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Insights

HHS Office of Civil Rights Publishes Final Regulations Prohibiting Discrimination in Health Care Programs and Activities Receiving Federal Financial Assistance

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The Health and Human Services' Office of Civil Rights ("OCR") recently published a final Regulation ("Regulation") that implements the nondiscrimination requirements of Section 1557 of the Patient Protection and Affordable Care Act.[1] Beginning on July 18, 2016, discrimination in health care programs and activities, any part of which receive Federal financial assistance, such as Medicare and Medicaid, will be prohibited. Health care providers and insurers subject to the Regulation ("Covered Entity") must implement policies prohibiting discrimination against individuals on the basis of race, color, national origin, sex, age, or disability and follow certain procedures to guarantee such protections. With the exception of employee health benefit programs, this Regulation does not apply to discrimination by a Covered Entity against its employees.

The Regulation imposes general and specific nondiscriminatory requirements on Covered Entities. Prohibited forms of discrimination range from the overt to the more discreet or unintentional, such as implementing polices that have the "effect" of discriminating against individuals. One point of major interest will probably concern OCR's decision to include gender identity under the category of discrimination related to sex, specifically a Covered Entity is obligated to treat all individuals "consistent with their gender identity." Further requirements imposed on Covered Entities: (1) take reasonable steps to give meaningful access to non-English speakers, i.e., translators or language assistance services free of charge; (2) ensure effective communication for individuals with disabilities; and (3) make necessary construction alterations to facilities to ensure appropriate access.

There are several oversight and transparency requirements to ensure compliance. For instance, a Covered Entity with more than 15 employees must develop a grievance procedure and designate an employee to coordinate compliance. Additionally, within 90 days of the effective date, all Covered Entities must publicize their nondiscrimination and patient right policies by means of notice and tagline—a brief message for non-English speakers offering language assistance. The Covered Entity must publish its notice conspicuously and visibly on websites and within patient accessible sites, as well as in the Covered Entities' "significant publications."

Existing administrative and judicial enforcement mechanisms will be used to enforce OCR's new Regulation. Administratively, individuals may utilize the existing process for enforcement under Title IV for discrimination claims on the basis of race, color, national origin, sex, and disability. The procedures for age discrimination fall under the Age Act. Additionally, OCR has been given the authority to initiate investigations into violations. And under the new Regulations, individuals have been given a private right of action to challenge violations in court. Compensatory damages are available in appropriate administrative and judicial actions.

A copy of the Regulation is available on the Federal Register at https://www.gpo.gov/fdsys/pkg/FR-2016-05-18/pdf/2016-11458.pdf. Examples of notices of nondiscrimination and translated taglines are available at the HHC OCR website at http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html.

For more information about the Regulation and its application to your facility, contact Brandon Shirley at bshirley@kdlegal.com.

[1] The Centers for Medicare and Medicaid Services published a proposed rule on June 16, 2016, imposing similar nondiscrimination requirements on hospitals and critical access hospitals. Specifically, the proposed rule considers a hospital or critical access hospital's compliance with the nondiscrimination requirement a condition of participation under 42 C.F.R. Part 482. A copy of the proposed rule is available at https://s3.amazonaws.com/public-inspection.federalregister.gov/2016-13925.pdf.