Legal Issues in the Care of Transgender Patients: ACA Section 1557 and Beyond

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What We Will Cover

- Current legal landscape
- Patient Protection and Affordable Care Act – Section 1557
  - Who is covered
  - Key terms
  - Sex discrimination
  - Medical record documentation
  - Compliance program elements
  - Enforcement

Current Legal Landscape

- Regulatory Structure
  - Section 1557
  - CMS does not believe there is sufficient evidence to support issuing a national coverage determination on gender reassignment surgery.
    - Leaves coverage determinations to administrative contractors on an individual claim basis
  - The Veterans Affairs Department has proposed removing its prohibition on medical services considered to be gender alterations.
Current Legal Landscape (cont.)

• Regulatory Structure (cont.)
  – In Indiana, state employees are protected from discrimination based on gender identity and expression.
  – Marion and Monroe counties prohibit employment discrimination on the basis of gender identity.
  – Over 15 Indiana cities, including most of the largest cities, prohibit employment discrimination on the basis of gender identity.

Current Legal Landscape (cont.)

• Other sources of regulation
  – Accreditation
    • The Joint Commission prohibits discrimination based on gender identity and gender expression.
    • HFAP prohibits the denial of visitation privileges on the basis of gender identity.
Current Legal Landscape (cont.)

• Areas of potential legal risk:
  – Access to care
  – Privacy
  – Room assignments
  – Visitation
  – Access to restrooms
  – Access to personal items that assist gender presentation

Current Legal Landscape (cont.)

• There is active litigation involving health care providers and transgender issues and likely more to come.
  – Example:
    • A nurse employee is suing Dignity Health for refusing to cover gender transition services under its employee health plan.
      – Alleging violations of Civil Rights Act and Affordable Care Act
Patient Protection and Affordable Care Act
Section 1557

- Provides that an individual shall not, on the basis of race, color, national origin, sex, age or disability, be excluded from participation in, denied the benefits of or subjected to discrimination under any health program or activity that receives Federal financial assistance
- Final Rule implementing Section 1557 issued on May 13, 2016 by the Office of Civil Rights (OCR) of the Department of Health and Human Services (HHS)
- Final Rule was effective July 18, 2016

Key Topics Covered by Final Rule

- Protecting against sex discrimination
- Ensuring meaningful access for individuals with limited English proficiency
- Ensuring effective communication with and accessibility for individuals with disabilities
- Protecting health insurance coverage
Section 1557 Covered Entities

• Any entity that operates a health program or activity, any part of which receives Federal financial assistance

• An entity established under Title I of the ACA that administers a health program or activity

• HHS

Examples of Covered Entities

• Hospitals
• Physicians and physician group practices
• Home health agencies
• Skilled nursing and long-term care facilities
• Pharmacies
• Laboratories
• Insurers
• Health professional training programs
• Public health programs, any part of which receive Federal financial assistance
Federal Financial Assistance

Federal financial assistance is defined very broadly and includes:

- Medicare, Medicaid and the Children's Health Insurance Program
- Meaningful use payments
- Certain tax credits
- National Institutes of Health research grants
- CMS gainsharing demonstration projects (e.g., MSSP, BPCI, CJR)
- Federally-funded community health centers
- National Health Service Corps

- Does not include Medicare Part B payments

- Physicians receiving only Medicare Part B payments are not subject to the Final Rule

- However, per HHS, "because almost all physicians receive payments from other [HHS] programs such as Medicaid or Medicare meaningful use payments, we believe that there are very few physicians excluded from these provisions."
Other Important 1557 Definitions

Gender Identity:

- An individual’s internal sense of gender, which may be male, female, neither or a combination of male and female, and which may be different from an individual’s sex assigned at birth
- The way an individual expresses gender identity is frequently called "gender expression," and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that individual at birth

Sex stereotypes: stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms or body characteristics

- Can include the expectation that individuals will consistently identify with only one gender and that they will act in conformity with the gender-related expressions stereotypically associated with that gender
- Can also include gendered expectations related to the appropriate roles of a certain sex
Protections Against Sex Discrimination

Historically, discrimination regulations enforced by OCR barred discrimination based on race, color, national origin, disability or age

• In the Final Rule, HHS extended this prohibition to discrimination based on sex for the first time
• The Final Rule’s prohibition on sex discrimination protects individuals from discrimination based on:
  o An individual’s sex
  o Pregnancy, childbirth and related medical conditions
  o Gender identity
  o Sex stereotyping, including the stereotype that an individual must identify as either male or female

Protections Against Sex Discrimination (cont.)

Under the Final Rule’s prohibition on sex discrimination:
• Individuals cannot be denied health care or health coverage based on their sex, including their gender identity and stereotyping
• Women must be treated equally with men in the health care they receive and the insurance they obtain
• Categorical coverage exclusions or limitations for all health care services related to gender transition are discriminatory
• Individuals must be treated consistent with their gender identity, including access to facilities
Protections Against Sex Discrimination (cont.)

• Providers may not deny or limit treatment for any health services that are ordinarily or exclusively available to individuals of one gender based on the fact that a person seeking such services identifies as belonging to another gender, provided that the service is necessary or appropriate
  o Example: a transgender male (assigned female gender at birth but identifies as a male) may still need an annual pelvic exam, and his gender identification as male should not prohibit him from obtaining a pelvic exam

• Sex-specific health programs or activities are permissible only if the entity can demonstrate an exceedingly persuasive justification that the sex-specific health program or activity is substantially related to the achievement of an important health-related or scientific objective

Note: HHS in the Final Rule did not resolve the issue of whether sexual orientation discrimination is a form of sex discrimination

• Final Rule states that OCR will evaluate complaints alleging discrimination based on sexual orientation to determine whether they involve "discriminatory stereotyping of sexual attraction or behavior" as protected under Section 1557

• HHS states that it supports prohibiting sexual orientation discrimination as a policy matter and will continue to monitor legal developments
Proposed Hospital Conditions of Participation

On June 16, 2016, CMS proposed revisions to the Patient's Rights Condition of Participation, requiring that hospitals (including critical access hospitals):

- Not discriminate on the basis of race, color, religion, national origin, sex (including gender identity), sexual orientation, age, or disability
- Establish and implement a written policy prohibiting discrimination on the basis of race, color, religion, national origin, sex (including gender identity), sexual orientation, age, or disability
- Inform each patient (and/or support person, where appropriate), in a language he or she can understand, of the right to be free from discrimination and how to file a complaint if he/she encounters discrimination

Examples of Sex Discrimination

- Multiple staff members at a hospital created a hostile environment for a transgender woman because she was transgender (patient was also required to share a room with a male patient)
- Pharmacist refused to provide a flu vaccine to a woman and questioned her about her non-gender-conforming clothing and hairstyle
- Staff at hospital emergency department ridiculed a male patient who arrived after sustaining injuries in a domestic incident. Staff did not evaluate the patient under a domestic violence protocol because he was male

Source: United States Department of Health and Human Services. Section 1557 of the Affordable Care Act: A Civil Rights Training for Health Providers and Employees of Health Programs and Health Insurance Issuers (July 2016).
Frequently Asked Questions

How should we document in the electronic health record that a patient is transgender?

• Document both "biological sex" or "biological sex at birth" and "gender" or "gender identity" in the medical record rather than only documenting "sex" as being either male or female.
• Rationale: Biological sex at birth should be included in the medical record, as there may be instances in which knowledge of a patient’s biological sex at birth would be important to treatment. For example, a transgender male (assigned female gender at birth but identifies as a male) may still have female internal organs. In that case, the patient may still need care traditionally provided to female patients, such as an annual pelvic exam. Removing information from the medical record about the patient’s biological sex could be detrimental to the patient’s health, as providers may be unaware of this care need related to the patient’s biological sex.

What if our electronic health records (EHR) system doesn’t have that capability?

• Contact your EHR vendor regarding adding a capability in the demographic or social history area of the EHR to address this, as it is being recognized increasingly as an important health and social issue.
• Rationale: In October of 2015, HHS issued guidance requiring that sexual orientation and gender identity data be included as demographic elements in all 2015 Certified Electronic Health Record Technology. Use of certified electronic health record technology is required for participation in the Meaningful Use program and proposed reimbursement models for the Medicare Access & CHIP Reauthorization Act of 2015 ("MACRA") and Merit-Based Incentive Payment System ("MIPS")
Frequently Asked Questions

Do we need to allow transgender patients to use bathrooms consistent with their gender identity? What about room assignments?

• Individuals should be allowed to use the restrooms corresponding to their gender identity, and in the case of shared occupancy rooms, a patient should receive a room assignment consistent with that patient’s gender identity.
• Rationale: The Final Rule provides that individuals must be treated consistent with their gender identity, “including in access to facilities.” We read this to include bathrooms and hospital wards. The Final Rule’s intent is that individuals should be allowed to use the restrooms corresponding to their gender identity, and in the case of shared occupancy rooms, a patient should receive a room assignment consistent with that patient’s gender identity. This is consistent with OCR Enforcement actions. Recently, a New York hospital entered into a resolution agreement with OCR after the hospital assigned a patient identifying as a female to a double occupancy patient room with a male patient.

Grievance Procedure and Compliance Coordinator

The Final Rule requires that each Covered Entity with 15 or more employees must:

• Designate at least one employee to coordinate the Covered Entity’s compliance with Section 1557 requirements
• Adopt a grievance procedure to investigate and address any alleged noncompliance
Grievance Procedure

HHS declined to provide minimum standards for the content of the 1557 grievance procedure in an effort to afford flexibility to Covered Entities. However, the grievance procedure must:

• incorporate appropriate due process standards
• provide prompt and equitable resolution of complaints

Compliance Coordinator

The 1557 Compliance Coordinator:
• May also serve in other compliance roles
• At a minimum, is responsible for:
  o Coordinating and monitoring compliance with Section 1557
  o Overseeing efforts to prevent Section 1557 violations
  o Implementing Covered Entity’s discrimination complaint procedures with respect to allegations of Section 1557 violations
  o Investigating complaints alleging violations of Section 1557 discrimination
Required Notices

By October 16, 2016 (90 days from the Final Rule’s effective date), the Covered Entity must provide notice to "beneficiaries, enrollees, applicants and members of the public" of its non-discrimination and available services by:

• Posting a notice containing the following:
  o Statement that the Covered Entity does not discriminate on the basis of race, color, national origin, sex, age or disability in its health programs and activities
  o Statement that the Covered Entity provides appropriate auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternative formats, free of charge and in a timely manner when the aids and services are necessary to ensure equal opportunity to participate
  o Statement that the Covered Entity provides language assistance services, including translated documents and oral interpretation free of charge and in a timely manner when necessary to provide meaningful access to individuals with limited English proficiency ("LEP")
  o Information on how individuals with disabilities and LEP can obtain the aids and services
  o Identification of and contact information for the Section 1557 Coordinator
  o Information on the availability of the grievance procedure, and on how to file a grievance
  o Information on how to file a discrimination complaint with OCR

• Posting, in a conspicuously-visible font size, taglines in at least the top 15 languages spoken by individuals with LEP in the relevant State or States in which the Covered Entity is located
Notices and Taglines

Must be posted:

• In significant publications and significant communications targeted to beneficiaries, enrollees, applicants and members of the public
• In conspicuous physical locations where the Covered Entity interacts with the public
• In a conspicuous location on the Covered Entity’s website accessible from the home page of the Covered Entity’s website

Notices and Taglines (cont.)

For significant publications that are small sized, such as postcards and tri-fold brochures, the Covered Entity must post, in conspicuously visible font size:

• The statement that the Covered Entity does not discriminate on the basis of race, color, national origin, sex, age or disability in its health programs and activities
• Taglines in at least the top two languages spoken by individuals with LEP in the relevant State or States where covered Entity is located
Recommended Policies

While not required under the Final Rule, in an effort to ensure compliance and provide good care, Covered Entities may wish to consider implementing policies addressing sex discrimination and treatment related to the care of transgender patients. Policies could cover topics such as:

- Gender identity and gender expression
- Protocols for interaction with transgender patients
- Documenting in the EHR
- Room assignments
- Access to restrooms

Enforcement

- Violations and failure to address noncompliance may result in suspension or loss of federal funding
- In addition, individuals may bring individual or class action claims directly against Covered Entities in federal court. Comments in the Final Rule indicate that remedies in these lawsuits could include compensatory damages and awards of attorneys' fees and costs
Please visit the Hall Render Blog at http://blogs.hallrender.com for more information on topics related to health care law.

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