



Compliance

TODAY

September 2013

A PUBLICATION OF THE HEALTH CARE COMPLIANCE ASSOCIATION

WWW.HCCA-INFO.ORG



Fighting fraud, waste, and abuse

Ted Doolittle

Deputy Director of the Center for Program Integrity,
Centers for Medicare and Medicaid Services

See page 16

23

**How to avoid the CIA:
The high price of non-compliance**

Gerry Goodman

26

The not-so-usual suspects: Four laws that may impact your compliance focus

Lisa J. Acevedo and
Brett B. Heger

31

**After the investigation:
What do you do when you are done?**

Meric Craig Bloch

35

Government targets healthcare for disability violations

Karen R. Glickstein

by Karen R. Glickstein

Government targets healthcare for disability violations

- » DOJ is targeting healthcare entities who provide services to the disabled.
- » The Barrier-Free Health Care Initiative has already resulted in multiple enforcement actions, some with large settlements.
- » The emphasis of the Initiative appears to be on HIV-positive and hearing-impaired or deaf patients.
- » In determining how or whether to treat patients, medical providers must focus on whether there is a direct threat to patient health and safety or whether reasonable accommodations exist.
- » DOJ will continue these efforts as program expands.

Karen R. Glickstein (kglickstein@polsinelli.com) is a Shareholder in the Kansas City office of Polsinelli PC.

All organizations that provide healthcare services should review their internal policies and provide additional training with regard to the Americans with Disabilities Act (ADA) and the disability discrimination provisions of the federal

Rehabilitation Act, in light of a recent government initiative to step up enforcement of those laws and provide additional protection to individuals with disabilities.

HIV settlements

Since January 2013, a number of healthcare organizations in different parts of the country reached settlements with the Department of Justice (DOJ) after investigations of allegations of discrimination with regard to HIV-positive patients.¹ Each of the settlements was reached as part of the DOJ's Barrier-Free Health Care Initiative, a partnership launched in July 2012 between the Civil Rights Division of DOJ and several U.S. Attorneys' Offices across the country.

In addition to the DOJ, the Department of Health and Human Services' Office for Civil

Rights (OCR) has been involved in stepping up enforcement of possible violations of these two federal laws that prohibit discrimination against "disabled" individuals with regard to employment and public accommodations, such as the receipt of medical services. The Initiative is designed to insure that access to all types of healthcare services are available to all individuals, regardless of whether they have a "disability" as that term is defined in the statutes.

Both the ADA and Section 504 of the Rehabilitation Act prohibit discrimination against "disabled" individuals (usually defined as those who are "substantially limited" in a major life activity). The Rehabilitation Act requires recipients of Medicare, Medicaid, and other federal assistance to ensure that disabled people have equal access to various programs, services, and activities which receive federal financial assistance. The ADA extends protections to most private employers and entities (which would include healthcare providers, even if those entities do not receive federal funding).

Although each of the cases resulting in settlements arose in a slightly different context, each involved stereotypes regarding perceived dangers of treating HIV-positive individuals



Glickstein

and the risk of possible transmission of the virus. Prior to these settlements, and prior to the official launch of the Barrier-Free Health Care Initiative, DOJ reached two settlements in May 2012 involving HIV-positive individuals who were refused treatment by physicians in medical facilities, presumably because of the HIV status of the patients.²

In one of the first post-Initiative settlements, a pain treatment facility in North Carolina agreed to pay an HIV-positive woman \$10,000 plus civil fines of \$5,000, after she sought treatment for back pain following a car accident. The facility refused to treat her after she had been referred by her primary care physician, appeared at the clinic and filled out paperwork, paid the required co-payment, and provided a urine sample.

In another settlement in February 2013, a dental clinic in Virginia agreed to pay \$7,000 to the patient and civil fines of \$3,000 in settlement of a DOJ complaint after the clinic required an HIV-positive patient to schedule appointments as the last appointment of the day, rather than provide options as to scheduling.

One of the largest settlements occurred in February 2013 and arose out of a matter initially initiated by the American Civil Liberties Union (ACLU). In that settlement, a Missouri eating disorders clinic paid \$115,000 to a patient and \$25,000 in civil fines after the clinic refused to treat a woman who had been on the facility's waiting list for months, clinic personnel had determined that the woman was eligible for treatment and counseling at

the clinic, and could be treated safely. During this waiting period, the clinic referred the woman to other facilities. When she was offered admission to the facility, she was told that any blood drawn as part of treatment and

testing would have to be taken at a hospital, rather than at the clinic.

And in March 2013, the DOJ announced a settlement with an Ohio hospital that refused to admit an HIV-positive patient to an alcohol treatment program, allegedly because of side effects of his HIV medication. The hospital

paid \$32,500 to the patient and \$5,000 in civil penalties to resolve this matter.

In each of these settlements, the primary issue addressed was the fact that the HIV-positive patients were denied treatment (or offered treatment on terms less preferential than other patients) due to the perception that treatment of the individual would pose a direct threat to the health or safety of others. In announcing each of the settlements, DOJ emphasized the fact that scientific evidence has established that transmission of the HIV virus can only occur in limited circumstances and, in the case of each of these settlements, the risk of such transmission through ordinary treatment would have been negligible or non-existent.

Hearing-impaired settlements

In addition to actions brought against health-care providers who allegedly violated the ADA and/or the Rehabilitation Act with regard to HIV-positive patients, DOJ has brought several enforcement actions in response to complaints

In each of these settlements, the primary issue addressed was the fact that the HIV-positive patients were denied treatment... due to the perception that treatment of the individual would pose a direct threat to the health or safety of others.

made by individuals who are hearing impaired. Over a one-year period between April 2012 and March 2013, DOJ reached eight separate settlements with seven healthcare providers (including hospitals, medical clinics, nursing homes, and doctor’s offices) that allegedly did not provide effective communication to deaf or hearing-impaired individuals. In addition, the OCR reached an additional settlement with one of the nation’s largest providers of senior care to provide sign language interpreters and other means of communication to hearing-impaired individuals.

The ADA requires that individuals who are hearing impaired have communications with their healthcare providers that are just as effective as the communications between a provider and a non-disabled individual. Although exchanging written notes may sometimes meet this obligation, DOJ has emphasized that in more complex healthcare situations, the provider must pay for a sign language interpreter or other type of auxiliary aid that is required to provide services. In each of the eight settlements, DOJ concluded that the medical facilities and physicians were compromising the overall health of their patients by not providing qualified sign-language interpreters.

Conclusion

Each of these settlements emphasizes the potential cost to a healthcare provider for failing to abide by the provisions of the ADA and/or the Rehabilitation Act—in terms of settlements paid to patients, civil fines, and/or attorney fees. In order to avoid liability and to

insure that best practices are followed in the event of any type of government investigation—which appears more likely given the current DOJ initiative—all medical providers should insure the following:

- ▶ Review and update all Human Resources, employment, and/or patient care policies to make sure that the policies contain appropriate anti-discrimination language and provide a mechanism for employees and/or patients to request accommodation.
- ▶ Provide and document meaningful training regarding the laws (including the responsibilities of the provider toward disabled patients) to all new employees and follow-up training to all employees on at least an annual basis.
- ▶ Provide and document specific training to employees regarding the treatment of HIV-positive, hearing-impaired, and deaf patients to insure that staff understands the nature of these conditions and the accommodations required, because these two conditions appear to be at the forefront of the government’s enforcement efforts.
- ▶ Review the DOJ website with regard to the Barrier Free Health Care Initiative to insure understanding of the goals of the program and keep up to date on continuing enforcement actions. ©

1. See <http://1.usa.gov/16xfnW9> for a list of settlements.
 2. Department of Justice, Office of Public Affairs press release: Healthcare Providers Settle with Justice Department Over Complaints of HIV Discrimination. May 11, 2012. Available at <http://1.usa.gov/1497nZp>

<p>Contact us</p> <p>EMAIL helpteam@hcca-info.org PHONE 888-580-8373 FAX 952-988-0146 MAIL HCCA 6500 Barrie Road, Suite 250 Minneapolis, MN 55435</p>	<p>To learn how to place an advertisement in <i>Compliance Today</i>, contact Margaret Dragon:</p> <p>EMAIL margaret.dragon@hcca-info.org PHONE 781-593-4924</p>	
---	---	--