LEVEL access

Digital Accessibility: It's All We Do

Digital Accessibility in Health Care:

Section 1557 of the Patient Protection and Affordable Care Act

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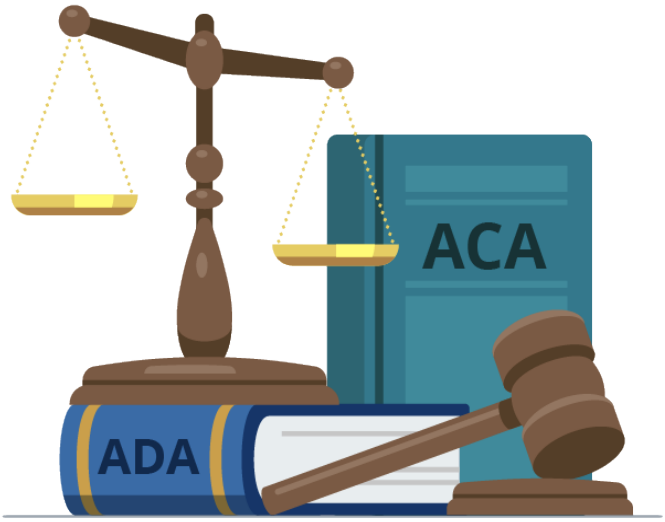
Background

Section 1557 of the Affordable Care Act (ACA) prohibits discrimination on the basis of a variety of different classifications—such as race and sex—but most notably for us, prohibits discrimination on the basis of disability. Section 1557 is not intended to stand alone but works in conjunction with other Federal anti-discrimination and civil rights legislation. Specifically, the law reiterates the prohibitions for discrimination already present in Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and the Americans with Disabilities Act (ADA) of 1990. To that extent, it can be argued that everything covered under Section 1557 is already covered under current laws.



The overall requirements of Section 1557 have been in effect since their enactment in 2010 and the HHS Office for Civil Rights (OCR) has been enforcing the provision since it was enacted. The implementing regulations are simply being issued at this time. As part of the text accompanying the rulemaking, OCR invites anyone that believes they may have been discriminated against under Section 1557 to file a complaint with their office.

The implementing regulations were published in the Federal Register - Vol. 81, No. 96 on Wednesday, May 18, 2016, under the title "Part IV - Department of Health and Human Services - Office of the Secretary - 45 CFR Part 92 - Nondiscrimination in Health Programs and Activities; Final Rule." Text that is part of the rulemaking is referenced with format "81 FR 31376" which refers to volume 81 of the Federal Register page 31376. The range of references to the rulemaking run from 81 FR 31376 to 81 FR 31473.

Covered Entities and Programs

Section 1557 covers a variety of different entities and programs relating to health care. In particular, it covers:

- Any health program or activity—in whole or part—that receives funding from the U.S. Department of Health and Human Services (HHS)
- Any health program or activity that HHS directly administers
- Health Insurance Marketplaces and all plans offered by issuers that participate in those Marketplaces.

Of most significant note is "all plans offered by issuers that participate in those Marketplaces," which would directly cover any plan that is provided on or through a health insurance exchange. In addition, monies spent on programs that receive partial Federal funding, notably Medicare plans, are likely to be considered covered.

Note that these rules apply to "all plans offered by issuers that participate in those Marketplaces," meaning any plan that is provided on or through a health insurance exchange.

Implementing Regulations

45 CFR § 92.204 Accessibility of electronic and information technology are the implementing regulations for Section 1557 of the Affordable Care Act. The regulatory text is relatively concise with only two requirements:

a) Covered entities shall ensure that their health programs or activities provided through electronic and information 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. When undue financial and administrative burdens or a fundamental alteration exist, the covered entity shall 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 but would ensure, to the maximum extent possible, that individuals with disabilities receive the benefits or services of the health program or activity that are provided through electronic and information technology.

b) Recipients and State-based Marketplaces shall ensure that their health programs and activities provided through web sites comply with the requirements of Title II of the ADA.

The rule provides for broad protection for individuals with disabilities and requires covered entities to make all programs and activities provided through digital channels to be accessible. The first requirement—paragraph (a)—defines the core of the regulation, which requires that "health programs or activities provided through electronic and information technology are accessible to individuals with disabilities." The rest of paragraph (a) allows for organizations to avoid making the electronic and information technology directly accessible if it would cause an "undue burden" or "fundamental alteration" of the program. Both "undue burden" and "fundamental alteration" have meaning assigned to them under the ADA and related regulations. Paragraph (b) is largely administrative and reiterates that covered entities also covered under Title II of the ADA most also comply with those requirements.

The definition of "disability" is the same as the definition of this term in the Rehabilitation Act, which, in turn, incorporates the definition of disability in the ADA. That definition was updated as part of the ADA Amendments Act (ADAAA) of 2008. This broadly defines disability as "as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability." This definition is intentionally broad and meant to cover both currently known disabilities and those that may evolve over time. The term "electronic and information technology" is defined as having the same meaning it has in the implementing regulations for Section 508 of the Rehabilitation Act.

This term is currently defined in 36 CFR 1194.4. As the Section 508 standards were going through a refresh at the time of the rulemaking for Section 1557, the OCR allowed this to be updated to "any term that replaces 'electronic and information technology' at 36 CFR 1194.4." By referencing this, OCR seeks to allow the definition for electronic and information technology to be updated and changed with the new Section 508 regulations.

In the same vein, a variety of points in the regulations and rulemaking text provide references to regulations relating to Title II of the ADA. The implication is that any future Title II rulemaking by the U.S. Department of Justice (DoJ) would also apply to entities, programs and activities covered under Section 1557. The implementation of Title II regulations that govern access to electronic and information technology was the subject of a long-running DoJ rulemaking activity (RIN 1190-AA65) which currently has an inactive status. If this process becomes active again and if regulations are finally published, they will provide guidance that is likely to supersede the Section 1557 guidance for covered entities, programs, and activities. It is worth noting that covered entities are prohibited from using "marketing practices or benefit designs" that discriminate on the basis of disability (45 CFR §92.207). Level Access views this requirement as effectively expanding digital accessibility requirements to the marketing activities associated with plans.

In addition to the digital accessibility requirements, it is important to note that the Section 1557 regulations, as a whole, require that covered entities "with 15 or more employees (i) have a grievance procedure and (ii) a compliance coordinator. In addition, covered entities must post notices of nondiscrimination to relevant public facing systems" (81 FR 31443).

The effective date of the rule is July 18th, 2016. As of that date, compliance is required with all of the information and communication technology requirements present in the rulemaking. As part of the rulemaking process, a variety of commenters requested additional time to make their technology compliant. In reviewing these comments, OCR found that "Section 92.204 largely reflects existing standards under the ADA and Section 504, and accordingly, most covered entities are already required to meet § 92.204's standards" (81 FR 314226). To that extent, OCR's view seems to be that the regulations introduce no new requirements, and no phase in time for their application is required.

Systems Covered

The rule requires covered entities to make all health programs and activities provided through electronic and information technology accessible. This requirement is wide ranging and broadly relates to any aspects of the health care program or service provided in a digital form. This would include such wide-ranging areas as:

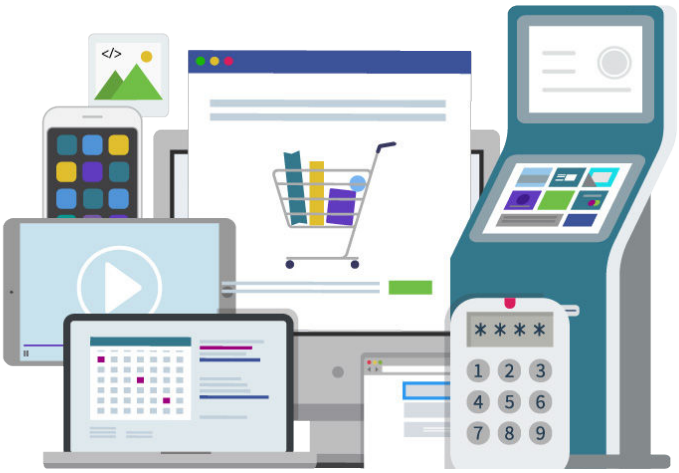
- Access to an online appointment system
- Accessible electronic billing and statements
- Comparison of health plans offered through a health insurance marketplace
- Information on the specific plan and benefits provided

It is important to note that OCR very clearly does not limit the application of the regulations to websites. "OCR at first considered a narrower interpretation that the rule applied only to access to health programs and activities provided through covered entities' web sites. However, we chose a broader interpretation, to include both web sites and other means of electronic and information technology" (81 FR 31462) In fact, anything that falls under the broad scope of electronic and information technology as defined under the Section 508 implementing regulations or successor regulation would fall under the scope of the regulation. In practice this includes:

- Web sites
- Web applications
- Mobile applications
- Kiosks
- Electronic documents and statements

Any electronic communication—most notably e-mail communication (81 FR 31462) In fact, anything that falls under the broad scope of electronic and information technology as defined under the Section 508 implementing regulations or successor regulation would fall under the scope of the regulation. In practice this includes:

- Web sites
- Web applications
- Mobile applications
- Kiosks
- Electronic documents and statements
- Any electronic communication —most notably e-mail communication



The covered programs and activities are limited to those that are directly related to consumers and, in general, not applicable to employee or provider facing systems. "The accessibility requirements in the final rule are limited to health programs and activities offered through electronic and information technology that is used by consumers or other program beneficiaries and do not apply to electronic and information technology that is used only by employees of a covered entity and that does not affect or impact customers or program beneficiaries, except as provided in § 92.208" (81 FR 31426). The rulemaking text does, however, note that employees of virtually all covered organizations are likely covered under other statutes and regulations, most notably Title I of the ADA and Section 504 of the Rehabilitation Act. So, while the application of Section 1557 is limited to consumers, broader requirements are likely applicable to access to electronic and information technology under other laws and requirements.

While we have a solid understanding of the regulations, there is one outstanding question related to marketing: are the marketing activities associated with covered plans covered? A variety of regulations already relate to how covered plans can be marketed. Section 1557 includes this requirement:

> **45 CFR §92.207(b)(2)** [A covered entity shall not…] Have or implement marketing practices or benefit designs that discriminate on the basis of race, color, national origin, sex, age, or disability in a health-related insurance plan or policy, or other health-related coverage.

This builds on existing regulations that govern marketing practices including 45 CFR 156.225 (b) that prohibits qualified health plans from employing "marketing practices or benefit designs that will have the effect of discouraging the enrollment of individuals with significant health needs." In addition, 45 CFR 147.104(e) prohibits a health insurance issuer from employing marketing practices or benefit designs "that will have the effect of discouraging the enrollment of individuals with significant health needs in health insurance coverage or discriminate based on an individual's race, color, national origin, present or predicted disability, age, sex, gender identity, sexual orientation, expected length of life, degree of medical dependency, quality of life, or other health conditions."

Level Access would offer that providing inaccessible marketing content and information about covered and qualified health plans, creates a material risk of a claim of systemic discrimination against people with disabilities. As such, Level Access's current recommendation is to include marketing assets related to covered programs and activities within the scope of digital accessibility endeavors.

Technical Standards

The Section 1557 regulations do not require conformance to a specific standard such as the Web Content Accessibility Guidelines (WCAG) 2.0 or 2.1 AA requirements. HHS contemplated doing so in the creation of the regulation but "OCR has decided not to adopt specific accessibility standards at this time" (81 FR 31426). While the HHS does not require conformance to a particular set of standards, the office "strongly encourages covered entities that offer health programs and activities through

electronic and information technology to consider such standards [WCAG 2.0 and Section 508] as they take steps to ensure that those programs and activities comply with requirements of this regulation" (81 FR 31426).

Declining to state a particular technical standard for conformance but still strongly encouraging its use is similar to the approach in rulemaking of the U.S. Federal Communication Commission (FCC) under the 21st Century Communications and Video Accessibility Act (CVAA). Under that act, the FCC was barred from defining a specific technical requirement but did indicate that conformance to a relevant technical standard would likely provide a high degree of accessibility. In the same vein, HHS indicates that conformance with those standards is likely a needed requirement for meeting the requirements of the regulation. Level Access's experience with companies implementing digital accessibility requirements would wholly bear this out. Conformance to a well-recognized digital accessibility technical standard—almost always WCAG 2.0 AA and more recently WCAG 2.1 AA—is strongly correlated with actual accessibility as well as providing a strong degree of defensibility to the implementing organization.

Finally, the OCR does state that "Due to the increasing importance of electronic and information technology in health care and health insurance coverage, OCR will continue to closely monitor this area, including developments in the standards developed by the Department of Justice and the Access Board" (81 FR 31426). Clearly OCR views this as an open issue and should the need for an explicit reference to an implementing technical standard grow, the issue can be revisited. More likely, given the already overlapping coverage between Section 1557 and other civil rights requirements, it is likely that other more developed rulemakings in digital accessibility that cite specific technical standards will supersede the implicit requirements of Section 1557.

While the regulation and rulemaking text declines to specify a technical standard, the regulation and rulemaking text does clearly require that the system be functionally usable by people with disabilities to conform. This is further clarified by OCR directly, "a covered entity's electronic and information technology must be functional as necessary to ensure that an individual with a disability has equal access to a covered entity's health program and activity" (81 FR 31427). In Level Access's view, this requires that systems be able to demonstrate both technical conformance and a minimum level of functional use by people with disabilities to safely be deemed compliant. This aligns with our long standing interpretation of similar requirements in other accessibility standards and regulations. This does, however, remove any concept of "safe harbor" associated with pure technical conformance of a system with a digital accessibility development standard.

Covered entities are "strongly encouraged" to consider existing standards (like WCAG 2.0 and Section 508) when evaluating and implementing accessibility for regulatory compliance.

Undue Burden?

Covered entities would not be required to make their health programs and activities "provided through electronic and information technology accessible if doing so would impose undue financial and administrative burdens or would result in a fundamental alteration in the nature of the health program or activity. In determining whether an action would impose such undue burdens, we proposed that a covered entity must consider all resources available for use in the funding or operation of the health program or activity" (81 FR 31425). When such an exception is elected for, however, the covered entity must still provide information in an alternative format. This alternative format would, to the maximum extent possible, ensure that people with disabilities "receive the benefits or services of the health program or activity that are provided through electronic and information technology."

In practice, Level Access's experience indicates that few, if any, programs or activities will fall under the undue burden or fundamental alteration exception. Undue burden tends to be interpreted in the context of an entire organization—versus purely the specific program or project—and in that context are very difficult to justify as unduly burdensome. In the same vein, "fundamental alteration" claims often don't survive even prima facie examination by technically skilled personnel. Many systems that have seemingly insurmountable accessibility challenges can be made accessible with a reasonable amount of expert consultation and brainstorming. Often these approaches involve modern, multi-device, and multi-modal solutions and result in better products and services for all users.

Privacy Considerations

In responding to the most recent draft of the regulations, a variety of commenters noted that there were many accessibility issues associated with covered programs and services that also touched on patient confidentiality and privacy. An example cited in the rulemaking is of a blind patient that, prior to the first appointment with a new doctor, is asked to complete required new patient documentation. That documentation is inaccessible. To complete the documentation visual assistance is provided and a third party (nurse, friend, administrator) helps the patient complete the forms. When this occurs, the blind person is "is forced to rely on a third party for assistance and, regardless of their personal relationship, disclose confidential information to that person such as the patient's medical history, illnesses, medications, and history of disease or genetic patterns running in the patient's family" (81 FR 31427).

It would seem that the OCR is going to take a relatively dim view of this approach as an effective accommodation and alternative. In particular, the OCR notes that the rule incorporates the relevant ADA requirements present in 28 CFR 35.160(b)(2) which note that "[i]n order to be effective, auxiliary aids and services must be provided [to individuals with disabilities] . . . in such a way as to protect the privacy and independence of the individual with a disability" (81 FR 31427). The OCR then reminds covered entities that in considering access to electronic information and technology "confidentiality of health information is a critical issue, and covered entities must ensure that the private health

information of individuals with disabilities is appropriately protected." Accordingly, Level Access would view any provision of alternative communication services that fail to protect the privacy of people with disabilities in a highly skeptical light.

Other Fun Items

Lest there be any confusion, it is clear that HHS takes the stance that Title III of the ADA does, in fact, cover access to electronic and information technology. "Places of public accommodation covered under the ADA already are required to make health programs and activities offered through electronic and information technology accessible to individuals with disabilities. The ADA does not exempt small providers from this requirement. Thus, the requirements under this final rule should be familiar to entities" (81 FR 31426)