

# Consent Manual

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2017  
44th Edition



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“S” denotes that the form is provided in English and Spanish. Spanish forms are included on CD only.

# 1 Patients' Rights and Interpreter Services

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## I. INTRODUCTION

An adult who is mentally competent has the fundamental right of self-determination — that is, he or she has the right to determine what happens to his or her body. Thus, patients have the right to make decisions about medical treatment that is offered or recommended. Both state and federal law require that hospitals tell patients about their rights, so they can better exercise them.

This chapter describes the rights that apply to all hospital patients. The laws granting special rights to patients receiving psychiatric care are described in chapters 15 and 16. Patient privacy rights are described in chapter 8. In addition, the “Pain Patient’s Bill of Rights” is described in XIX. “Mandatory Patient Information — Severe Chronic Intractable Pain,” page 5.46. (*For information about skilled nursing facility patient rights, see 42 C.F.R. Section 483.10; Health and Safety Code Sections 1599, 1599.1 and 123222.2; and Title 22, California Code of Regulations, Section 72527.*)

Chapter 11 of this manual discusses admission and registration documents, and various requirements that should be fulfilled upon patient admission or registration.

### A. Informing the Patient and the Patient’s Family

Both state and federal law require that hospitals inform patients of specified rights. This list of rights included in each law is different, although there is significant overlap. In addition, the required manner of informing the patient is different. The various requirements are described in this chapter.

In addition to informing the patient of their rights, a general acute care hospital must ask each patient, upon admission, if he or she would like the hospital to provide the patient’s next of kin or agent under a durable power of attorney for health care with patient’s rights information (and patient responsibilities, if the facility has a patient responsibility document). If the patient answers affirmatively, the hospital must do so. In addition, upon request of the patient, patient’s next of kin, or agent under a durable power of attorney for health care, a hospital representative must explain the patients’ rights information.

A similar requirement exists for skilled nursing facilities, intermediate care facilities and nursing facilities. No such requirement exists for psychiatric hospitals. [Health and Safety Code Section 123222.2]

### B. Font Size of Handouts

Handouts about patients’ rights must be in 12-point font or larger [Health and Safety Code Section 123222.1]. (*See “Readable Documents,” page 1.7, for more information about this requirement.*)

## II. THE PATIENT SELF-DETERMINATION ACT

Federal law — The Patient Self-Determination Act (PSDA) — requires that hospitals participating in the Medicare or Medicaid (Medi-Cal) programs provide information to patients regarding the right, under state law, to formulate advance directives concerning health care decisions. This information must be provided to all adult hospital inpatients, as well as outpatients who are in the emergency department, who are in an observation status, or who are undergoing same-day surgery. Hospitals need not provide this information to other outpatients. [42 U.S.C. Sections 1395cc(f) and 1396a(w); 42 C.F.R. Sections 489.100 and 489.102; Hospital *Interpretive Guidelines*, Tag A-0132]

The information should be presented upon admission or registration.

In addition, The Joint Commission requires hospitals to adopt written policies regarding advance directives (see The Joint Commission Comprehensive Accreditation Manual for Hospitals, *RI.01.05.01, EP 1*).

### A. Requirements of the PSDA

The PSDA requires hospitals, skilled nursing facilities, home health and personal care agencies, hospice programs and health maintenance organizations (HMOs) to maintain written policies and procedures to assure that every adult patient is given written information at the time of admission (or initial contact for home health care agencies and HMOs) about rights under state law to make decisions regarding his or her medical care.



Specifically, each provider must:

1. Provide written information to adult patients of rights under state law to make decisions regarding medical care, including the right to accept or refuse treatment and the right to formulate advance directives. A provider must update its information as soon as possible, but no later than 90 days after a change in state law.

The California Department of Public Health (when it was called the Department of Health Services) developed a brochure, “Your Right to Make Decisions About Medical Treatment,” that hospitals may use to implement this requirement. It is available in English at [www.cdss.ca.gov/cdssweb/entres/forms/english/pub325.pdf](http://www.cdss.ca.gov/cdssweb/entres/forms/english/pub325.pdf) or [www.cdss.ca.gov/cdssweb/PG167.htm](http://www.cdss.ca.gov/cdssweb/PG167.htm) and in Spanish at [www.cdss.ca.gov/cdssweb/PG177.htm](http://www.cdss.ca.gov/cdssweb/PG177.htm). The brochure is also available in English, Spanish and many other languages from:

The Pacific Center for Health Policy & Ethics  
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 Los Angeles, CA 90089-0071  
 Phone: (213) 740-2541  
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<http://weblaw.usc.edu/centers/paccenter/orderBrochures.cfm>

**NOTE:** A POLST (Physician Orders for Life-Sustaining Treatment) is not considered an advance directive [Probate Code Section 4780(a)]. (See IX. “POLST (Physician Orders For Life-Sustaining Treatment),” page 6.25, for information about POLST forms.) In addition, patients may not make an advance directive requesting an aid-in-dying drug and hospitals are not required to tell patients about the End of Life Option Act (see XI. “End of Life Option Act,” page 6.28).

2. Provide written policies for implementation of these rights, including a clear and precise statement of limitation if the provider cannot implement an advance directive on the basis of conscience. (The PSDA states that it is not meant to preempt any state law that protects providers’ rights not to implement an advance directive as a matter of conscience.) Thus, each hospital must provide information about any limitations the hospital has on honoring specific requests based on conscience (e.g., religious belief). The statement of limitation must clarify any differences between hospital-wide conscience objections and those that may be raised by individual physicians. The hospital’s policy must identify California’s legal authority

authorizing conscience objections, and describe the range of medical conditions or procedures affected by the conscience objections. California law authorizes conscience objections pursuant to the Health Care Decisions Law (see “Declining to Comply,” page 3.12).

3. Document — in a prominent part of the individual’s medical record — whether or not the individual has executed an advance directive. The Joint Commission requires that employees and medical staff involved in the patient’s care be aware of whether or not the patient has an advance directive (see The Joint Commission Comprehensive Accreditation Manual for Hospitals, RI.01.05.01, EP 9, 11). Surveyors will ask hospital staff and/or medical staff if a particular patient has an advance directive, and will expect staff to know exactly where to look for it in the paper or electronic medical record.
4. Not condition the provision of care, or otherwise discriminate against a patient, based on whether or not he or she has executed an advance directive.
5. Comply with state statutes, regulations, and court decisions regarding advance directives.
6. Educate the facility’s staff about its policies and procedures on advance directives.
7. Provide community education regarding advance directives. Separate community education materials may be developed and used, at the discretion of providers. The same written materials do not have to be provided in all settings, but the material should define what constitutes an advance directive, emphasizing that an advance directive is designed to enhance an incapacitated individual’s control over medical treatment, and describe applicable state law about advance directives. The law allows, but does not require, a provider to give advance directive forms to patients and community members. A provider must document its community education efforts.
8. Inform individuals that complaints about the advance directives requirements may be made to the California Department of Public Health (to the nearest Licensing and Certification District Office). Home health agencies must inform patients in writing of the state’s toll-free home health agency hotline, its hours of operation, and that the purpose of the hotline is to receive complaints or questions about local home health agencies and complaints about their implementation of advance directive requirements [42 C.F.R. Section 484.10(f)].

## B. Who Must Be Given the Information

The materials mentioned above should be given to the patient on or before every admission to the facility and should be presented in a reasonably clear manner. The Centers for Medicare & Medicaid Services (CMS) has said that this material must be given upon each admission, even for patients who are frequently readmitted [60 Fed. Reg. 33262 (June 27, 1995)].

CMS has stated that hospitals should also provide this information to outpatients who are in the emergency department, who are on observation status, or who are undergoing same-day surgery. This information should be presented at the time of registration. Hospitals need not provide this information to other outpatients. [Hospital *Interpretive Guidelines*, Tag A-0132] However, if an outpatient has executed an advance directive, the facility must honor it if the patient lacks capacity. See *Ill. "Advance Directives: The Health Care Decisions Law," page 3.3.*

If a patient lacks capacity to make health care decisions at the time of admission, the hospital may give advance directive information to a family member or surrogate, but must also give the required information to the patient when the patient becomes able to understand and respond to the information. Hospitals must have procedures in place to ensure appropriate follow-up.

## III. PATIENTS' RIGHTS UNDER STATE LAW

### A. Notice of Patients' Rights

The California Department of Public Health (CDPH) has described certain patients' rights that must be protected in general acute care hospitals in Title 22, California Code of Regulations, Section 70707. This regulation requires hospitals and medical staffs to adopt a written policy on patients' rights. In addition, a list of these patients' rights must be posted in English and Spanish in appropriate places within the hospital so that such rights may be read by patients. The law does not specify what "appropriate places" means.

CHA has developed a sample poster included as CHA Appendix 1-A, "Patient Rights" that hospitals may use to comply with this requirement. This list may be given to patients as a handout, in addition to being posted as required. Additional rights may be added to the poster or handout, if desired.

This list must include, but need not be limited to, the patient's right to:

1. Exercise these rights without regard to sex, economic status, educational background, race, color, religion,

ancestry, national origin, sexual orientation, disability, medical condition, marital status, registered domestic partner status, or the source of payment for care.

2. Considerate and respectful care.
3. Knowledge of the name of the licensed health-care practitioner acting within the scope of his or her professional licensure who has primary responsibility for coordinating the care, and the names and professional relationships of physicians and nonphysicians who will see the patient.
4. Receive information about the illness, the course of the treatment and prospects for recovery in terms that the patient can understand.
5. Receive as much information about any proposed treatment or procedure as the patient may need in order to give informed consent or to refuse this course of treatment. Except in emergencies, this information must include a description of the procedure or treatment, the medically significant risks involved in this treatment, alternate courses of treatment or nontreatment and the risks involved in each and to know the name of the person who will carry out the procedure or treatment.
6. Participate actively in decisions regarding medical care. To the extent permitted by law, this includes the right to refuse treatment.
7. Full consideration of privacy concerning the medical care program. Case discussion, consultation, examination and treatment are confidential and should be conducted discreetly. The patient has the right to be advised as to the reason for the presence of any individual.
8. Confidential treatment of all communications and records pertaining to the care and the stay in the hospital. Written permission must be obtained before the medical records can be made available to anyone not directly concerned with the care.
9. Reasonable responses to any reasonable requests made for service.
10. Leave the hospital even against the advice of members of the medical staff.
11. Reasonable continuity of care and to know in advance the time and location of appointments as well as the identity of persons providing the care.
12. Be advised if the hospital/licensed health care practitioner acting within the scope of his or her professional licensure proposes to engage in or

perform human experimentation affecting care or treatment. The patient has the right to refuse to participate in such research projects.

13. Be informed of continuing health care requirements following discharge from the hospital.
14. Examine and receive an explanation of the bill regardless of the source of payment.
15. Know which hospital rules and policies apply to the patient's conduct while a patient.
16. Have all patients' rights apply to the person who may have legal responsibility to make decisions regarding medical care on behalf of the patient.
17. Designate visitors of his/her choosing, if the patient has decision-making capacity, whether or not the visitor is related by blood, marriage, or registered domestic partner status, unless:
  - a. No visitors are allowed.
  - b. The facility reasonably determines that the presence of a particular visitor would endanger the health or safety of a patient, a member of the health facility staff, or other visitor to the health facility, or would significantly disrupt the operations of the facility.
  - c. The patient has indicated to the health facility staff that the patient no longer wants this person to visit.
18. Have the patient's wishes considered for purposes of determining who may visit if the patient lacks decision-making capacity and to have the method of that consideration disclosed in the hospital policy on visitation. At a minimum, the hospital shall include any persons living in the household.
19. This section may not be construed to prohibit a health facility from otherwise establishing reasonable restrictions upon visitation, including restrictions upon the hours of visitation and number of visitors.

All hospital personnel must observe these patients' rights.

**NOTE:** In addition to the Title 22 patients' rights, hospitals participating in the Medicare and Medicaid programs are required to inform each patient of his or her rights under federal law (see IV. "Patients' Rights Under Federal Law," page 1.7). The Joint Commission also requires that accredited hospitals inform patients of their rights [R.I.01.01.01]. CHA has developed a poster that combines the patients' rights requirements of Title 22 and other state laws, Medicare CoPs and The Joint Commission. The text of this poster is included in this manual as CHA Appendix

1-A, "Patient Rights." Posters may be downloaded or ordered through CHA's website at [www.calhospital.org/free-resources](http://www.calhospital.org/free-resources) then "Forms and Posters."

## B. Right to Non-Discriminatory Treatment

The Unruh Civil Rights Act [Civil Code Sections 51-53] prohibits discrimination by all business establishments, including those that provide medical services, on the basis of a person's sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language or immigration status (unless required by federal law).

California hospital licensing regulations also prohibit discrimination. Title 22, California Code of Regulations, Section 70715 states that:

No hospital shall discriminate against any person based on sex, race, color, religion, ancestry, national origin, sexual orientation, disability, medical condition, marital status, or registered domestic partner status, except as provided herein. This provision shall apply to the appointment of the medical staff, hiring of hospital employees, and the admission, housing, or treatment of patients.

An additional law has been enacted related to discrimination in the provision of emergency care. Emergency services may not be based upon, or affected by, a person's ethnicity, citizenship, age, preexisting medical condition, insurance status, economic status, ability to pay for medical services or any other characteristic listed in the Unruh Civil Rights Act, except to the extent that a circumstance such as age, sex, preexisting medical condition, or physical or mental disability is medically significant to the provision of appropriate medical care to the patient. These services must be rendered without first questioning the patient or any other person regarding the patient's ability to pay for treatment. Payment information may be obtained after the services are rendered. [Health and Safety Code Section 1317] (*For more information, see "Health and Safety Code Section 1317," page 12.22.*)

## DEFINITIONS

**"Disability"** means any mental disability or physical disability as defined in Government Code Sections 12926 and 12926.1.

**"Medical condition"** means a health impairment related to a diagnosis or history of cancer, or genetic or inherited characteristics [Government Code Section 12926].

**"Sex"** includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.

“Sex” also includes, but is not limited to, a person’s gender. **“Gender”** means sex, and includes a person’s gender identity and gender expression. **“Gender expression”** means a person’s gender-related appearance and behavior whether or not stereotypically associated with the person’s assigned sex at birth.

### C. Right to Know the Identity of Persons Caring for the Patient

The Title 22-required patients’ rights poster includes a provision stating that patients have the right to know the name of their caregivers (see A. “Notice of Patients’ Rights,” page 1.3). A different Title 22 provision requires that all employees of the hospital having patient contact, including students, interns and residents, must wear an identification tag bearing their name and vocational classification [Title 22, California Code of Regulations, Sections 70721 (general acute care hospitals) and 71521 (acute psychiatric hospitals)].

In addition, Business and Professions Code Section 680 requires each health care practitioner to disclose, while working, his or her name and license status, as granted by the state of California, on a name tag in at least 18-point type. CDPH had originally said that both the first and last name must be on the name tag, but changed its interpretation after a nurse was stalked by a patient. It now appears that just first or last name would be satisfactory. In this regard, it should be noted that it is unlawful for any person to use the title “nurse” in reference to himself or herself, unless that person is a registered nurse or licensed vocational nurse. A certified nurse assistant may use the title of “certified nurse assistant.”

A health care facility licensed by CDPH must implement policies and procedures to ensure that health care practitioners adhere to this requirement.

#### EXCEPTIONS

A health care practitioner in a practice or office whose license is prominently displayed, may opt to not wear a name tag. If a health care practitioner or a licensed clinical social worker is working in a psychiatric setting or in a setting that is not licensed by the state, the employer may make an exception from the name tag requirement for safety or therapeutic reasons.

#### ADDITIONAL REQUIREMENT FOR INDIVIDUAL HEALTH CARE PRACTITIONERS

An additional requirement exists for specified types of licensed health care practitioners; however, this requirement does not apply to practitioners who work in

a facility licensed under Health and Safety Code Section 1250 (which includes general acute care hospitals, acute psychiatric hospitals, skilled nursing facilities, and other facilities) or a clinical laboratory. This requirement, in brief, requires health care practitioners to communicate to each patient his or her name, state-granted practitioner license type, and highest level of academic degree, by one or both of the following methods:

1. In writing at the patient’s initial office visit.
2. In a prominent display in an area visible to patients in his or her office. If this method is used, the sign must be in at least 24-point type in the following format:

---

#### Health Care Practitioner Information

1. Name and license.
  2. Highest level of academic degree. [Nurses and pharmacists need not list this item]
  3. Board certification (ABMS/MBC). [For physicians who are board certified]
- 

In addition, a health care practitioner who has a website must prominently display the information listed above on the website. (See *Business and Professions Code Section 680.5* for further information about this requirement.)

#### ADDITIONAL REQUIREMENT FOR PHYSICIAN ASSISTANT TRAINEES

A regulation of the physician assistant examining committee states that no trainee (including preceptees) in any approved program may render general medical services to any patient except in emergencies unless the patient has been informed that such services will be rendered by that trainee. Except in emergencies, if the medical service to be rendered by the trainee is surgical in nature, or where the trainee will assist in a surgical procedure, the patient on each occasion must be informed of the procedure to be performed by that trainee under the supervision of the program’s instructors or physician preceptors and must consent in writing prior to the performance of the procedure.

This regulation specifies that the patient must be informed of the role of the physician assistant trainee on each occasion. Therefore, language in a “Conditions of Admission” form that the patient signs only once may not suffice to fulfill this requirement.

[Title 16, California Code of Regulations, Section 1399.538]

## D. California Right to Visitors

The Title 22-required patients' rights poster states that a patient has the right to designate visitors of his or her choosing, if the patient has decision-making capacity, whether or not the visitor is related by blood, marriage, or registered domestic partner status.

The health facility may, however, restrict visitation in the following circumstances:

1. No visitors are allowed.
2. The facility reasonably determines that the presence of a particular visitor would endanger the health or safety of a patient, a member of the health facility staff, or other visitor to the health facility, or would significantly disrupt the operations of the facility.
3. The patient has indicated to the health facility staff that the patient no longer wants this person to visit.

The patient also has the right to have his or her wishes considered for purposes of determining who may visit if the patient lacks decision-making capacity. [Title 22, California Code of Regulations, Section 70707(b)(17-19)]

The hospital must have a policy regarding visitation that describes how a patient's wishes will be considered for determining who may visit if the patient lacks decision-making capacity. At a minimum, the hospital policy must provide for the inclusion of any persons living in the household. In addition, Health and Safety Code Section 1261 specifically states that a patient's registered domestic partner (as defined in Family Code Section 297), the children of the patient's registered domestic partner, and the registered domestic partner of the patient's parent or child must be permitted to visit, unless one of the exceptions noted above applies.

A health facility may establish reasonable restrictions for visitation, including the hours of visitation and number of visitors.

Federal law also regulates a patient's right to visitors (see *"Federal Right to Visitors and Support Persons,"* page 1.11). The hospital's policy must comply with both state and federal law.

## E. Right to Be Informed of Continuing Care Requirements After Discharge

Health and Safety Code Sections 1262.5 and 1262.6 require that the patient be informed, orally or in writing, of continuing health care requirements following discharge from the hospital. The right to this information applies to the person who has legal responsibility to make decisions regarding medical care on behalf of the patient, if the

patient is unable to make those decisions for himself or herself. In addition, a patient may request that friends or family members be given this information, even if the patient is able to make his or her own decisions regarding medical care.

The hospital must give each patient, upon admission or as soon thereafter as reasonably practical, written information regarding the patient's right to:

1. Be informed of continuing health care requirements following discharge from the hospital.
2. Be informed that, if the patient so authorizes, that a friend or family member may be provided information about the patient's continuing health care requirements following discharge from the hospital.
3. Participate actively in decisions regarding medical care. To the extent permitted by law, participation shall include the right to refuse treatment.
4. Appropriate pain assessment and treatment consistent with Health and Safety Code Sections 124960 and 124961 (see XIX. *"Mandatory Patient Information — Severe Chronic Intractable Pain,"* page 5.46).

The patient also has the right to designate a family caregiver who will assist in posthospital care; the hospital must permit the patient and the caregiver (if any) to participate in the discharge planning process and receive instruction regarding posthospital care needs.

This information may be included with other notices to the patient regarding patient rights. The form "Patient Rights" (CHA Appendix 1-A) fulfills this requirement.

(See chapter 12 for a general discussion of information that must be given to patients upon discharge.)

## F. Right to Have Family Member and Personal Physician Notified of Admission

If a hospital emergency department receives a patient who is unconscious or otherwise incapable of communication, Probate Code Section 4717 requires the hospital, within 24 hours, to make reasonable efforts to contact the patient's agent (under a power of attorney for health care), surrogate, or a family member or other person the hospital reasonably believes has the authority to make health care decisions on behalf of the patient. HIPAA permits this notification [45 C.F.R. Section 164.510(b)].

A hospital will have fulfilled this requirement if it does all of the following:

1. Examines the personal effects, if any, accompanying the patient.

2. Examines any medical records regarding the patient.
3. Reviews any verbal or written report made by emergency medical technicians or the police.
4. Contacts or attempts to contact any agent surrogate, or a family member or other person the hospital reasonably believes has the authority to make health care decisions on behalf of the patient, that was identified during the search of the effects and records noted above.
5. Contacts the California Secretary of State, directly or indirectly, (including by voice mail or fax) to ask whether the patient has registered an advance health care directive, if the hospital finds or is given an Advance Health Care Directive Registry identification card.

The hospital must document in the patient's medical record all efforts made to contact a potential substitute decision maker.

This law is suspended during any period in which the hospital implements its disaster and mass casualty program, or its fire and internal disaster program.

In addition, the Medicare CoP give patients the right to have a family member or representative of his or her choice and his or her own personal physician promptly notified of the admission to the hospital [42 C.F.R. Section 482.13(b) (4)]. The hospital must document that:

1. The patient (unless incapacitated) was asked no later than the time of admission whether he or she wanted a family member or other representative notified of his or her admission;
2. The date, time and method of notification (if the patient requested that someone be notified); or
3. The patient declined to have notice provided.

If the patient was incapacitated at the time of admission, the medical record must indicate the steps taken to identify and provide notice to a family member or representative and to the patient's physician. [Hospital *Interpretive Guidelines*, Tag A-0133]

Special requirements apply to notifying family members about the admission of mental health patients. (See E. "Special Requirements for a Minor," page 15.15, and IV. "Informing Family and Others of Patient's Admission, Release and Condition," page 16.6, for more information.)

### G. Readable Documents

Health and Safety Code Section 123222.1 requires that most printed materials provided to patients or residents by general acute care hospitals, skilled nursing facilities, other

facilities or their agents be printed in at least a 12-point font that is clear and legible. This requirement does not apply to psychiatric hospitals. The term "agents" is not defined.

The materials that must be in 12-point or greater type include:

1. Admission and discharge papers and forms.
2. Medical and therapeutic instructions prepared by the facility specifically for an individual upon his or her discharge.
3. Conditions of admission forms.
4. Agreement to assume financial responsibility between a patient and a facility.
5. Instructions and forms for advance health care directives.
6. Information produced by the hospital or facility regarding the rights and responsibilities of patients, and regarding grievances and appeals, forms and instructions.
7. Correspondence written, printed, or produced by facilities (not by agents).

A facility's policies and procedures are excluded from the 12-point font requirement.

**NOTE:** An authorization for the release of medical information must be in 14-point font [Civil Code Section 56.17] (see chapter 8 for information about these authorizations).

## IV. PATIENTS' RIGHTS UNDER FEDERAL LAW

Federal law requires that hospitals participating in Medicare protect and promote each patient's rights, as discussed below. These rights apply to all patients, not just Medicare patients. [42 U.S.C. Section 18116; 42 C.F.R. Sections 482.13 and 489.10; 45 C.F.R. part 92]

### A. Right to Nondiscriminatory Treatment: Section 1557

#### INTRODUCTION

Section 1557 of the Patient Protection and Affordable Care Act (ACA) prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in any health program or activity, any part of which is receiving federal financial assistance. A hospital that participates in Medicare or Medi-Cal receives federal financial assistance, and thus must comply with this law. This law became effective July 18, 2016. [42 U.S.C. Section 18116; 45 C.F.R. part 92]

The Office for Civil Rights has posted educational materials, sample documents, and answers to FAQs at [www.hhs.gov/civil-rights/for-individuals/section-1557](http://www.hhs.gov/civil-rights/for-individuals/section-1557).

This manual is not intended to be an exhaustive description of federal anti-discrimination laws. Rather, it is meant to inform hospitals of procedural requirements and operational practicalities in implementing Section 1557 of the ACA.

### **Enforcement**

This law is enforced by the Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services. On Dec. 31, 2016, the U.S. District Court for the Northern District of Texas issued an opinion in *Franciscan Alliance, Inc. et al v. Burwell*, enjoining the regulation's prohibitions against discrimination on the basis of gender identity and termination of pregnancy on a nationwide basis.

Accordingly, OCR may not enforce these two provisions while the injunction remains in place. However, OCR will continue to enforce the prohibitions against discrimination on the basis of race, color, national origin, age, or disability, as well as other sex discrimination provisions that are not impacted by the court's order.

An individual or entity may bring a civil action to challenge a violation of Section 1557 in federal court.

### **NOTICE OF NONDISCRIMINATION**

Hospitals and other entities subject to this law (called "covered entities") must notify beneficiaries, enrollees, applicants, and members of the public of the following:

1. The covered entity does not discriminate on the basis of race, color, national origin, sex, age, or disability in its health programs and activities;
2. The covered entity provides appropriate auxiliary aids and services, including qualified interpreters for individuals with disabilities and information in alternate formats, free of charge and in a timely manner, when such aids and services are necessary to ensure an equal opportunity to participate to individuals with disabilities;
3. The covered entity provides language assistance services, including translated documents and oral interpretation, free of charge and in a timely manner, when such services are necessary to provide meaningful access to individuals with limited English proficiency;
4. How to obtain the aids and services described in paragraphs (2) and (3) above;
5. Identification of, and contact information for, the employee responsible for implementing

these nondiscrimination requirements and investigating complaints;

6. The availability of a grievance procedure and how to file a grievance; and
7. How to file a discrimination complaint with the Office for Civil Rights in the U.S. Department of Health and Human Services.

OCR has developed a sample notice and a sample nondiscrimination statement that may be used to fulfill this requirement, found in many languages at [www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources](http://www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources).

A covered entity may combine the content of the Section 1557 notice with other notices given to patients.

### **POSTING THE NOTICE**

Each covered entity must:

1. Post the entire notice in a conspicuously-visible font size:
  - a. In significant publications and significant communications targeted to beneficiaries, enrollees, applicants, and members of the public, except for significant publications and significant communications that are small-sized, such as postcards and tri-fold brochures;
  - b. In conspicuous physical locations where patients and the public are likely to see it; and
  - c. In a conspicuous location on the covered entity's web site accessible from the home page.
2. Post the nondiscrimination statement (not the entire notice) in a conspicuously-visible font size, in significant publications and significant communications that are small-sized, such as postcards and tri-fold brochures.

OCR requires posting only in English, although a covered entity may post notices and nondiscrimination statements in foreign languages if it wishes.

### **LGBTQ INDIVIDUALS**

As mentioned above, Section 1557 of the ACA requires hospitals and other covered entities to provide equal access to its health programs or activities without discrimination on the basis of sex. Federal regulations define "on the basis of sex" to include, but not be limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity.

There is ongoing litigation about whether the federal regulation improperly defined “on the basis of sex” to include gender identity. California hospitals should be aware that state law has prohibited discrimination on the basis of gender identity for many years. Hospitals should consult their legal counsel if they have questions about providing services in a manner that contradicts their religious tenets.

Federal law states that a hospital or other covered entity must treat individuals consistent with their gender identity. A hospital or other covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which the health services are ordinarily or exclusively available.

[45 C.F.R. Section 92.206]

### Definitions

**“Gender identity”** means an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth. The way an individual expresses gender identity is frequently called “gender expression,” and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth.

**“Sex stereotypes”** means stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include the expectation that individuals will consistently identify with only one gender and that they will act in conformity with the gender-related expressions stereotypically associated with that gender. Sex stereotypes also include gendered expectations related to the appropriate roles of a certain sex.

### DESIGNATION OF COMPLIANCE COORDINATOR

Each covered entity that employs 15 or more persons must designate at least one employee to coordinate its efforts to comply with Section 1557, including investigating any grievances or allegations of any action that would be prohibited by Section 1557. OCR calls this person a “Civil Rights Coordinator” or “Section 1557 Coordinator” in its sample notices; however, a different job title may be used. This function can be combined with other job duties so long as there is no conflict of interest.

### GRIEVANCE PROCEDURES

Each covered entity that employs 15 or more persons must adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of grievances alleging any action that would be prohibited by Section 1557. The law contains no specific requirements for the Section 1557 grievance procedure. However, the Medicare CoPs contain very specific requirements that hospital grievance procedures must meet (see VIII. “Patient Complaints,” page 1.26). Hospitals may wish to adopt the same procedures for both types of complaints.

OCR has developed a sample complaint procedure, which is found at [www.hhs.gov/civil-rights/for-individuals/section-1557](http://www.hhs.gov/civil-rights/for-individuals/section-1557).

### B. Requirements of the Medicare COPs

#### NOTICE OF PATIENTS' RIGHTS

The CoPs require that a hospital inform each patient or, when appropriate, the patient's legal representative (as determined by state law), of the patient's rights in advance of furnishing or discontinuing care whenever possible (see chapters 3 and 4 regarding who may be a legal representative). According to the preamble to the regulation, if the patient is unable to be informed of his or her rights before care is provided, due to the patient's physical or mental condition, the patient should be so informed when his or her condition improves, even if the legal representative has been informed. Outpatients as well as inpatients must receive a notice of their rights.

The U.S. Department of Health and Human Services (DHHS) does not specify how a hospital must inform each patient of his or her rights. Language in the preamble suggests that posting notices in the facility may suffice [64 Fed. Reg. 36070, 36072 (July 2, 1999)]. However, patients who come to the facility in an emergency condition are unlikely to be able to read and comprehend posted notices. For these patients, a written information sheet may provide better notice. Each hospital must develop policies and procedures to “address how, where, and when to notify patients of the full gamut of rights to which they are entitled under the Act” [64 Fed. Reg. 36070, 36072 (July 2, 1999)]. Patients must be informed of their rights in a language or method of communication they understand [Hospital Interpretive Guidelines, Tag A-0117]. Surveyors are required to interview patients who are blind, deaf or limited English proficient to determine if they were informed of their rights in a language and manner they understand.

DHHS does not clearly specify the rights about which a patient must be informed. However, in the “Collection of



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