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Providing Transgender-Inclusive Health Care

The United States Department of Health and Human Services (“HHS”) Office for Civil Rights (“OCR”) has issued a final rule implementing Section 1557 of the Affordable Care Act, which prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in health programs and activities that receive certain financial assistance from HHS (“Final Rule”). Specifically, the Final Rule codifies considerable protections for transgender individuals with respect to their access to health care, facilities, and programs. While the Final Rule took effect in July of 2016, clients have sought clarification regarding implementation of the Final Rule.

Background:

The Final Rule applies to health care providers that receive “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. 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. Accordingly, most hospitals, health clinics, physician practices, community health centers, nursing homes, and rehabilitation centers will be subject to the requirements under the Final Rule.¹

Under the Final Rule, a covered provider must provide individuals equal access to its health programs or activities without discrimination on the basis of gender identity in all respects. The OCR defines “gender identity” as “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 OCR recognizes a limited exception wherein it is medically appropriate for a provider to provide sex-specific health services without regard to an individual’s gender identity. For example, a provider cannot deny a transgender male a pap smear or a transgender female a prostate exam, if such care is medically indicated.

Provider Requirements Regarding Transgender Individuals:

As of October 17, 2016, providers must post nondiscrimination notices and statements. Please see Shipman & Goodwin LLP’s recent client alert regarding nondiscrimination notification requirements under the Final Rule, available at <http://shipmangoodwin.com/october-17th-compliance-deadline-for-hhs-nondiscrimination-notifications-approaches>.

- Providers that employ fifteen (15) or more individuals must designate at least one employee to oversee compliance with the Final Rule.
- Providers that employ fifteen (15) or more individuals must adopt grievance procedures for addressing discrimination complaints on the grounds covered by the Final Rule.

¹ Note that all of a provider’s operations, including its medical departments, cafeteria, and gift shop, are subject to the Final Rule.

- Providers must permit individuals to use the restroom facilities that correspond with their gender identity.
- In order to operate a sex-specific health program or activity, providers must demonstrate an “exceedingly persuasive justification.” The OCR explains that, in order to satisfy this standard, such program or activity must be “substantially related to the achievement of an important health-related or scientific objective.” For example, an ovarian cancer group cannot refuse to include transgender men solely because its female patients would feel uncomfortable.
- Providers must develop and implement a comprehensive training program for their staff to ensure the provision of nondiscriminatory health services and to prevent adverse treatment based on sex. The OCR has provided a training guide, which is available at <http://www.hhs.gov/civil-rights/for-individuals/section-1557/trainingmaterials/index.html>.

Suggested Practices for Offering Transgender-Inclusive Health Care

- Revise intake policies and procedures to provide patients with an opportunity to self-identify their preferred name and gender identity/transgender status.
- Refer to patients using their preferred pronouns and name at all times, regardless of the patient’s appearance, sex assigned at birth, and legal name. For example, if a patient’s insurance card provides that the patient’s legal name is “John Smith” but the patient identifies as “Sally Smith,” staff must refer to the patient as “Sally.” Ensure that patients’ preferences are well-documented and that staff is aware of these preferences.
- Review room assignment policy and ensure that it provides for the safe and nondiscriminatory assignment of rooms for transgender patients.
- Do not inquire about a patient’s transgender status unless such information is directly relevant to the health care services being provided. If it is medically necessary to make such an inquiry, inform the patient that the information is directly relevant to the patient’s care and that it will be treated confidentially in accordance with and to the extent required by law. Encourage patients to review the provider’s HIPAA policies regarding permitted disclosures of patient information.
- Ensure that staff is aware that information about a patient’s transgender status is sensitive and that this information must be kept confidential.
- For more information, you may consider reviewing guidance issued by Lambda Legal and the Human Rights Campaign Foundation regarding best practices for the care of transgender patients in hospitals, entitled Creating Equal Access to Quality Health Care for Transgender Patients: Transgender-Affirming Hospital Policies, available at http://www.lambdalegal.org/sites/default/files/publications/downloads/hospital-policies-2016_5-26-16.pdf.

Questions?

If you have any questions about this alert or transgender-inclusive practices, please contact Joan Feldman (jfeldman@goodwin.com or 860.251.5104), Vincenzo Carannante (vcarannante@goodwin.com or 860.251.5096), William Roberts (wroberts@goodwin.com or 860.251.5051), or Stephanie Gomes-Ganhão (sgomesganhao@goodwin.com or 860.251.5239).

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