

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Recent Article Highlights Legal Responsibility to Provide Interpreters for Patients Who Aren't Proficient in English

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According to a recent article in the New England Journal of Medicine (NEJM), more than 22 million Americans have limited English proficiency (LEP).¹ The NEJM article cites numerous examples of miscommunications that have led to misdiagnosis and improper medical treatment. Such tragic consequences are avoidable, the article states, if LEP patients are provided qualified medical interpreters and meaningful access to medical care.²

Health care providers who receive Federal financial assistance should be aware of their legal responsibility to furnish a competent interpreter to LEP patients who do not speak English as their primary language and who have limited ability to read, write, speak or understand English.

Federal Law

Title VI of the Civil Rights Act of 1964³ generally prohibits discrimination against any person based on national origin. The United States Supreme Court has interpreted this prohibition as applying to conduct that has a disproportionate effect on LEP persons. Accordingly, no one who receives Federal financial assistance may restrict an individual from enjoying any privilege that is enjoyed by others, including health care services.

Any individual or entity that operates, provides or engages in health services and receives any Federal financial assistance from the Department of Health and Human Services (DHHS) must take reasonable steps to provide "meaningful access" to LEP persons. Recipients of Federal financial assistance may include physicians, hospitals, nursing homes and universities with health research

¹ *NEJM*, Language Barriers to Health Care in the United States, 355:229-231, Glenn Flores, M.D. (July 20, 2006).

² *Id.*

³ 45 U.S.C. § 2000d.

programs. DHHS issued policy guidance on February 1, 2002,⁴ advising that the failure to ensure that LEP persons can effectively participate in or benefit from Federally-assisted programs, including health care programs and services, may violate Federal law.

Complying with Federal Guidelines

Compliance requires an individualized assessment that balances the need to provide meaningful access to LEP patients and the undue burdens on health care providers. This balancing test can be applied using the following four factors:

1. The number or proportion of LEP persons from a particular language group who are eligible to be served or likely to be encountered by the health care provider;
2. The frequency with which LEP individuals come in contact with the health care provider;
3. The nature and importance of the services; and
4. The resources available and the costs.

There are two main ways for health care providers to furnish interpretation services: (1) oral interpreters in person or via telephone; and (2) written translation. Whether an in-person interpreter is necessary or written translation will suffice depends on a reasonable individualized analysis of the foregoing factors.

Health care providers and institutions that receive Federal financial assistance from DHHS can hire bilingual staff, use contract interpreters, use community volunteers or establish a telephone interpreter service line. Qualified interpreters must be able to interpret competently, accurately and impartially. An interpreter must also demonstrate ethics and confidentiality, be familiar with any specialized vocabulary, and be able to interpret medical terms and concepts.

Health care providers cannot require an LEP patient to use a family member or friend as an interpreter, and should make patients aware that they have the option of using a third-party interpreter without charge. However, if the LEP patient prefers to use a family member or friend to interpret, a health care provider should respect the patient's wishes, so long as it does not adversely effect the provision of health care.

Also, health care providers may be required to provide certain "vital" documents in different languages. Whether a document is "vital" depends on the nature of the information and the consequence to the LEP patient if the information is not provided in a language and format that the patient understands. "Vital" documents may include written consent forms, notices of eligibility and explanation of rights.

Compliance should be measured on a case-by-case basis taking financial resources into account. What is reasonable for large practice groups and hospitals with larger operating budgets may not be reasonable for small practice groups or sole practitioners. There is no "one-size-fits-all" solution.

⁴ 67 Fed. Reg. 4968 (February 1, 2002).

In any event, health care providers who receive Federal financial assistance must use the four point balancing test to develop a reasonable and practical way to effectively communicate with LEP patients in order to provide all patients with meaningful access to health care services. If you have any questions about this topic or would like assistance in developing effective policies and procedures for LEP patients, please feel free to contact any of the attorneys in our Healthcare Practice area, listed below.

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