

September 27, 2016

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October 17th Compliance Deadline for HHS Nondiscrimination Notifications Approaches

On May 18, 2016, the United States Department of Health and Human Services (“HHS”) Office for Civil Rights (“OCR”) published a final rule implementing Section 1557 of the Affordable Care Act. Among other topics, the final rule imposes new requirements on health care providers and health plans regarding the publishing of nondiscrimination notices. The compliance deadline for the nondiscrimination notifications is October 17, 2016.

Who Must Comply?

The nondiscrimination notification requirements apply to health care providers and health insurance plans that receive certain “financial assistance” from HHS. Federal financial assistance includes grants, property, Medicaid, Medicare Parts A, C and D payments, and tax credits and cost-sharing subsidies from HHS. Note that a provider that receives only Medicare Part B payments (i.e. no participation in Medicaid) from HHS is not required to comply with the final rule. We expect that most hospitals, health clinics, physician practices, community health centers, nursing homes, rehabilitation centers and health insurance issuers will be subject to the rules. In addition, state and federal health insurance marketplaces (i.e. health insurance exchanges) also must comply with the requirements. All of an entity’s operations must comply with the rule. For example, this means that a hospital’s medical departments, as well as its cafeteria and gift shop, are subject to the rule.

Summary of the Required Notifications

Pursuant to the final rule, covered health care providers, payers and others are required to provide the following nondiscrimination notifications to patients, insureds and members of the public:

- posting of nondiscrimination notices;
- posting of nondiscrimination statements; and
- use of taglines for non-English language speakers.

The following sections summarize the requirements applicable to each.

1. Nondiscrimination Notice

Each covered health care entity must post a “nondiscrimination notice” in:

- “significant publications and significant communications” targeted to beneficiaries, enrollees, applicants, and members of the public;
- conspicuous physical locations where the entity interacts with the public; and

- a conspicuous location on the entity’s web site accessible from the home page of the entity’s website.

The notice must be posted or published in a conspicuously visible font, such that it is readily apparent to readers or visitors, as applicable. The notice must notify the reader of at least the following:

- the entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities;
- the 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;
- the 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;
- how to obtain aids and services;
- the identification of, and contact information for, the employee responsible for language assistance compliance services;
- the availability of the grievance procedure and how to file a grievance; and
- how to file a discrimination complaint with OCR.

With an entity’s nondiscrimination notice, the entity must include a tagline in at least each of the top 15 languages spoken by individuals of the relevant state(s) with limited English proficiency (“LEP”). Taglines alert readers to the availability of language assistance services in languages other than English.

Note that the nondiscrimination notice is not required to be included in significant publications and communications that are “small-sized.” For those documents, the nondiscrimination statement described below is required.

2. *Nondiscrimination Statement*

Each covered health care entity must post a “nondiscrimination statement” in “significant publications and significant communications” targeted to beneficiaries, enrollees, applicants, and members of the public that are “small-sized.” While “small-sized” is not defined in the final rule, OCR indicates that postcards and tri-fold brochures would be small-sized for purposes of this requirement.

The nondiscrimination statement must state that the entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities. The covered health care entity must include with the nondiscrimination statement taglines in at least the top two non-English languages spoken by LEP individuals in the state(s).

Summary

The following table summarizes the requirements for each of the above nondiscrimination notice requirements:



	Significant Publications and Communications	Significant Publications and Communications (small-sized)	Physical Locations	Website
Nondiscrimination Notice	X		X	X
Nondiscrimination Statement		X		
Number of Taglines Required	15	2	15	15

Frequently Asked Questions

What are “significant publications and significant communications”?

While not defined in the final rule, OCR described “significant publications and significant communications” as including “written notices to an individual, such as those pertaining to rights or benefits.” OCR declined to identify or provide examples of such documents but did state that it would interpret the term “broadly.”

Where should notices and taglines be placed on a document?

OCR encourages entities to include the required notice and taglines “at the beginning of significant publications and significant communications.” However, HHS opined that in some circumstances, such as lengthy publications, it might be **necessary** to include the notice and taglines at the beginning of a document to meet the requirements of the final rule.

What are examples of physical locations where the nondiscrimination notice is required?

The physical locations where an entity must display a nondiscrimination notice will vary depending upon the type of entity and the services it provides. Examples where such a notice may be required include a patient waiting room, an office where an individual may come to sign up for insurance, a mobile care unit or other patient service location.

How do we determine what languages to use for taglines?

When determining which taglines to include along with a nondiscrimination notice or statement, an entity must aggregate the limited English proficiency population in each state in which it operates and then include taglines for the 15 most prevalent non-English languages spoken (or at least the 2 most prevalent for small-sized documents). An entity is not required to use different taglines in each state in which it operates.

Has OCR made any resources available for entities?

Yes, sample notices, statements and taglines translated in various languages are available at <http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/>.

Does the Final Rule include other requirements?

Yes, the Final Rule includes numerous other requirements health care providers and plans must address, including but not limited to grievances, sex discrimination and complaints.

Questions?

If you have any questions about this alert or nondiscrimination notices generally, please contact any member of Shipman & Goodwin LLP’s Health Law Practice Group.

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