New Risks for Healthcare Providers under Section 1557 of the ACA: Meaningful Access for Limited-English Proficiency Patients and Disparate Impact Claims

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This article is the first in a series addressing the new risks facing healthcare providers under Section 1557 of the Affordable Care Act.

By now, healthcare providers undoubtedly know about Section 1557 of the Affordable Care Act and the final rule issued by the Department of Health and Human Services ("HHS") on May 13, 2016 (the "Final Rule"). The Final Rule notably requires covered healthcare providers to take immediate action to comply by: 1) adopting a grievance procedure to resolve complaints of patient discrimination; 2) designating an employee responsible for compliance with Section 1557; and 3) posting nondiscrimination notices and taglines in multiple languages.

Less well-known, however, are the ways in which Section 1557 immediately exposes healthcare providers to increased liability for discrimination claims. A significant aspect of this immediate expansion is the product of two things:

1. Section 1557 requires covered healthcare providers to provide "meaningful access" to patients with Limited-English Proficiency (LEP); and

2. Section 1557 allows an LEP patient (or class of LEP patients) to challenge, in federal court, any facially neutral policy or practice that disproportionately burdens LEP patients.

To stay ahead of opportunistic plaintiffs and minimize attendant risk, a covered healthcare provider must therefore understand the interaction of these two concepts and address its meaningful access obligations.

Meaningful Access for LEP Patients

The Final Rule requires covered healthcare providers to provide meaningful access to patients with LEP. A patient with LEP is a patient "whose primary language for communication is not English and who has a limited ability to read, write, speak, or understand English." The Final Rule thus ***requires*** covered healthcare providers to provide "language assistance services" (including oral interpretation or written translation services) for LEP patients where it is reasonable to do so. This requirement extends to each LEP patient "eligible to be served or likely to be encountered" by the covered provider.

In evaluating whether a covered healthcare provider is meeting its meaningful access obligations, HHS states that it will look to two factors:

1. The nature and importance of the health program or activity and the particular communication at issue; and

2. Other relevant factors, ***including whether a covered entity has developed and implemented an effective written language access plan.***

Accordingly, the existence of an effective language access plan is fundamental for any provider to

later contend that it otherwise acted reasonably with respect to any access challenge presented by or on behalf of an LEP patient. Moreover, any provider will be better positioned to defend against potential class claims if the issue is the application of any language access plan as opposed to the existence (or lack thereof) of any plan.

As to this second factor, HHS ***recommends*** that each language access plan considers the following:

a) How the entity will determine a patient's primary language;
b) Identify a telephonic oral interpretation service to be able to access qualified interpreters as needed;
c) Identify a translation service to be able to access qualified translators as needed;
d) Identify the types of language assistance services that may be required under particular circumstances; and
e) Identify any documents for which written translations should be routinely available.

Employees and practitioners would then also need to be trained on any such policy.

Section 1557's New Disparate Impact Claims

Although the meaningful access obligation pre-dates the Affordable Care Act, Section 1557 greatly increases the risks associated with a healthcare provider's failure to meet its meaningful access obligations for LEP patients.

For example, before the Affordable Care Act, healthcare providers that accepted federal financial assistance were required to provide meaningful access to LEP patients under Title VI of the Civil Rights Act. But the remedies available to LEP patients denied meaningful access under Title VI were severely curtailed by the U.S. Supreme Court in *Alexander v. Sandoval* in 2001. In that case, the Supreme Court held that a private plaintiff could not bring an action for *unintentional* discrimination (known as disparate impact discrimination) under Title VI. Instead, a private plaintiff could only bring an action for *intentional* discrimination (known as disparate treatment) under Title VI. While the federal government could still bring disparate impact claims against covered entities, disparate impact litigation in the healthcare context has been virtually non-existent largely due to other enforcement priorities of the Office for Civil Rights of HHS.

Section 1557 (according to HHS) has provided a work around to that ruling. In particular, HHS interprets Section 1557 as allowing any private plaintiff to bring a disparate impact claim for discrimination on the basis of any protected class enumerated in the statute. Under this interpretation, a private plaintiff could therefore challenge any facially neutral policy or practice that disproportionately burdens a protected class. In turn, this means that Section 1557 now allows any LEP patient (or a class of LEP patients) who is denied meaningful access to file a claim for disparate impact discrimination in federal court. This is significant for several reasons aside from the obvious – that plaintiff attorneys now have more incentive to sue and effectively fill the void left by HHS's general inactivity in the area to date.

First, an LEP patient filing a disparate impact claim of discrimination need not show that a healthcare provider intended to discriminate against her. This makes any disparate impact claim easier to prove, at least in theory because the individual does not have to focus on evidence relating to any personal decision as to her. Instead, the individual can focus on broader data relating to the provider and other evidence relating to the provider's general intent.

Second, a disparate impact claim challenges a healthcare provider's ***policies***—or in this case, the potential lack thereof—on a ***system-wide basis***. Disparate impact claims are therefore often associated with "impact ligation" strategies that often fundamentally alter the way an entity conducts itself. Furthermore, the mere threat of an attack on "macro" policies and decisions escalates the stakes and associated costs of any lawsuit – a disparate impact claim by its nature has a higher profile (and potential media profile) for any provider.

Therefore, with a disparate impact claim, an LEP patient could (in effect) force a covered healthcare provider to begin to meet its meaningful access obligations and punish it for having failed to do so in the past. On the one hand, an LEP patient could challenge the sufficiency of the healthcare provider's language assistance services or its training to employees and staff. On the other hand, if a covered healthcare provider provides no language assistance services whatsoever, an LEP patient could effectively force the provider to begin doing so while simultaneously seeking to hold the

provider responsible for the past failure to do so.

Conclusion: Providers Must Meet their Meaningful Access Obligations

To minimize its disparate impact risk, and to stay ahead of opportunistic plaintiffs, healthcare providers must meet their LEP meaningful access obligations. This means providing oral interpretation and written translation services where it is reasonable to do so. A natural extension of this obligation is to develop and implement a written language access plan that defines the parameters of what a provider will and will not do, and appoint designated persons responsible for administering and exercising discretion under the plan.

Alternatively, the failure to do so may result in a lawsuit, an award of compensatory damages, (possibly attorney's fees), and an agreement that the covered entity must meet its meaningful access obligations moving forward.

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