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Communication Breakdown: Hospital Liability for Failing to Provide Interpreter Services

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Federal law requires that health care providers make language assistance available to individuals with limited English proficiency (LEP). Individuals considered to have LEP are those who do not speak English as their primary language and have a limited ability to speak, read, write, or understand English. At the national level, the size of the foreign-born LEP population has grown 30.7% between 2000 and 2011, while the LEP population in Wisconsin has increased even more during that time period, expanding by 40.1%. When physicians cannot effectively communicate with LEP patients, there is danger of improper medical care, lack of informed consent, and impaired patient understanding of diagnoses.

Legal Requirements

While there is no specific legislation that mandates the use of language interpreters in the health care setting, Title VI of the Civil Rights Act of 1964 stipulates that no organization that receives federal financial assistance may deny benefits of the program or discriminate based on race, color, and/or national origin. Discrimination based on language is equivalent to discrimination based on national origin. Since most hospitals, managed health care organizations, and physician practices receive Medicaid and Medicare reimbursements, they are recipients of federal assistance and therefore must comply with Title VI.

In 2000, Executive Order 13166 required federal agencies to examine the services health care organizations provide, identify any need for services to help those with LEP, and develop and implement a system to provide those services so that LEP individuals would have meaningful access to them. To assist federal agencies in doing this, the Department of Justice (DOJ) established compliance standards, known as the Four Factor Analysis. A recipient of federal financial assistance can use these standards to individually evaluate the extent of its obligation to provide LEP services. The four factors include:

1. The number or proportion of LEP individuals eligible to be served or likely to be served by the program or grantee;
2. The frequency with which LEP individuals come in contact with the program;

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3. The nature and importance of the program, activity, or service provided by the program to people's lives; and

4. The resources available to the grantee/recipient and the costs of providing language services.

Since releasing these guidelines, the federal government has not made significant progress in improving or increasing language access. At the state level, however, there has been legislative and regulatory activity to address language barriers. Different state initiatives have included continuing education for health professionals, certification of health care interpreters, and reimbursements for language services for Medicaid/State Children's Health Insurance Program (SCHIP) enrollees.

Key Takeaways

LEP can negatively impact the use of health services in a variety of ways. These effects can include lower utilization of preventative services, impaired patient understanding of diagnoses and medications, and increased use of resources for diagnostic testing. Further, physicians may be subject to tort liability for failure to provide appropriate interpreter services. When physicians treat patients with whom they cannot effectively communicate, there is potential for medical malpractice lawsuits based on improper medical care, lack of informed consent, breach of duty to warn, and breach of patients' privacy rights. Hospitals may be held vicariously liable for physician malpractice, regardless of whether the physician is considered an employee or an independent contractor.

In order to prevent physician and hospital liability for failure to provide language assistance to LEP patients, hospitals and health care systems should consider undertaking the following proactive measures:

- Use the DOJ's Four Factor Analysis to assess your individual responsibility to provide interpreter services, remembering to include both LEP and deaf/hard-of hearing interpreter services in the analysis.

- Streamline your system so that when LEP individuals schedule their appointments, interpreters are alerted and able to accompany them to the appointment, instead of making the patient wait while the health care provider calls an interpreter and waits for them to arrive.

- Train staff members and post notices of interpreter service policies in waiting

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rooms.

- Compile a list of resources by communicating with directors of health care interpreter certification courses or continuing education interpreter training courses in your area to assess availability.
- Implement telephonic and remote video interpreting systems so that one or two staff interpreters can provide services to a number of hospitals and clinics in your system.

If you have any questions regarding the above, please contact your Reinhart attorney, Larri Broomfield, or any member of our Health Care team.

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