuals with limited English

proficiency ("LEP"). The regulations define an individual with LEP as "an individual whose primary language for communication is not English and who has a limited ability to read, write, speak, or understand English."

Covered entities must provide individuals with LEP with a "qualified interpreter" when oral interpretation would be "a reasonable step to provide meaningful access" for the individual with LEP. A "qualified interpreter" is someone who: (1) "adheres to generally accepted interpreter ethics principles, including client confidentiality"; (2) "has demonstrated proficiency in speaking and understanding both spoken English and at least one other 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."

The regulations also require covered entities to use a "qualified translator" when translating written content. "Qualified translator" is defined similarly to "qualified interpreter," with the exception that a translator must demonstrate proficiency in written English and one other language.

Entities subject to the regulations may only rely on bilingual/multilingual staff to communicate with individuals with LEP if the staff member: (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." The bilingual/multilingual staff member can only be relied upon to communicate with individuals with LEP if the staff member is specifically designated by the entity to provide oral language assistance as a part of the staff member's current job responsibilities.

The regulations specifically prohibit entities from requiring an individual with LEP to bring his or her own interpreter, and any language assistance services provided must be free of charge to the individual. Entities subject to the regulations are also prohibited from relying on an adult accompanying the individual with LEP for translation, except: (1) in an emergency involving an imminent threat to the individual or public where there is no qualified interpreter immediately available or (2) where the individual with LEP specifically requests an accompanying adult provide assistance. If the individual with LEP specifically requests that an accompanying adult provide translation, the adult must agree to provide such assistance and the reliance on the accompanying adult must be appropriate under the circumstances.

To reduce the burden of these regulations, covered entities are permitted to use remote video interpreting services, provided those services meet certain specifications. The video interpreting services must be in real-time with "full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection." The connection should not be choppy, blurry, or grainy and should not produce lags or irregular pauses in communication. The video must be large enough to display the face of both the interpreter and the participating individual.

Unfortunately, the regulations are silent as to the requirements for using telephonic oral interpretation, but they do not specifically prohibit its use. The bottom line is that in providing any

language assistance services, an entity must ensure the language assistance provides meaningful access to the health care services for individuals with LEP.

Prevention of Disability Discrimination

Covered entities must also take appropriate steps to ensure communications with disabled individuals are as effective as communications with nondisabled individuals. This includes providing appropriate auxiliary aids and services, when necessary, to consumers with disabilities. Examples of auxiliary aids and services include: sign language interpreters (on-site or through live video); computer-aided transcription; written materials; telephone handset amplifiers; captioned telephones; braille materials; screen reader software; or other assistive listening devices.

Covered entities are also required to make all programs and activities provided through electronic means accessible to individuals with disabilities, unless doing so would impose undue financial or administrative burdens on the entity or would result in a fundamental alteration in the nature of the entity's programs or activities.

The regulations also incorporate the 2010 Americans with Disabilities Act Standards for Accessible Design. They require that any construction or alterations commenced on or after July 18, 2016 by a covered entity comply with the 2010 ADA standards. Fortunately, almost all covered entities are already required to comply with the 2010 ADA standards.

Sex Discrimination under the ACA

The ACA is the first federal civil rights law to broadly prohibit discrimination on the basis of sex in federally funded health programs. The regulations clarify that sex discrimination not only includes discrimination based on an individual's sex, but also discrimination based on pregnancy, childbirth and related medical conditions, gender identity, and sex stereotyping. The regulations prohibit the denial of healthcare or coverage based on any of the foregoing factors, prohibit categorical exclusions of limitations for all health care services related to gender transition, and require that transgender individuals be treated consistent with their gender identity, including in access to facilities.

While the regulations do not resolve whether discrimination on basis of an individual's sexual orientation alone is a form of sex discrimination, they make clear that complaints regarding sexual orientation discrimination will be evaluated to determine if they involve the sort of sex stereotyping that is prohibited under the ACA.

Posting Requirements & Grievance Procedure

Like existing civil rights laws, the regulations require covered entities to post a notice of consumer civil rights by October 16, 2016.

For the disabled or those with LEP, the regulations require covered entities to post information telling consumers about the right to receive communication assistance. Covered entities must also post taglines in the top 15 languages spoken by individuals with LEP in the state where the covered entity is located. "Taglines" are "short statements written in non-English languages that indicate the

availability of language assistance services free of charge." The Department of Health and Human Services has provided the taglines in the top 15 languages spoken nationally by individuals with LEP.

Appendix A to the regulations includes a model notice covered entities can use for their posting. The model notice is titled "Sample Notice Informing Individuals About Nondiscrimination and Accessibility Requirements and Sample Nondiscrimination Statement: Discrimination is Against the Law," and states:

[Name of covered entity] complies with applicable Federal civil rights laws and does not discriminate on the basis of race, color, national origin, age disability, or sex. [Name of covered entity] does not exclude people or treat them differently because of race, color, national origin, age, disability, or sex.

[Name of covered entity]:

- **Provides free aids and services to people with disabilities to communicate effectively with us, such as:**
 - › **Qualified sign language interpreters**
 - › **Written information in other formats (large print, audio, accessible electronic formats, other formats)**
- **Provides free language services to people whose primary language is not English, such as:**
 - › **Qualified interpreters**
 - › **Information written in other languages**

If you need these services, contact [Name of Civil Rights Coordinator]

If you believe that [Name of covered entity] has failed to provide these services or discriminated in another way on the basis of race, color, national origin, age, disability, or sex, you can file a grievance with: [Name and Title of Civil Rights Coordinator], [Mailing Address], [Telephone number], [TTY number – if covered entity has one], [Fax], [Email]. You can file grievance in person or by mail, fax, or email. If you need help filing a grievance, [Name and Title of Civil Rights Coordinator] is available to help you.

You can also file a civil rights complaint with the U.S. Department of Health and Human Services, Office for Civil Rights, electronically through the Office of Civil Rights Complaint Portal, available at <https://ocrportal.hhs.gov/ocr/portal/lobby.jsf>, or by mail or phone at:

**U.S. Department of Health and Human Services
200 Independence Avenue, SW
Room 509F, HHH Building
Washington, D.C. 20201
1-800-368-1019, 800-537-7697 (TDD)**

Complaint forms are available at <http://www/hhs.gov/ocr/office/file/index.html>

Appendix B to the regulations includes the following sample tagline:

ATTENTION: If you speak [insert language], language assistance services, free of charge, are available to you. Call 1-xxx-xxx-xxxx (TTY: 1-xxx-xxx-xxxx).

Covered entities with 15 or more employees are also required to have a civil rights grievance procedure and an employee designated to coordinate compliance efforts. Appendix C to the regulations contains a model grievance procedure covered entities can use.

Enforcement

The regulations allow for private individuals and entities to sue in federal court to challenge alleged violations of the ACA's anti-discrimination provisions. Thus, failure to comply with the ACA's anti-discrimination provisions and the accompanying regulations could result in both litigation and the reduction or elimination of a covered entity's federal funding.

It is important to note that while the regulations may appear comprehensive, they in no way alter the protections provided by Title VII or other civil rights statutes. Entities subject to the ACA and its anti-discrimination regulations must also ensure they are in compliance with Title VII and any other applicable civil rights statutes and regulations.

For more information, please contact:



Meghan N. Cox
Associate
Birmingham, AL
Phone (205) 458-5248
E-Mail mcox@burr.com

*Services: Employer Advising,
Policies & Training, Employment
Litigation, Labor & Employment*



Emily A. Crow
Associate
Mobile, AL
Phone (251) 345-8222
E-Mail ecrow@burr.com

Service: Labor & Employment