Discrimination in the Health Care Setting

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Overview of non-discrimination laws and enforcement
• Federal laws
• State law – training requirements
• EEOC and DFEH enforcement of laws and regulations
• Gender issues
  • Long-term care “LGBT Patient Bill of Rights”
• Discrimination and harassment scenarios
  • Employee vs. employee // patient vs. employee // patient vs. patient
• Religious Discrimination
  • OCR Conscience & Religious Freedom Division – renewed focus

Federal Laws
• Equal Pay Act of 1963
• Title VII – Civil Rights of 1964 – prohibited discrimination (voting, public accommodation, public facilities, employment, etc.) based upon five protected characteristics: race, color, religion, national origin, and sex
• Age Discrimination Act of 1967 (40+)
• Equal Employment Opportunity Act 1972 – established EEOC and right to sue
• Title IX – Education Act Amendments of 1972 – prohibited discrimination in education and training programs based upon the same “protected characteristics” enumerated in Title VII
Federal Laws (cont.)

- Sections 501 and 505 of Rehabilitation Act of 1973
- Civil Service Reform Act (1978) – CSRA – prohibited personnel practices in federal employment/contract matters that are based on attributes or conduct that do not adversely affect employee performance such as marital status or political affiliation
- OPM (Office of Personnel Management) has interpreted CSRA to include discrimination based on sexual orientation
- Americans with Disabilities Act of 1990
- Civil Rights Act of 1991
- Genetic Information Non-discrimination Act of 2008
- Federal Courts are divided: sexual orientation as a protected characteristic? This will likely be settled by Supreme Court soon!

California State Anti-Discrimination Laws

CA Government Code 12940 – 12957 (Discrimination Prohibited in Employment and Housing)

Protected characteristics: race, religious creed, color, national origin, sex, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status

(State Manual page 1.4)

State Law – Unruh Civil Rights Act

California Civil Code 51.

(a) This section shall be known, and may be cited, as the Unruh Civil Rights Act.

(b) All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

(State Manual page 1.4)
DFEH-185:
“The mission of the Department of Fair Employment and Housing is to protect people of California from unlawful discrimination in employment, housing and public accommodations, and from the perpetration of acts of hate violence and human trafficking.”
- www.dfeh.ca.gov

SB 219 – LGBT Long-Term Care Facility Bill of Rights

SB 219 – Effective 1/1/18 - Enacts LGBT Long-Term Care Facility Residents’ Bill of Rights making it unlawful for LTC facility to
• Discriminate;
• Make room assignments;
• Fail to use preferred name or pronoun; or,
• Deny or restrict care based upon a person’s actual or perceived:
  • HIV status
  • Sexual orientation
  • Gender identity
  • Gender expression
  • Sex
SB 219 – Legislative Findings

2011 study – 43% of respondents reported personally witnessing or experiencing instances of mistreatment of LGBT seniors in a long-term care facility, including:

• Being refused admission or readmission
• Being abruptly discharged
• Verbal or physical harassment from staff
• Staff refusal to accept a medical power of attorney from the resident’s spouse or partner
• Discriminatory restrictions on visitation
• Staff refusal to refer to a transgender resident by his or her preferred name or pronoun

The national study published by National Senior Citizens Law Center also found:

• 81% of respondents believed other residents would discriminate against an LGBT elder in a LTC facility
• 89% believed staff would discriminate
• 53% believe staff discrimination would rise to the level of abuse or neglect
• Study included instances of severe discrimination within CA
Guidance from LGBT Long-Term Care Advocates

National (LGBT) health survey (2010): 70% of transgender respondents reported having one or more of the following experiences:

- Health care providers refusing to touch them or using excessive precautions
- Health care providers using harsh or abusive language
- Health care providers being physically rough or abusive
- Health care providers blaming them for their health status

In addition, nearly 27% of transgender survey respondents reported being denied needed health care outright because of their transgender status.

Training Your Staff About Transgender Issues

Some resources to consider:

2. “Seven Things I’m Learning About Transgender Persons,” Pastor Mark Wingfield, May 13, 2016, Article BaptistNews.com

Examples of inappropriate staff behavior cited by transgender patients that should be specifically addressed in training include:

- Laughter, pointing, joking, taunting, mockery, slurs and a wide variety of negative comments
- Violations of confidentiality, regardless of HIPAA
- Use of improper name and/or pronoun for patient
- Exceptionally long waits for care
- Inappropriate questions and/or exams, and needless viewing of genitals
- Prohibitions of bathroom use, or challenges to it
- Inappropriate room assignments
- Failure to follow standards of care
Training Staff (cont.)

Make sure staff is clear on your policy:

- Patient has a right to have their chart match their gender identity
- Patient has a right to be addressed by preferred name and gender
- If there is concern re: billing issues etc., those should be discreetly handled with patient involvement

Room Assignments – Suggestions and Guidance from LGBT Organizations

Policy:
Where room assignments are gender-based, transgender patients will be assigned to rooms based on self-identified gender; sufficient privacy can be provided using curtains or single side-rooms off of gender-appropriate ward.

Procedure:
Assign rooms based on self-identified gender unless patient requests otherwise. Assign transgender patients to in-patient rooms in the following order of priority:

1. If a transgender patient requests to be assigned to a room with a roommate of the patient’s same gender identity and such a room is available, the request should be honored
2. If a transgender patient requests a private room and one is available, the request should be honored
3. If a transgender patient does not indicate a rooming preference and a private room is available, the private room should be offered
4. If a transgender patient requests a private room and one is not available, the patient should be assigned to a double room with the second bed blocked
Room Assignment Suggestions (cont.)

5. If there is no private room or empty double room available, the patient should be assigned to a room with a roommate of the gender with which the patient identifies.

6. If there is no requested room available and the patient does not wish to share a room, other patients may be moved to create a private room if doing so would not compromise the health of those who are moved.

7. If none of these possibilities are available, the transgender patient should be allowed to remain in the ED or Admitting Office without harassment until a private room becomes available.

SB 179 – Gender on ID, DL, and Birth Certificates; Changing Information

SB 179 (Effective 9/1/18)

- Provides for third gender option on driver’s licenses, ID cards and birth certificates (female, male, non-binary)
- Also restructures process for name change to conform with gender identity

CA Non-Gender Specific Bathroom Law

AB 1732 (Passed 2016, Effective 3/1/17) Places of public accommodation (including hospitals and clinics) must use gender-neutral signage for single-user restroom facilities.
If you know one transgender person, you know one transgender person; everyone is unique, and so are transgender individuals.

Parts, paperwork, and presentation are no indication of a person’s pronoun preference.

-- Rev. Emma Chattin, Metropolitan Community Church

When you understand, things are just as they are.
When you don’t understand, things are just as they are.

-- Taoist Saying

It is not necessary to “understand” a person to accept, respect, and help the person.

-- Rev. Emma Chattin

**Discrimination and Harassment Training Requirements for Employers**

**AB 1825** (2005 – California sexual harassment training law)

- All employers of 50 or more employees must provide two hours of interactive training for all supervisors and managers every two years
- All new supervisors and managers must receive the training within six months of assuming their position
- Topics must include information on preventing sexual harassment, discrimination and retaliation in the workplace

**Training (cont.)**

**AB 2053** (2015) - anti-abusive conduct training requirement

Does not make bullying an unlawful activity, but recognizes cost to employers and employee victims; and, it encourages employers to stop it when they see it, and discipline employees who behave in a disruptive manner.
SB 396 – Training on Gender Issues

SB 396 (Effective 1/1/18) - Requires employers to include training on harassment based on gender identity, gender expression, and sexual orientation as part of mandatory bi-annual sexual harassment training.

SB 396 – Requires Poster 1/1/18

Who Might be the Perpetrator in Discrimination and Harassment Cases?

It could be:
- Employer
- Supervisor
- Co-worker
- Vendor/supplier
- Visitor/patient/guest
- Stranger
Obligation of Employer (Hospital)

Take reasonable steps to protect target of discriminatory treatment, regardless of who the perpetrator is!

Which may mean showing the perpetrator to the door!

Protecting Employees:
Employee vs. Employee

1. Employer must have policy and post it.
2. Employer must take reasonable steps to prevent discrimination and harassment; this includes training.
3. Employer must have “open door” to hear complaints.
4. Employer must investigate and resolve problems (e.g., by disciplining harasser).
5. Employer must mitigate the harm (e.g., reinstate harmed employee)

Protecting Employees:
Patient vs. Employee (cont.)

1. Employee nurse has a right to work in an environment free from discrimination and harassment
2. Hospital employer has a duty to provide that discrimination and harassment-free work environment
3. Patient doesn’t want care from a ______ nurse
   (Fill in the blank with any protected characteristic, e.g., “male” or “Muslim” or “black” or “gay” or “foreign speaker with accent”)
4. Employer must intervene to protect EMPLOYEE! (The customer is NOT always right!) … sometimes easier said than done …
Protecting Patients: Patient vs. Patient

1. Patient in a 2-bed room does not like his/her roommate and wants the roommate OUT based upon a protected characteristic.
2. Hospital must protect patient who is target of the discrimination and harassment.
3. Hospital may offer to move the complaining patient if doing so is not disruptive to patient care; if that is not possible notify physician who can talk to patient/family and try to resolve.
4. Will require creative solution if complaint is not discreet and target is aware of complaint, is being harassed, or care is impacted – imperative that something be done to protect the targeted patient!

CA: Protecting People from National Origin "Harassment" from ICE

AB 450 (effective 1/1/18) - Prohibits public and private employers from voluntarily providing ICE agents access to any non-public areas of a "place of labor," including a health clinic or hospital unless the agent has a warrant (federal law permits but does not require ICE agents to enter if they have consent of the owner or other person in control of the site).

(Consent Manual page 9.7)
ICE Agents On Your Property?

AB 450 - continued

• Also prohibits an employer from voluntarily permitting ICE agents to access, review or obtain employee records without a subpoena or court order (arguably not only applies to employment-related inquiries but also to patient-related inquiries).

• Employers must continue to comply with federal laws such as responding to Notice of Inspection of I-9 Employment Eligibility Verification forms and other documents.

Another “Right” – 1st Amendment Right to Freedom of Religion

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

Conscience Opt Outs

New Division of DHHS to protect health care workers who refuse to provide care or services that run counter to their moral or religious convictions

• Federal laws already protect healthcare providers who want to opt out of abortion care, sterilization, certain birth control, or end of life care that “assists the dying process.”

• California has these laws as well; e.g., End of Life Option Act is “opt in”

Note: conscience opt-out cases usually focus on refusal to PROVIDE medical care, but in some cases involve refusal to ACCEPT medical care required by health care employers to protect patients, e.g., from exposure to infectious disease (discussed below)
45 CFR Part 88 – Proposed New Rule

- Trump Administration has directed OCR to step up enforcement of existing statutes
- OCR is now "open for business" and soliciting complaints from health care providers who have been asked to do things that violate their moral code; some worry the broad language of the new mandate could cover refusal to treat transgender patients or those seeking to transition (or, for example, Michigan pediatrician who in 2015 refused to care for infant with two "moms")

Recent Developments – HHS News
Release 1/19/18

- Proposed New Rule - Conscience Regulation – Modeled on existing regulations including Coats-Snowe, Weldon, and Church Amendments; CMS regulations, ACA, and others (25 statutes)
- Proposed rule applies to entities that receive money from programs funded in whole or part by HHS
- 1/19/18 – CMS issued State Medicaid Directors Letter restoring state flexibility in establishing reasonable standards for their Medicaid programs (rescinding 2016 guidance that restricted states' ability to take action against family-planning providers that offer abortion services, e.g., disqualifying them from Medicaid programs)

From Federal Register 1/18/18

"… Congress has recognized that modern health care practices may give rise to conflicts with the religious beliefs and moral convictions of providers and patients alike … To address these problems, Congress has repeatedly legislated conscience protections for the institutions and individuals providing health care to the American public.[1]"

Conscience Issues

3/6/18 – Department of Justice has sued Ozaukee County, Wisconsin, saying their care center discriminated against a nursing assistant who was forced to have a vaccination despite her “sincerely held religious belief that Bible-based scriptures prohibited flu shots.”

- The care center permits employees to opt out but only if they present a written statement from their clergy leader agreeing to the request
- She did not belong to a church so had no one to write the statement
- She opted to have the flu shot rather than be terminated (“voluntary resignation”) and allegedly suffered severe emotional distress, sleep problems, anxiety, and “a fear of going to Hell” as a result
- DOJ is arguing that the requirement for a written statement discriminates based on religion

Examples Where Religious Issues May Arise – You May Want To Review Your Policies!

- Birth; access to labor and delivery or newborn nursery
- Circumcision
- Hearing and other testing at birth
- Blood and blood products
- Birth control, sterilization, abortion
- Organ transplants, organ and tissue donation
- End of Life Option Act
- Death, last rites, autopsy
- Visiting policy, especially to ICU
- Dietary restrictions or requests; personal grooming; consent to treatment

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Other Issues To Think About

- Patient modesty based on religious tenets (for example, female patients/male doctors)
- Daily prayers – providing assistance to patients in this activity
- Morning prayers for all over the loud speaker
- Sunday services announcements; staff urging LTC residents to attend or taking them there even though it’s not their choice
- Visits from clergy - HIPAA, 45 CFR 164.510 allows patient’s religion to be shared with clergy who ask, for example, “any Lutherans in the house?” unless patient opts out of hospital directory; does CA Civil Code 56.10(c)(14) incorporate that disclosure because it is “specifically authorized by law?”
Religious Freedom vs. Discrimination Laws

1st Amendment vs. Non-Discrimination:

This battle between “my freedom” and “yours” will continue and California will likely lead the way; have policies and know that they won’t cover every possible issue that comes up. Ethics committees will help give you the flexibility to respond appropriately.

Two things are also helpful to remember in a pinch:

• “Do No Harm”
• The Golden Rule

Final Thoughts: Conscience Rights

• AMA Ethics Code – doctors should act on moral views to refuse to participate in activities they abhor such as torture, death penalty lethal injection, interrogation, or forced treatment (“what they do”)
• … but should not refuse to care for patients based upon protected criteria (“who they treat”).

*but, of course, sometimes there may be an overlap …

“I’m Sick of Experts Telling Me What Paints I Can’t Drink.”
Questions

Thank You

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