New Non-Discrimination Notice Requirements Go Into Effect October 17, 2016

October 17, 2016

In May of this year, the Office for Civil Rights (OCR) of the Department of Health and Human Services (HHS) finalized its rulemaking implementing certain non-discrimination requirements under Section 1557 of the Affordable Care Act. The rulemaking applies to "covered entities," which includes any entity that receives federal financial assistance from HHS (*e.g.*, Medicaid, most Medicare, Meaningful Use, etc.) or is covered under Title II of the Americans with Disabilities Act as a program, service or regulatory activity relating to the provision of health care or social services.

As part of this rulemaking, covered entities are required to post certain notices regarding non-discrimination practices by October 17, 2016. Notices must be posted in a "conspicuously-visible font":

(1) in conspicuous locations in which it interacts with the public;
(2) in a conspicuous location on its website accessible from the home page; and
(3) in "large-sized" "significant" publications and "significant" communications, targeted to beneficiaries, enrollees, applicants or members of the public.

Whether a communication is "significant" (and thus requires a discrimination notice) is not defined with particularly; rather, OCR provides several examples of such communications:

- "[S]ignificant publications and significant communications" "may include patient handbooks, outreach publications or written notices pertaining to rights or benefits or requiring a response from an individual."
- Consent forms; complaint forms; notice of eligibility criteria; notice of rights; notice of denial of benefits or services; notice of loss of benefits or services; notice of decreases in benefits or services; and applications to participate in the covered entity's program, activity or to receive the covered entity's benefits or services, are examples of "vital documents," provided in the HHS limited English proficiency guidance and are a subset of "significant communications and significant publications."
- "the scope of ‘significant publications and significant communications'" includes "not only documents meant for the public but also individual letters or notices to an individual, such as a letter to a consumer notifying the individual of a change in benefits."

Because OCR recognizes that the full discrimination notice cannot feasibly be included with some small communications, a covered entity is only required to include a discrimination "statement" with significant

communications, which are "small-sized, such as postcards and tri-fold brochures" in "conspicuously-visible font," stating only that it does not discriminate on the basis of race, color, national origin, sex, age or disability.

Lastly, a covered entity is required to post "taglines" in at least the top 15 languages spoken by limited-English proficiency individuals in the relevant states in which it operates, in "conspicuously-visible font": (1) in conspicuous locations in which it interacts with the public; (2) in a conspicuous location on its website accessible from the home page; and (3) in large-sized significant publications. Taglines are "short statements written in non-English languages that indicate the availability of language assistance services free of charge." The actual taglines must be translated into each appropriate non-English language in its native script. For publications in small-sized significant communications, a covered entity must include taglines translated into the top **two** languages spoken by limited-English proficiency individuals in which the covered entity operates.

To assist covered entities in satisfying these new requirements, OCR has translated the taglines into a number of different languages on its website (http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/). OCR has also made available a table listing the 15 most common languages for each state, available at http://www.hhs.gov/sites/default/files/resources-for-covered-entities-top-15-languages-list.pdf.

As the deadline approaches, healthcare entities covered by the final rule should review existing processes to ensure the required changes are implemented. For assistance with this implementation process or questions regarding the applicability of the requirements, contact your Lathrop Gage attorney or the healthcare attorneys listed above.