When Billboards Become Hospitals

Spotting the compliance concerns in the virtual care space

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Agenda

- How did we get here?
- Webposting requirements
  - HIPAA – NPP
  - IRS – 990
  - FTC – Privacy Policy
- Privacy/e-commerce
  - Wiretapping
  - Document retention for non-DRS
  - Trademark/Copyright
  - Social Media policy
- Accessibility
  - Americans with Disabilities Act
  - 504 of the Rehabilitation Act
  - Section 1557
  - Compliance in the Virtual Space

How did we get here?

- 2000s – The website was primarily a tool for marketing
  - locations
  - services
  - medical staff
- Today – the website is the front door to a broad array of services
  - patient portal for communication and medical record access
  - telemedicine visits
  - payment
  - medical device reporting
  - Custom app (disease or research specific)
  - Symptom checker

New Facility checklist:

- Life Safety Code
- medical staff enrollment
- accreditation considerations
- pharmacy licensure/controlled substance registration
- Physician/staff licensure
- commercial contracting
- EEOC requirements
- Accessibility
- Facility security
- IT systems

Management of the Virtual Front Door

- Does my organization have a process today for management of the virtual front door?
- What risks exist?
- Who are the stakeholders in my organization?

Web posting requirements:

- 990 publication. – (*See* Instructions for Form 990)
- Notice of Privacy Practices 164.520 (c)(3)(i)
- FTC – Website Privacy Policy
- IP protections –
  - Terms of Use
  - Millenium Copyright Act of 1998
- 1557 –
  - Notice of Nondiscrimination
  - Notice of how to file a grievance
  - Notice of Availability

Managing your website like another facility:

- Accessibility
  - ADA Title 2 or 3
  - ADA Title 1 Employment
  - 504 of the Rehabilitation Act
  - 1557 of ACA - language accessibility
- Legal/Compliance
  - Reporting hotline
  - Is it clear who the provider is?
- Patient consent
- Risk
- Data privacy
  - (HIPAA)
    - Webtracker
    - medical record access
  - Sensitive Data
    - behavioral health
    - Part 2
    - Reproductive health
  - Personal Health record
- e-commerce laws
  - FTC marketing rules
  - FTC Personal Health Record
- Wiretapping
  - Document retention for non-DRS
- Trademark/Copyright
- Social Media policy
- Communication Tools
  - TCPA/CITA

Accessibility Regulations

Section 504 of the Rehabilitation Act of 1973

- Broadly prohibits discrimination on the basis of disability in programs and activities that receive federal financial assistance
- Requires reasonable accommodations to individuals with disabilities to ensure that have equal access to healthcare services and prohibits discrimination against individuals with a disability.
- Requires that healthcare providers modify policies and practices when necessary to accommodate individuals with disabilities, unless doing so would fundamentally alter the nature of the services provided.
- Applies to any program or activity receiving federal financial assistance.

Americans with Disabilities Act (1980)

- *Title 1: Employment* – Prohibits discrimination against qualified individual with disabilities in job application procedures, hiring, advancement, and other terms of employment.
- *Title II: Public Services* – Requires state and local governments to provide equal access to services, programs, and activities for individuals with disabilities.
- ***Title III: Public Accommodations* – Prohibits discrimination based on disability in public accommodations, which includes healthcare facilities such as hospitals, clinics, and physician offices.**
- *Title IV: Telecommunications* – Ensures that individuals with hearing and speech disabilities have access to telecommunication services, including relay services for telephone communications.
- *Title V: Miscellaneous* – Contains provisions relating to ADA as a whole

Requirements of the ADA

A Covered Entity MUST:

- Provide services and programs in the most integrated setting appropriate to the needs of the qualified individual with a disability;
- Ensure that programs, services, activities, and facilities are accessible;
- Make reasonable modifications in their policies, practices, and procedures to avoid discrimination on the basis of disability, unless it would result in a fundamental alteration of the program;
- Provide auxiliary aids to persons with disabilities, at no additional cost, where necessary to afford an equal opportunity to participate in or benefit from a program or activity;
- Designate a responsible employee to coordinate their efforts to comply with the ADA

A Covered Entity may NOT, on the basis of a disability:

- Exclude a person with a disability from a program or activity;
- Deny a person with a disability the benefits of a program or activity;
- Afford a person with a disability an opportunity to participate in or benefit from a benefit or service that is not equal to what is afforded others;
- Provide a benefit or service to a person with a disability that is not as effective as what is provided others;
- Provide different or separate benefits or services to a person with a disability unless necessary to provide benefits or services that are as effective as what is provided others;
- Apply eligibility criteria that tend to screen out persons with disabilities unless necessary for the provision of the service, program or activity.

Section 1557 of Affordable Care Act

- Primary nondiscrimination provision.
- Prohibits discrimination based on race, color, national origin, sex, age, or disability in health programs or activities that receive federal financial assistance. Requires healthcare provides to make programs and facilities accessible to individuals with disabilities.
- Incorporates Section 504 of the Rehabilitation Act and the Americans with Disabilities standards, requiring reasonable accommodations in accessing healthcare services.
- Applies to health programs or activities that receive federal financial assistance.

Who is Subject to Section 1557?

- Health programs and activities that receive HHS funding.
- Health programs or activities administered by HHS (such as the Medicare Part D program)
- The health insurance Marketplace (and all plans offered by issuers that participate in those Marketplaces that receive Federal financial assistance).
- Those covered by the rule include hospitals, health clinics, health insurance issuers, state Medicaid agencies, community health centers, physicians' practices, and home health care agencies

What Does Section 1557 Require?

- With regard to accommodations for LEP persons and individuals with disabilities, a covered entity must:
  - Provide a notice of availability of language assistance services and auxiliary aids and services that meets certain requirements.
  - Take reasonable steps to provide meaningful access to each LEP individual eligible to be served or likely to be directly affected by its health programs and activities. These services must be free of charge, accurate, timely, and must protect the privacy and the independent decision-making ability of the LEP individual.
  - Take appropriate steps to ensure that communications with individuals with disabilities (including companions with disabilities), are as effective as communications with non-disabled individuals in its health programs and activities.
  - Provide appropriate auxiliary aids and services where necessary to afford individuals with disabilities an equal opportunity to participate in, and enjoy the benefits of, the health program or activity in question. Such auxiliary aids and services must be provided free of charge, in accessible formats, in a timely manner, and in such a way to protect the privacy and the independence of the individual with a disability.
  - Ensure that its health programs and activities provided through information and communication technology are accessible to individuals with disabilities, unless doing so would result in undue financial and administrative burdens or a fundamental alteration in the nature of the health programs or activities.

Website Compliance

- The ADA, Section 1557, and Section 504 all apply to websites.
- LEP and interpretive services must be integrated in virtual care programs
- Websites need to be accessible
  - Add closed captioning to videos
  - No images of text – i.e. must be readable by a screen reader
  - Font thresholds
  - Make websites intuitive – consistent, logical, labeled
  - Incorporate WCAG 2.1 design principals into your website.

HHS – Office of Civil Rights: "Nondiscrimination on the Basis of Disability In Programs or Activities Receiving Federal Financial Assistance"

- Final Rule – Effective July 8, 2024
- Congress's intent that title II of the ADA and section 504 be interpreted consistently, the rule contains provisions that mirror the corresponding provisions in the title II ADA regulation.
- Subpart I – Web, Mobile and Kiosk Accessibility

Subpart I – Web, Mobile and Kiosk Accessibility

- Beginning May 11, 2026, (May 10, 2027 for small entities) a recipient shall ensure that the web content and mobile apps that the recipient provides or makes available, directly or through contractual, licensing, or other arrangements, comply with Level A and Level AA success criteria and conformance requirements specified in WCAG 2.1, unless the recipient can demonstrate that compliance with this section would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. (84.84(b))

Practical Application

- **Situation**: A nurse practitioner's office uses telehealth to hold virtual appointments with patients by video. A patient who is deaf or has hearing loss schedules a virtual appointment with that office.
- What may be required of the provider?

- **Situation**: A nurse practitioner's office uses telehealth to hold virtual appointments with patients by video. A patient who is deaf or has hearing loss schedules a virtual appointment with that office.
- Possible Considerations: To ensure effective communication during the appointment, the provider may need, for example, to:
  - Ensure that the telehealth platform can support effective real-time captioning; or
  - Provide a qualified sign language interpreter during the appointment.
    - Note: If an interpreter is needed, the provider should make sure that the telehealth platform lets the interpreter join the session, even if the interpreter is in a different physical location than the patient and the provider. *The provider can't require the patient to bring their own interpreter or real-time captioner.*

- **Situation**: A physical therapy practice uses a telehealth platform to send patients messages and videos showing how to do physical therapy exercises. One of the physical therapists is sending messages and videos to a client who is blind or has a visual disability.

- What may be required of the provider?

- **Situation**: A physical therapy practice uses a telehealth platform to send patients messages and videos showing how to do physical therapy exercises. One of the physical therapists is sending messages and videos to a client who is blind or has a visual disability.

- Possible Considerations: To effectively communicate with this patient, the practice may need to make sure, for example, that:
  - its telehealth platform is compatible with screen readers
  - its videos have audio descriptions, or audio tracks that describe and give context for what is happening on screen.

- **Situation**: A physician's office allows patients to attend appointments virtually using a telehealth platform. A patient with an intellectual disability and/or their support person wants to schedule a virtual appointment for the patient.

- What may be required of the provider?

- **Situation**: A physician's office allows patients to attend appointments virtually using a telehealth platform. A patient with an intellectual disability and/or their support person wants to schedule a virtual appointment for the patient.
- Possible Considerations: To effectively communicate with this patient, the practice may need, for example, to:
  - offer additional time before the appointment so the patient can become familiar with how the telehealth platform works;
  - make sure the telehealth platform allows a support person to log in, regardless of whether the support person is in the same room as the plaintiff or is logging in from somewhere else;
  - take more time during the appointment as needed to make sure the patient understands what is being discussed.

- **Situation**: A health care provider who offers telehealth services adopts a blanket policy of refusing to schedule telehealth appointments for any patients with intellectual disabilities because the provider assumes that these patients would have a hard time understanding how to navigate the online platform used for telehealth appointments.

- What may be required of the provider?

- **Situation**: A health care provider who offers telehealth services adopts a blanket policy of refusing to schedule telehealth appointments for any patients with intellectual disabilities because the provider assumes that these patients would have a hard time understanding how to navigate the online platform used for telehealth appointments.
- No! The provider must offer these patients an opportunity to participate in telehealth appointments equal to that given to others.
- Possible Considerations:
  - Simplified user interface
  - Additional time and assistance
  - Caregiver support personal involvement
  - Visual and verbal communication aids
  - Assistive technology

Enforcement

ADA Enforcement

- ADA may be enforced through:
  - (1) Private Individuals. Lawsuits by individuals who are being subjected to discrimination or who have reasonable grounds for believing that they are about to be subjected to discrimination against building owners, operators, and tenants. May seek injunctive relief and attorney's fees and costs.
  - (2) Government Intervention. Lawsuits by the Department of Justice (DOJ) – must have reasonable cause to believe that there is a pattern of discrimination, or discrimination that raises to general public importance. Remedial action may also be required by the Office of Civil Rights (OCR).

Private Enforcement

- Private lawsuits
  - Individual need not engage in futile gesture
  - Potential DOJ intervention
  - Court may appoint an attorney for the plaintiff and may permit plaintiff to commence the civil action without first paying fees, costs, or security
  - Remedies:
    - Injunctive Relief - an order from a court to take specific actions to come into compliance with the ADA.
    - Compensatory Damages - available under Title III of the ADA to compensate the individual with a disability for any harm they suffered as a result of the business or entity's failure to provide reasonable accommodations.
    - Attorney's Fees
    - Civil Penalties - These penalties can range from $55,000 for a first-time violation to $110,000 for subsequent violations.

Section 504 Enforcement

- Section 504 may be enforced through:

(1) Private Individuals. Lawsuits by individuals who are being subjected to discrimination. May seek monetary damages, injunctive relief, and attorneys fees & costs.

(2) Government Intervention. The Office for Civil Rights (OCR) in HHS enforces section 504 as well as other statutes that prohibit discrimination on the basis of disability.

Section 1557 Enforcement

- Section 1557 may be enforced through:

(1) Private Individuals. Lawsuits by individuals who are being subjected to discrimination. May seek monetary damages, injunctive relief, and attorney's fees costs.

(2) Government Intervention. OCR enforces section 1557.

ADA & Section 1557 Compliance in Technology

Health programs or activities provided through information and communication technology must be accessible to individuals with disabilities, unless doing so would result in undue financial and administrative burdens or a fundamental alteration in the nature of the health programs or activities.

When undue financial and administrative burdens or a fundamental alteration exist, provide information in a format other than an electronic format that would not result in such undue financial and administrative burdens or a fundamental alteration.

Practical Takeaways

- The Virtual Front door is a virtual facility and requires appropriate compliance strategies.
- Telemedicine Services are not exempt from accessibility requirements.
- Website and virtual care content should be designed consistent with WCAG 2.1 principles.

Questions?

For more information on these topics visit hallrender.com.

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