CONSIDER WEBSITE AND OTHER TECHNOLOGY ACCESSIBILITY OBLIGATIONS TO BETTER SERVE YOUR COMMUNITY AND AVOID LITIGATION AND LOSS OF FEDERAL FUNDING

Health care providers are increasingly relying on technology to market, communicate with and otherwise provide services to their community, such as information about services provided on the website, patient portals, check-in kiosks and mobile applications. In using technology to communicate with patients and the larger community, it is important to remember the importance of accessibility of public-facing technology used to provide services, especially websites. Failure to incorporate accessibility measures in public-facing technology can unintentionally exclude individuals with disabilities by making it difficult or impossible for those individuals to use that technology. This not only makes the technology less effective; it violates the law. Failure to comply with technology accessibility obligations can place non-compliant health care providers at risk of losing federal funding. Furthermore, in addition to the importance of ensuring patients have access to online and other technology-based services, we are seeing increased litigation from private plaintiffs, especially in Florida and New York, seeking private damages from this failure to comply with legal requirements.

Generally, claims related to technology inaccessibility are rooted in the concept that an individual was denied services offered by a health care provider, and thus discriminated against in violation of law because the individual was unable to access services provided on a website, mobile application or other technology-based service offering. Claims can arise when a health care provider uses an online payment portal that is not compatible with screen-reader software used for individuals who are visually impaired or when educational videos about procedures are not closed captioned, potentially excluding individuals who are hearing-impaired.

LEGAL FRAMEWORK

Entities that accept federal financial assistance and places of public accommodation, like most health care providers, have obligations to make programs, activities and services, including those that are technology-based, equally available to individuals with disabilities. Such obligations stem from:

1. Section 1557 of the Affordable Care Act (“Section 1557”);
2. Section 504 of the Rehabilitation Act of 1973 (“Section 504”);
3. Americans with Disabilities Act (“ADA”); and
4. State anti-discrimination laws.

While each of these laws uses slightly different standards and applies based on slightly different criteria, they all have one thing in common – they require entities that either offer goods or services to the public, that are considered places of public accommodation, or that receive public funding, ensure that individuals with disabilities are not discriminated against in accessing those good and services.

WCAG STANDARDS

Although these laws do not dictate the exact criteria by which services offered through technology, like a website, are determined to be “accessible,” the Web Content Accessibility Standards (“WCAG”), voluntary international guidelines developed by the Website Accessibility Initiative of the World Wide Web Consortium, have emerged as the leading voluntary technical standard. Conformance with WCAG 2.0 AA has been strongly encouraged by the Department of Health and Human Services ("HHS"), and WCAG 2.0 AA has also been cited by the Department of Justice (“DOJ”) in consent decrees related to accessibility issues. Although at one point DOJ was expected to define standards for website accessibility, DOJ recently indicated that it will not define a standard for website accessibility and requested that Congress take up this effort. WCAG recently released a new standard, WCAG 2.1, although there has not yet been a significant shift to the WCAG 2.1 standard. Importantly, compliance with a particular WCAG standard is not a guarantee that a website or other technology is accessible to an individual. The test will be whether the inability of an individual with a disability to access services provided via technology was discrimination under Section 1557, the ADA or Section 504, or any applicable state law.

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ADDITIONAL COMPLIANCE CONSIDERATIONS

Website and technology accessibility is just one component of "technology compliance" health care providers should incorporate into their technology and online services strategy. Health care providers should also ensure that they have a website "terms of use" and "privacy policy." This is especially important as the regulatory framework governing online interactions between individuals and websites continues to evolve, such as new state laws and the European Union's General Data Protection Regulation. Additionally, for health care providers that have not yet done so, Section 1557 requires that a "notice of nondiscrimination" and "taglines" be placed on their website as well.

PRACTICAL TAKEAWAYS

Health care providers should consider the following with respect to their obligations to ensure their website designs and technology-based services offered to the community are accessible:

- Evaluate your existing accessibility policies and procedures to determine what revisions need to be made to incorporate technology-based accessibility.
- Incorporate Section 1557, Section 504, ADA and any state law compliance requirements in procurement processes to ensure that accessibility is given due consideration when making relevant technology-based purchases. This should include making certain that vendors are speaking with the right internal person regarding accessibility when these issues arise during the procurement process.
- Evaluate the website and other technology-based services offered to patients and the public to determine whether technology-based services need to be reformatted to meet WCAG standards.
- Determine whether other website compliance efforts are needed, such as a terms of use, privacy policy or other Section 1557 website requirements.
- Think of services offered online as a part of the entire interaction between the patient and the health care provider. In many cases, the relationship with a health care provider now starts with the website or a mobile application, not at the registration desk.

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