

## **RULES GOVERNING MEDICAL INTERPRETERS AND DISCLOSURE OF PHI**

### **HIPAA & TITLE VI**

Organizations that are subject to both HIPAA and Title VI must comply with the requirements of both laws, though not all HIPAA covered entities are recipients of federal financial assistance and thus, required to comply with Title VI; and not all recipients of federal financial assistance are also HIPAA covered entities, subject to the Privacy Rule.<sup>1</sup>

HIPAA covered entities may also be required to comply with the Americans with Disabilities Act and/or Section 504 of the Rehabilitation Act of 1973, both of which have requirements for the provision of sign language and oral interpreters for people who are deaf or hard of hearing.

### **RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE (TITLE VI)**

Under Title VI and its implementing regulations, recipients of federal financial assistance must take reasonable steps to ensure meaningful access to their programs, services, and activities by eligible limited English proficient (LEP) persons.

To comply with these federal requirements, Medicaid and CHIP providers, Medicare Part A providers, and organizations offering Medicare Part C and Part D Medicare Advantage Plans and Prescription Drug Plans may need to provide language assistance services, such as interpreters and translated documents. Also, for markets with a significant non-English speaking population, Medicare regulations for the Medicare Advantage Program and Voluntary Medicare Prescription Drug Benefit program require recipients to provide materials in the language of these individuals.<sup>2</sup>

### **AMERICANS WITH DISABILITIES ACT (ADA)**

The ADA requires that title II entities (State and local governments) and title III entities (businesses and nonprofit organizations that serve the public) communicate effectively with people who have communication disabilities. The goal is to ensure that communication with people with these disabilities is equally *effective* as communication with people without disabilities.<sup>3</sup>

### **Effective Communication**

As noted in Appendix B to the ADA regulations, even if a family member or friend is proficient in sign language, he, or she "may not be qualified to render the necessary interpretation because of factors such as emotional or personal involvement or considerations of confidentiality that may adversely affect the ability to interpret effectively, accurately, and impartially.

The key phrase used by the ADA when it comes to deaf and hard of hearing individuals is "effective communication." Whatever is necessary to ensure effective communication is required, by law, to be done.<sup>4</sup>

### **SECTION 1557 OF THE AFFORDABLE CARE ACT (ACA)**

ACA Section 1557 can be classified as a Federal civil rights act, because it prohibits healthcare discrimination on the basis of national origin (which includes immigration status and English proficiency),

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<sup>1</sup> <https://www.hhs.gov/hipaa/for-professionals/fag/760/must-a-covered-provider-obtain-individual-authorization-to-disclose-to-an-interpreter/index.html>

<sup>2</sup> <https://www.hhs.gov/civil-rights/for-individuals/faqs/must-medicare-and-chip-provide-interpreters-and-translations-for-lep-recipients/405/index.html>

<sup>3</sup> <https://www.ada.gov/effective-comm.htm>

<sup>4</sup> <https://www.ada.gov/effective-comm.htm>

race, sexual orientation and gender identity. This legislation applies to health programs, medical appointments and activities that receive federal funding where a person with limited English proficiency or who are Deaf or Hard-of-Hearing has access:(Medicaid, Medicare, CHIP, and Programs created under Title 1 of ACA (state and federal marketplaces)).<sup>5</sup>

### **PENALTIES FOR NON-COMPLIANCE**

According to ADA standards, it is usually up to the institution in question to provide — and pay for — any necessary sign language interpreting. If an institution does not comply by providing ASL interpreting to meet the needs of a hard of hearing individual, it may suffer serious penalties.<sup>6</sup>

### **DISCLOSURE OF PHI**

When using interpreter services, a covered entity may use and disclose protected health information regarding an individual without an individual's authorization as a health care operation, in accordance with the Privacy Rule, in the following ways:

- When the interpreter is a member of the covered entity's workforce (i.e., a bilingual employee, a contract interpreter on staff, or a volunteer)<sup>7</sup>;
- When a covered entity engages the services of a person or entity, who is not a workforce member, to perform interpreter services on its behalf, as a business associate<sup>8</sup>. A covered entity may disclose protected health information as necessary for the business associate to provide interpreter services on the covered entity's behalf, subject to certain written satisfactory assurances.<sup>9</sup>

For instance, many providers including those that are recipients of federal financial assistance and are required under Title VI of the Civil Rights Act of 1964 to take reasonable steps to provide meaningful access to persons with limited English proficiency -- will have contractual arrangements with private commercial companies, community-based organizations, or telephone interpreter service lines to provide such language services. If a covered entity has an ongoing contractual relationship with an interpreter service, that service arrangement should comply with the Privacy Rule business associate agreement requirements.

### **DISCLOSURE OF PHI WITHOUT AUTHORIZATION**

A covered health care provider may, without the individual's authorization, use or disclose protected health information to the patient's family member, close friend, or any other person identified by the individual as his or her interpreter for a particular healthcare encounter. In these situations, that interpreter is not a business associate of the health care provider. As with other disclosures to family members, friends or other persons identified by an individual as involved in his or her care, when the individual is present, the covered entity may obtain the individual's agreement or reasonably infer, based on the exercise of professional judgment, that the individual does not object to the disclosure of protected health information to the interpreter.<sup>10</sup>

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<sup>5</sup> <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>

<sup>6</sup> <https://www.justdigit.org/are-doctors-or-hospitals-required-to-provide-interpreters-for-deaf-patients-and-what-are-the-penalties-for-not-doing-so/>

<sup>7</sup> 45 CFR 160.103

<sup>8</sup> 45 CFR 160.103

<sup>9</sup> 45 CFR 164.504(e)

<sup>10</sup> 45 CFR 164.510(b)(2)

## **BILINGUAL MINORS, ADULT FAMILY MEMBERS, FRIENDS AND STAFF PROHIBITED FROM INTERPRETING**

An LEP patient's child or any accompanying minor or adult cannot be relied on as a medical interpreter. The exception to the rule is when a medical emergency poses imminent threat to the patient or public and an interpreter is not readily available. The second exception is if the patient specifically requests the adult family or friend to be present. In this circumstance, the health care provider is not off the hook legally. An interpreter still needs to be provided.<sup>11</sup>

A bilingual staff member may be used if and only if he/she is formally trained. Oral interpretation must be included in such person's job description and duties.

## **TELECOMMUNICATIONS RELAY SERVICE (TRS) WITH AND WITHOUT PRIOR AGREEMENT**

Under the Privacy Rule, a covered entity such as a doctor can contact a patient using a Telecommunications Relay Service (TRS), without the need for a business associate contract with the TRS. The sharing of protected health information between a covered health care provider and a patient through the TRS is permitted by the Privacy Rule<sup>12</sup>, and a business associate contract is not required in these circumstances.<sup>13</sup>

Even where the covered health care provider initiates a call using the TRS without the individual's prior agreement, the individual will have an opportunity to agree or object at the outset of the call. Typically, the CA will begin the call by identifying the service to the party called, and if that party is unfamiliar with the TRS, the CA will briefly explain how the service operates. This initial contact by the CA provides the individual with the opportunity to agree to the disclosure by proceeding with the call using the TRS, or to object by terminating the call.<sup>14</sup>

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<sup>11</sup> <https://interpretersunlimited.com/section-1557-affordable-care-act-faq/#:~:text=An%20LEP%20patient's%20child%20or,interpreter%20is%20not%20readily%20available.>

<sup>12</sup> 45 C.F.R. 164.510(b)

<sup>13</sup> [https://www.hhs.gov/hipaa/for-professionals/fag/500/is-a-relay-service-a-business-associate-of-a-doctor/index.html#:~:text=Answer%3A,associate%20contract%20with%20the%20TRS.&text=164.510\(b\)%2C%20and%20a,not%20required%20in%20these%20circumstances.](https://www.hhs.gov/hipaa/for-professionals/fag/500/is-a-relay-service-a-business-associate-of-a-doctor/index.html#:~:text=Answer%3A,associate%20contract%20with%20the%20TRS.&text=164.510(b)%2C%20and%20a,not%20required%20in%20these%20circumstances.)

<sup>14</sup> 45 C.F.R. 164.510(b)(2)(i)-(ii)