

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

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THE AMERICANS WITH DISABILITIES ACT (ADA) IS A  
FEDERAL LAW TO STOP DISCRIMINATION AGAINST  
PEOPLE WITH DISABILITIES

- The ADA applies to:
  - Many private and public employers (Title I)
  - State and local government agencies (Title II)
  - Places of public accommodation (Title III)
  - Transportation facilities (Titles II and III)
  - Telephone companies (Title IV)
  - U.S. Congress (Title V)

## WHO ARE HIPAA COVERED ENTITIES?

- Covered entities are defined in the HIPAA rules as (1) health plans, (2) health care clearinghouses, and (3) health care providers who electronically transmit any health information in connection with transactions for which HHS has adopted standards. Generally, these transactions concern billing and payment for services or insurance coverage. For example, hospitals, academic medical centers, physicians, and other health care providers who electronically transmit claims transaction information directly or through an intermediary to a health plan are covered entities. Covered entities can be institutions, organizations, or persons.

## 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.

For information about the obligation of recipients of federal financial assistance to take reasonable steps to provide meaningful access to persons who are limited English proficient, see [Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons](#). This guidance includes information for recipients of federal financial assistance about important considerations for determining the competency of interpreters, such as their understanding of applicable confidentiality requirements, that should be taken into account when using interpreters arranged by the provider or when individuals elect to use friends, family or others as interpreters.

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. (TRS)

## WHAT IS TITLE VI OF THE CIVIL RIGHTS ACT OF 1964(ACA)?

- Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color or national origin.

- Set forth below are examples of conduct that may violate Title VI:

A local welfare office located in a neighborhood with a number of immigrant groups provides no language assistance to TANF applicants or participants who are limited English proficient (LEP), but advises them to bring friends or relatives, as interpreters, to their appointments.

A training program charges an LEP class member for interpreter services that are needed for the class member to benefit from the training program.

A local welfare office which regularly serves LEP persons only makes interpreters available for persons applying for benefits three hours a week.

## WHO ARE RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE?

The following are recipients of federal financial assistance from HHS:

- Health care providers participating in CHIP and Medicaid programs
- Hospitals and nursing homes (recipients under Medicare Part A)
- Medicare Advantage Plans (e.g., HMOs and PPOs) (recipients under Medicare Part C)
- Prescription Drug Plan sponsors and Medicare Advantage Drug Plans (recipients under Medicare Part D)
- Human or social service agencies
- Insurers who are participating in the Marketplaces and receiving premium tax credits.
- As recipients of federal financial assistance, these entities are subject to the nondiscrimination requirements under Title VI and its implementing regulations.

## RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE

- 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.





## TITLE VI

- Title VI of the Civil Rights Act of 1964 requires recipients of Federal financial assistance to take reasonable steps to make their programs, services, and activities accessible by eligible persons with limited English proficiency.

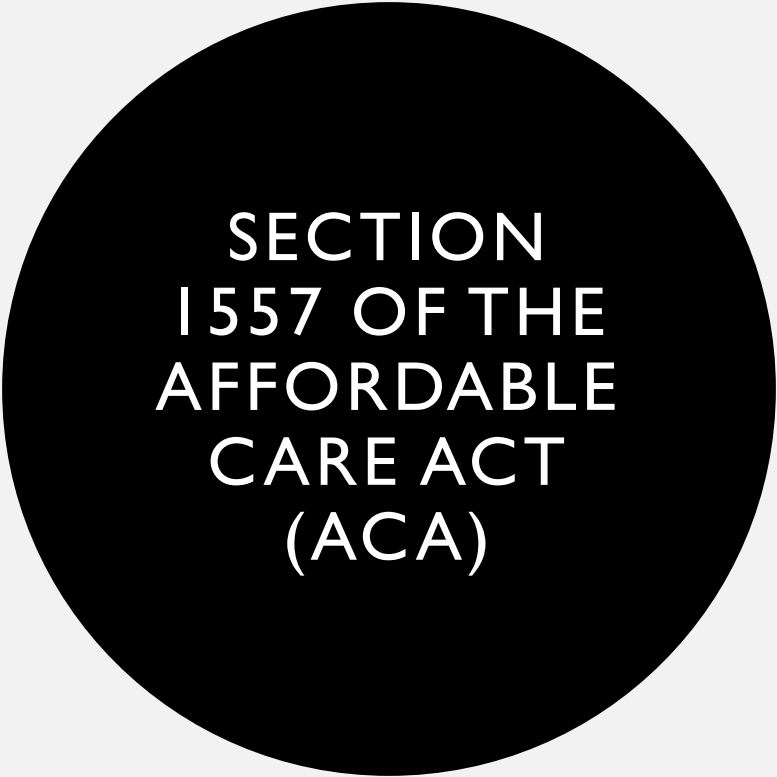
# ADA REQUIREMENTS FOR EFFECTIVE COMMUNICATION

- 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.

# EFFECTIVE COMMUNICATION

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.

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.



SECTION  
1557 OF THE  
AFFORDABLE  
CARE ACT  
(ACA)

- Section 1557 of the Affordable Care Act (ACA) went into effect July 18, 2016, and has a direct impact on the laws surrounding medical language services. Under the new law, any healthcare provider or health insurance company receiving federal assistance must provide limited English proficiency (LEP) patients with a qualified interpreter.

# ABOUT SECTION 1557

- 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), 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
  - Children's Health Insurance Program (CHIP)
  - Programs created under Title I of ACA (state and federal marketplaces)

## 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.
- In a 2008 disability discrimination and punitive damages case, a deaf woman successfully sued a New Jersey doctor who refused to provide her with a sign language interpreter after she asked for one on multiple occasions. The jury agreed that this qualified as discrimination and ruled unanimously in favor of a \$400,000 award.

## DISCLOSING 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) as defined at 45 CFR 160.103;
  - 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, as defined at 45 CFR 160.103. 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 set forth in 45 CFR 164.504(e). 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.

## DISCLOSING 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. See 45 CFR 164.510(b)(2).



## DISCLOSING PHI WITHOUT A BUSINESS ASSOCIATE CONTRACT

EXAMPLE: if a covered health care provider encounters a patient who speaks a language for which the provider has no employee, volunteer member of the workforce or contractor who can competently interpret, but then is able to identify a telephone interpreter service to communicate with the patient, the provider may contact the telephone interpreter service and identify the language used by the patient, so that the interpreter may explain to the patient that the interpreter is available to assist the patient in communicating with the provider.

If the provider *reasonably concludes* that the patient has chosen to be assisted by the interpreter, and, by the patient's willingness to continue the health care encounter using the interpreter, reasonably infers that the individual does not object to the disclosure, protected health information may be disclosed in accordance with 45 CFR 164.510(b) without a business associate contract.

## 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.

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.

MUST A COVERED HEALTH CARE PROVIDER OBTAIN AN INDIVIDUAL'S AUTHORIZATION TO USE OR DISCLOSE PROTECTED HEALTH INFORMATION TO AN INTERPRETER?

- Covered entities may use and disclose protected health information for treatment, payment and health care operations without an individual's authorization. See 45 CFR 164.506(c).
- A covered health care provider might use interpreter services to communicate with patients who speak a language other than English or who are deaf or hard of hearing, and provision of interpreter services usually will be a health care operations function of the covered entity as defined at 45 CFR 164.501.

## USING TELECOMMUNICATIONS RELAY SERVICE (TRS)

- 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 under 45 C.F.R. 164.510(b), and a business associate contract is not required in these circumstances.

## TRS WITHOUT PRIOR AGREEMENT

- 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. See 45 C.F.R. 164.510(b)(2)(i)-(ii).

## PRIVATE HEALTH CARE PROVIDERS

- Title III of the Americans with Disabilities Act prohibits discrimination against individuals with disabilities by places of public accommodation. 42 U.S.C. § 12181 - § 12189. Private health care providers are considered places of public accommodation. The Department of Justice has issued regulations for the obligations of public accommodations under Title III at 28 C.F.R. Part 36. The Department's Analysis to this regulation is at 56 Fed. Reg. 35544 et seq. (July 26, 1991)

MUST A HEALTH CARE PROVIDER PAY FOR AN AUXILIARY AID OR SERVICE FOR A MEDICAL APPOINTMENT IF THE COST OF THAT AID OR SERVICE EXCEEDS THE PROVIDER'S CHARGE FOR THE APPOINTMENT?

- In some situations, the cost of providing an auxiliary aid or service (e.g., an interpreter) may exceed the charge to the patient for that very same service. A health care provider is expected to treat the costs of providing auxiliary aids and services as part of the annual overhead costs of operating a business. Accordingly, so long as the provision of the auxiliary aid or service does not impose an undue burden on the provider's business and does not fundamentally alter the provider's services, the provider may be obligated to pay for the auxiliary aid or service in this situation.

CAN A HEALTH CARE PROVIDER CHARGE A DEAF OR  
HARD OF HEARING PATIENT FOR PART OR ALL OF  
THE COSTS OF PROVIDING AN AUXILIARY AID OR  
SERVICE?

- No. A health care provider cannot charge a patient for the costs of providing auxiliary aids and services, either directly or through the patient's insurance carrier. 28 C.F.R. § 36.301 (c).



## CAN A HEALTH CARE PROVIDER REQUIRE FAMILY MEMBERS AND FRIENDS TO INTERPRET FOR DEAF PATIENTS?

- Generally, no. Family members often do not possess sufficient sign language skills to effectively interpret in a medical setting. Even if they are skilled enough in sign language to communicate, family members and friends are very often too emotionally or personally involved to interpret "effectively, accurately, and impartially." Finally, using family members and friends as interpreters can cause problems in maintaining patient confidentiality. 56 Fed. Reg. at 35553.

## WHO PAYS FOR THE INTERPRETER OR OTHER AUXILIARY AID?

- Interpreters and other auxiliary aids must be provided free of charge. A deaf person may not be held responsible, directly or indirectly, for the costs of an auxiliary aid. For example, the cost of an interpreter for a doctor's appointment may not be passed on to a deaf patient through an insurance company. 28 C.F.R. 35.130(f); 28 C.F.R. 36.301(c).

## DOES THE ADA APPLY ONLY TO LARGER BUSINESSES?

- No. Title III of the ADA applies to all places of public accommodation, regardless of the size of the business or number of employees.

## WHO IS A “QUALIFIED” INTERPRETER?

- A qualified interpreter is defined to mean “an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.” 228 C.F.R. 35.104 (See also Fed. Reg. At 35701); 28 C.F.R. 36.104. (See also 56 Fed. Reg. At 35553.) The definition recognized that the interpreting skill needed for some types of communication may be higher than for other types of communication. For example, an interpreter in a doctor’s office must be able to interpret complex medical terminology. Similarly, a highly skilled interpreter may be needed for a court proceeding or a theater production.
- The Department of Justice regulations to implement Title III provide a comprehensive list of auxiliary aids and services required by the ADA.

## CAN HEALTH CARE PROVIDERS RECEIVE ANY TAX CREDITS FOR THE COSTS OF PROVIDING AUXILIARY AIDS AND SERVICES?

- Eligible small businesses may claim a tax credit of up to 50 percent of eligible access expenditures that are over \$250, but less than \$10,250. The amount credited may be up to \$5,000 per tax year. Eligible access expenditures include the costs of qualified interpreters, CART services, and other auxiliary aids and services. Omnibus Budget Reconciliation Act of 1990, P.L. 101-508, § 44.

# RESOURCES

- <https://www.hhs.gov/hipaa/index.html>
- <https://success.ada.org/en/regulatory-legal/section-1557/individuals-with-lep>
- <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html>
- <https://www.hhs.gov/hipaa/for-professionals/faq/760/must-a-covered-provider-obtain-individual-authorization-to-disclose-to-an-interpreter/index.html>
- <https://www.hhs.gov/civil-rights/for-individuals/faqs/must-medicaid-medicare-and-chip-provide-interpreters-and-translations-for-lep-recipients/405/index.html>
- <https://www.hhs.gov/hipaa/for-professionals/faq/536/may-a-health-care-provider-share-information-with-an-interpreter/index.html>
- <https://www.hhs.gov/civil-rights/for-individuals/faqs/what-qualifies-as-federal-financial-assistance/301/index.html>
- <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needy-families/civil-rights-requirements/index.html>
- Code of federal regulation