

Nondiscrimination Update: Website Accessibility, Recent ADA Litigation and Section 1557 of the ACA

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March 8, 2017

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& BYRON, P.A.

Overview

- Website Accessibility
 - What the law requires
 - Recent litigation
 - Responding to demand letters
- Section 1557 of the ACA
 - What the law requires
 - Recent developments

2008: Class Action Settlement.



REVIEWS

NEWS

VIDEO

HOW TO

SMART HOME

CARS

DEALS

DOWNLOAD

Target settles with blind patrons over site accessibility

Retail giant will pay \$6 million to plaintiffs and promises to embed Target.com with code that makes it fully usable by blind visitors, ending a class action suit.

Ad closed by Google

Internet



by **Michelle Meyers**

August 28, 2008 11:07 AM PDT

Target and an advocacy group for the blind announced Wednesday that they've settled a **class action lawsuit** regarding the accessibility of Target.com for the visually impaired.

The retail giant will establish a \$6 million fund for settlement claims and promised to make its site fully accessible to blind visitors as part of a deal ending a class action lawsuit filed two and a half years ago.





Walgreen Stores Theranos, Seeking to Recover \$140 Million



Alphabet Pushes Out Leaders of Drone-Delivery Project



Alphabet Snaps Up Falling Hertz Shares



Latest Robots Land a Helping Arm at Factories



Valiant After the Chop

BREAKING NEWS

Stock futures plunge as Donald Trump's victories in swing states rattle investors



BUSINESS | LAW

Companies Face Lawsuits Over Website Accessibility For Blind Users

More than 240 businesses nationwide have been sued in federal court since the start of 2015



Legally blind para-athlete Juan Carlos Gil, seen here at a rowing training session in Miami in 2014, has sued more than 30 businesses this year claiming their websites aren't accessible to the blind. PHOTO: LYNNE SLADKY/ASSOCIATED PRESS

By **SARA RANDAZZO**

Updated Nov. 1, 2016 10:54 a.m. ET

69 COMMENTS

The disability lawsuits started hitting the Pittsburgh federal courthouse last July, all claiming corporations' websites violated the law by not being accessible to the blind. The first round came against household names such as **Ernst & Young Inc.**, **Toys "R" Us**, **Brooks**

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Judges Handling ADA Lawsuits Over Websites Not Waiting On DOJ Regulations



Legal Newline, CONTRIBUTOR

We cover issues that affect businesses in state and federal courts [FULL BIO](#) ▾

Opinions expressed by Forbes Contributors are their own.

POST WRITTEN BY

Amanda Robert

In the past year, an increasing number of companies have faced lawsuits from blind and deaf plaintiffs alleging their websites violate the Americans with Disabilities Act. Plaintiffs lawyers in three jurisdictions – California, New York and Pennsylvania – [have led the charge](#).



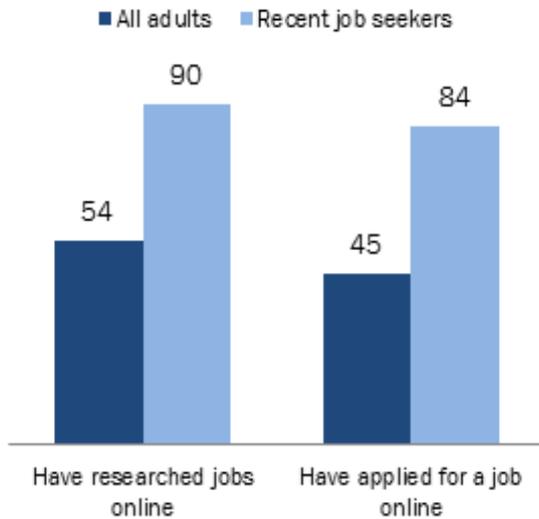
Sampling of Hundreds of Known Lawsuits and Settlements.



What Happened: 2008 → 2017

Researching and applying for jobs online is nearly universal among recent job seekers

% in each group who ...



Note: "Recent job seekers" are defined as those who have looked for a new job in the last two years.

Survey conducted June 10-July 12, 2015. Sample size = 2,001

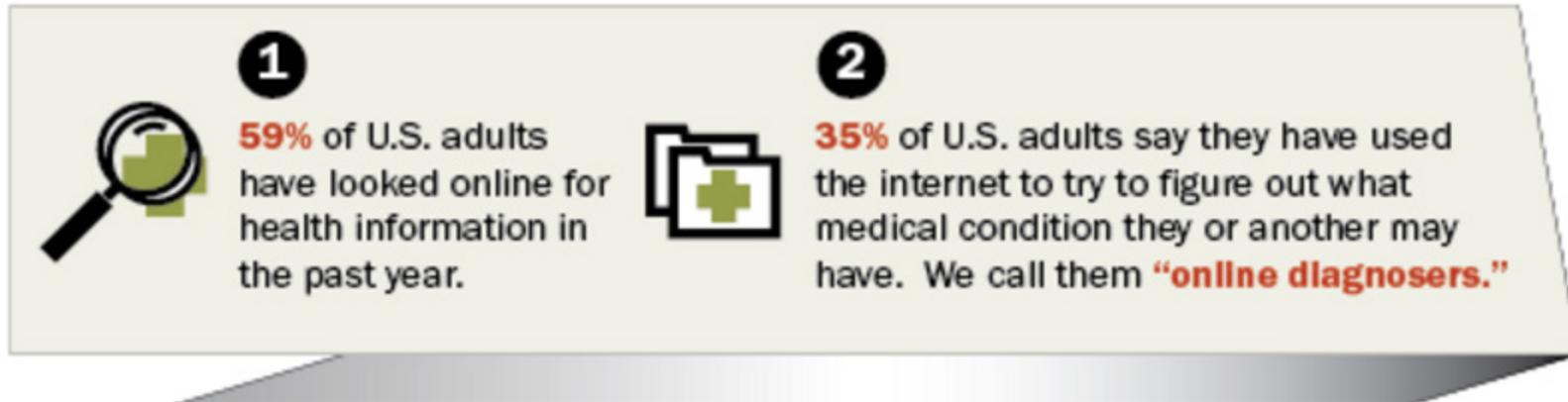
PEW RESEARCH CENTER



Source: Forrester Research Online Retail Forecast, 2012 To 2017 (US)

What Happened: 2008 → 2017

The internet as diagnostic tool...



- Source: Pew Internet and America Life Project.

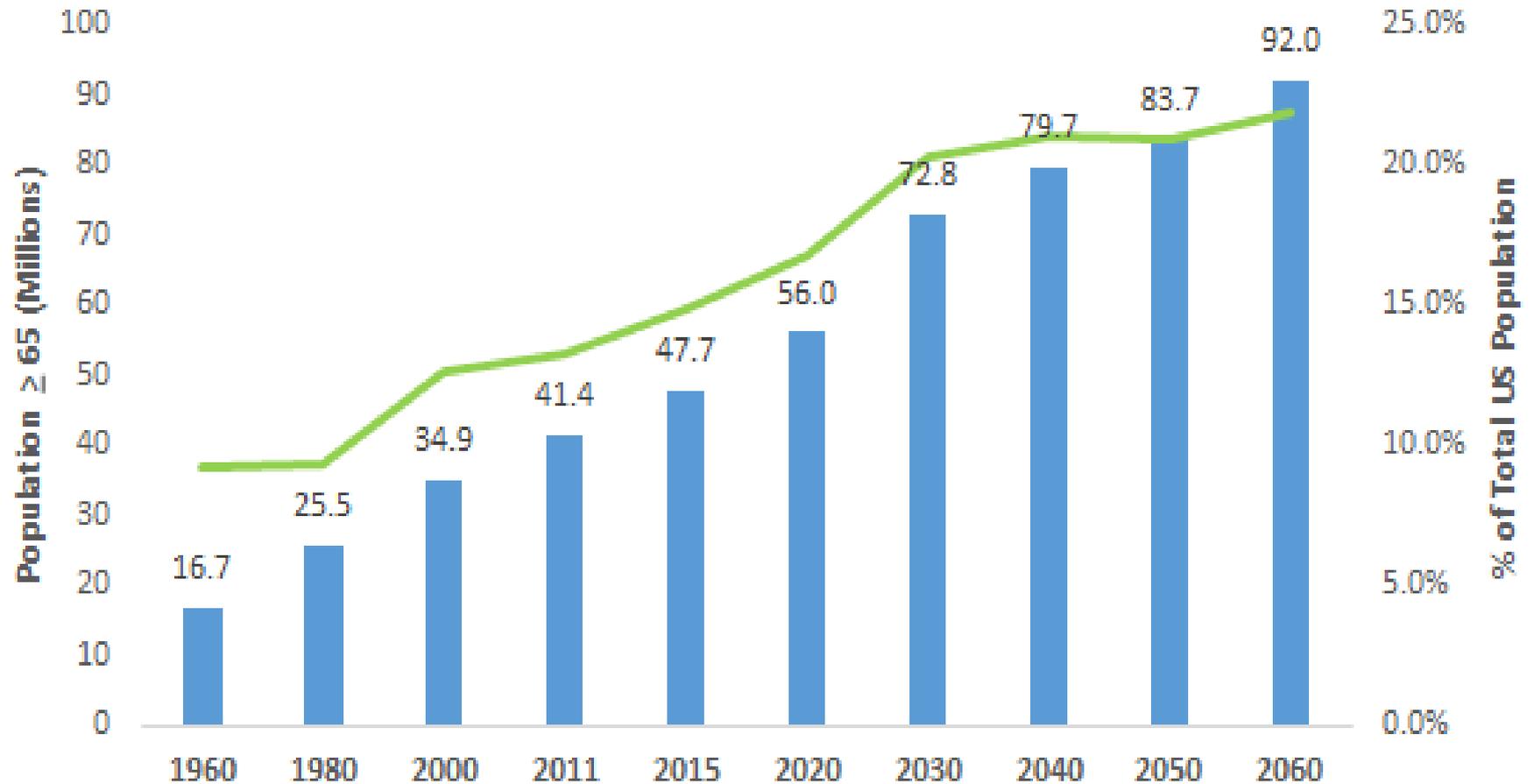
Disabilities and The Disabled.

- 1 in 5 Americans 56.7 million people¹
- Includes wide range of disabilities across four categories
- People move in and out of disabled status



¹ US Census Bureau

US Population 65 Years and Older



Source: US Census Bureau

What Does the Law Require?



Americans with Disabilities Act of 1990.

- ADA Title III, Public Accommodations
- “No individual shall be **discriminated against** on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any **place of public accommodation** by any person who owns, leases (or leases to), or operates a place of public accommodation.” 42 U.S. Code § 12182.

What is a “Public Accommodation”?

- There are 50+ types of businesses

Hotel	Restaurant	Bar	Bank	Theater	Stadium
Store	Hospital	Library	Health Club		School
Health Clinic		Shopping Center			Lawyer’s Office
Government Offices		Senior Center			Bowling Alley
Sport Stadiums					

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

Full list at: 42 U.S.C. § 12181

ADA Title III. Public Accommodations.

- **Discrimination.** Includes failure to make *reasonable modifications* in policies, practices or procedures to make a good, service, or item available, unless the modification would *fundamentally alter* the nature of the goods, services, privileges or accommodations.
- **Discrimination.** Includes failure to take steps necessary to ensure that no individual with a disability is excluded, denied service, or otherwise treated differently because of the *absence of auxiliary aids and services*, unless such steps would *fundamentally alter* the nature of the good, service, facility, privilege, advantage or accommodation being offered or would result in an *undue burden*. 42 U.S. Code § 12182

Rehabilitation Act.

- Section 504. (29 U.S. Code § 794)
- “No otherwise qualified individual with a disability... shall... be excluded from the participation in... or be subjected to discrimination under any program or activity receiving Federal financial assistance...”

Required by Contract.

- General: *“Vendor will comply with all applicable laws and regulations in providing Services and Deliverables.”*
- Specific: Services and Deliverables will comply with ADA, 504, WCAG2.0.
- Pass-through: Vendor agrees to comply with all laws and requirements applicable to Customer.

What Does A Lawsuit Allege?

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

LISA FRAZIER,

Plaintiffs,

v.

HCA HOLDINGS, INC.,

Defendant.

Case No.

Filed Electronically

**COMPLAINT FOR PERMANENT INJUNCTION
REQUIRING CHANGES TO CORPORATE POLICY AND THE ELIMINATION OF
DIGITAL ACCESS BARRIERS PURSUANT TO 42 U.S.C. § 12188(a)(2)**

Courts and Judges Disagree.



National Federation of the Blind v. Target, 452 F.Supp.2d 946 (N.D. Cal., 2006).

- Complaint: target.com website is inaccessible to the blind and therefore violates the ADA and state law.
- On Target's motion to dismiss:
 - Claims that target.com has a nexus to goods and services offered in store survive
 - Court grants dismissal of claims to the extent target.com does not impact enjoyment of goods and services offered in store

Case ultimately settled. Target agrees to payment and site improvements.

Cullen v. Netflix, No. 13-15092 (9th Cir., unpublished, 2015).

The Netflix logo is displayed in white, bold, sans-serif capital letters with a slight 3D effect, set against a solid red rectangular background.

U.S.C. § 12182(a). We have previously interpreted the statutory term “place of public accommodation” to require “some connection between the good or service complained of and an actual physical place.” *See Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1114 (9th Cir. 2000). Because Netflix’s services are not connected to any “actual, physical place[],” Netflix is not subject to the ADA.

- Contrast: National Association of the Deaf v. Netflix, 869 F. Supp.2d 196 (D. Mass. 2012).

Gomez v. Bang & Olufsen, U.S. District Ct, S.D. Florida, Feb. 2, 2017.

BANG & OLUFSEN



B&O PLAY

Bottom Line On Litigation:

- Many courts are not hearing motions to dismiss.
- Courts tend to require discovery and mediation.
- 90% of Cases settle in 2 days – 6 months.

What Does a Private Demand Letter Look Like?

CARLSON
LYNCH
SWEET
& KILPELA

CARLSON
LYNCH



Sent Via Federal Express

January 4, 2016

Chief Legal Officer
MAZZIO'S, LLC
4441 S 72nd East Ave
Tulsa OK 74145

Re: www.mazzios.com, including Notice of Preservation Obligation

FOR SETTLEMENT PURPOSES ONLY

Dear Sir or Madam:

We represent disabled individuals throughout the United States who use the Internet to facilitate their access to goods and services, and whose rights to access those goods and services are protected under the Americans with Disabilities Act (the "ADA"). These individuals have disabilities that include: blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, mobility impairments, speech disabilities, photosensitivity and combinations of these.

Carlson Lynch letter “scan”

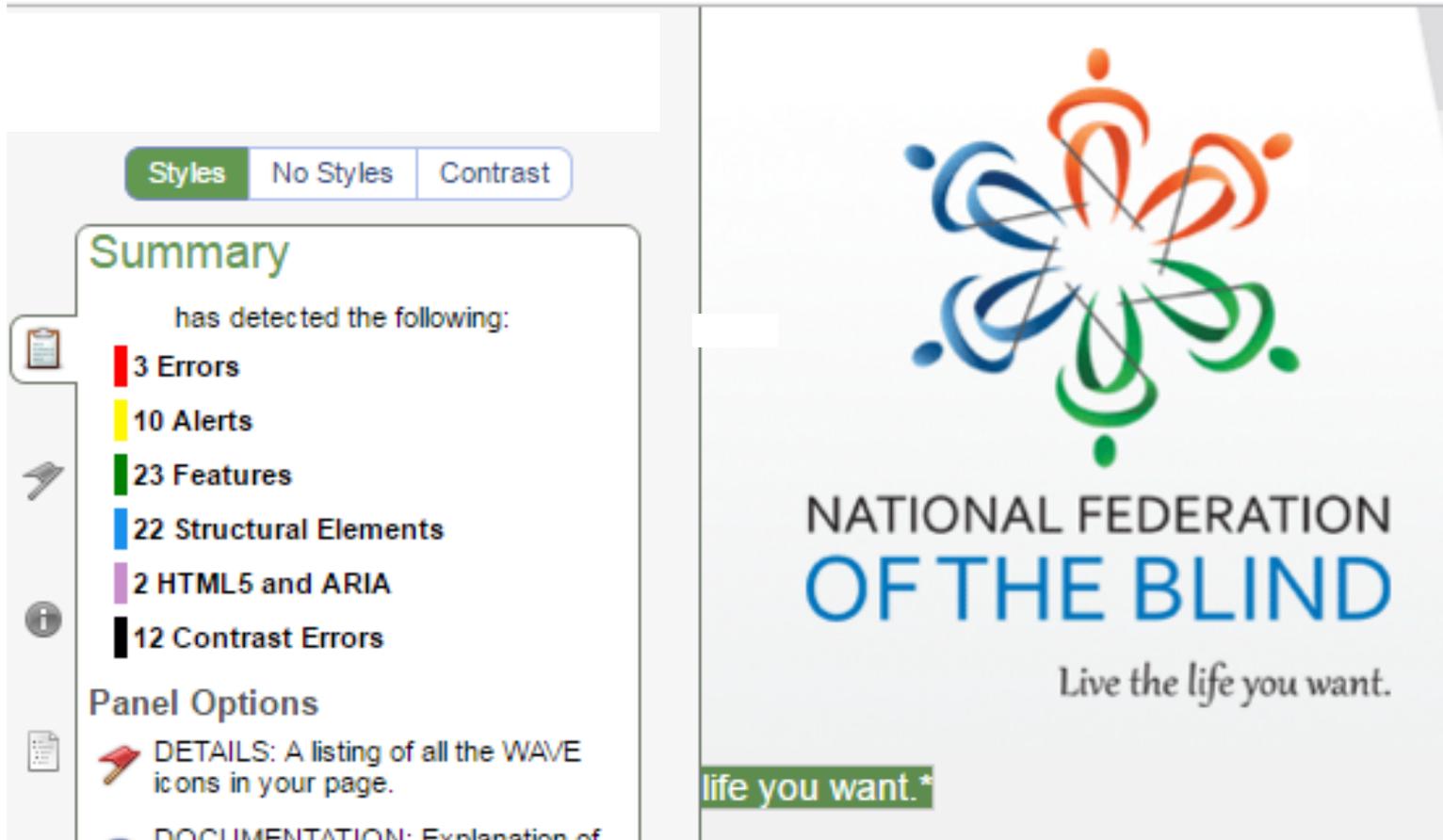
U.S. Accessibility Board - Section 508 Standards

Checkpoint	Checkpoint Title	# failed pages	% failed pages
a	Text equivalent for every non-text element.	155 (of 589)	26%
l	Provide equivalent text when using scripts.	513 (of 589)	87%
n	Forms providing same information and functionality.	85 (of 589)	14%

Web Content Accessibility Guidelines (WCAG-2)

Checkpoint	Level	Checkpoint Title	# failed pages	% failed pages
1.1.1	A	All non-text content (with certain exceptions) presented to the user should have an equivalent text alternative.	155 (of 589)	26%
1.3.1	A	Information about the meaning and structure of your content must be conveyed by more than the visual presentation of your content.	85 (of 589)	14%
1.4.4	AA	Except for captions and images of text, text can be resized without assistive technology up to 200 percent without loss of content or functionality.	31 (of 589)	5%
2.2.1	A	If the content enforces a time limit, the user should be able to extend, adjust or disable it, unless the time limit is part of a real time activity or would invalidate the activity.	29 (of 589)	5%

Scanning Tools Are Unreliable. Accessibility is a Human Test.



The image shows a side-by-side comparison. On the left is a screenshot of a web accessibility scanner's 'Summary' panel. It features three tabs: 'Styles' (selected), 'No Styles', and 'Contrast'. Below the tabs, the text reads 'has detected the following:'. A list of findings is shown with colored markers: 3 Errors (red), 10 Alerts (yellow), 23 Features (green), 22 Structural Elements (blue), 2 HTML5 and ARIA (purple), and 12 Contrast Errors (black). Below this list is a 'Panel Options' section with a red arrow icon and the text 'DETAILS: A listing of all the WAVE icons in your page.' and a blue icon with the text 'DOCUMENTATION: Explanation of'. On the right is a logo for the National Federation of the Blind. The logo consists of a stylized figure in orange and red, surrounded by blue and green abstract shapes. Below the logo, the text reads 'NATIONAL FEDERATION OF THE BLIND' in blue, and 'Live the life you want.' in black. At the bottom of the logo area, the text 'life you want.*' is highlighted in a green box.

Styles No Styles Contrast

Summary

has detected the following:

- 3 Errors
- 10 Alerts
- 23 Features
- 22 Structural Elements
- 2 HTML5 and ARIA
- 12 Contrast Errors

Panel Options

- DETAILS: A listing of all the WAVE icons in your page.
- DOCUMENTATION: Explanation of



NATIONAL FEDERATION
OF THE BLIND

Live the life you want.

life you want.*

What is Discrimination?

What is Accessibility?

- What must a website operator do, to avoid discrimination?
- U.S. Dept. of Justice: WCAG2.0AA
- Plaintiffs: WCAG2.0AA

WCAG2.0AA Highlights:

- <https://www.w3.org/TR/WCAG20/>
- Provide alt-text / text alternatives for images.
- Captions for videos.
- Keyboard navigation (not mouse).
- Consistent design.
- Color contrast.

Action Items to Reduce Risk, Promote Compliance:

- Audit website (+ apps)
- Improve website (+preserve evidence)
- Assess the remediation (re-check)
- Accessibility Statement (External)
- Accessibility Policy and Plan (Internal)
- HR portals & Vendor Contracts
- Insurance (Cyber/ Website)
- [continued on next slide]

Action Items to Reduce Risk, Promote Compliance:

- Monitor, its not just one-time event
- Train
- Track your actions
- Alternate methods (telephone support)
- Website Terms and Conditions
- Don't ignore demand letter (start working on improving your site)

Section 1557 of the ACA

SEC. 1557 [42 U.S.C. 18116]. NONDISCRIMINATION.

(a) **IN GENERAL.**—Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.

(b) **CONTINUED APPLICATION OF LAWS.**—Nothing in this title (or an amendment made by this title) shall be construed to invalidate or limit the rights, remedies, procedures, or legal standards available to individuals aggrieved under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), or the Age Discrimination Act of 1975 (42 U.S.C. 611 et seq.), or to supersede State laws that provide additional protections against discrimination on any basis described in subsection (a).

(c) **REGULATIONS.**—The Secretary may promulgate regulations to implement this section.

What is Section 1557?

- Nondiscrimination provision of the Affordable Care Act.
- Prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities.
- Extends or strengthens existing nondiscrimination laws.

Notable Provision

- First Federal civil rights law to broadly prohibit sex discrimination.
 - Sex discrimination includes, but is not limited to, discrimination based on an individual's sex, including pregnancy, related medical conditions, termination of pregnancy, gender identity and sex stereotypes.

Applicability

- All health programs or activities, any part of which received “Federal financial assistance” from HHS.
- Covered entities include hospitals, clinics, physician practices, home health agencies, health insurance issues, State Medicaid agencies, etc.
 - Applicable to employers in limited circumstances.

Effective Dates

- Section 1557 of the ACA
 - Effective since 2010
- Section 1557 Final Rule
 - Effective as of July 18th, 2016
 - Notice requirements: October 17, 2016
 - Benefit design changes: January 1, 2017

Access to LEP Individuals

- Extends Title VI of the Civil Rights Act and Executive Order 13166.
- Must take reasonable steps to provide meaningful access to each LEP individuals:
 - Provision of language assistance services.
 - Inclusion of language taglines.

Communicating with LEP Individuals

- A covered entity may not:
 - Require individuals to provide their own interpreter or rely on an accompanying adult interpreter when there are competency, confidentiality or other concerns.
 - Rely on a minor child to interpret, except in emergencies and when no qualified interpreter is immediately available.
 - Rely on unqualified bi/multilingual staff.
 - Use low-quality video remote interpreting services.

Access for People with Disabilities

- Extends ADA standards.
- Must “provide appropriate auxiliary aids and services to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.”

Access for People with Disabilities, Cont.

- All health programs and activities provided through electronic and information technology must be accessible to individuals with disabilities unless doing so would:
 - Cause undue financial and administrative burdens; or
 - Result in a major alteration in the nature of the program or activity.

Access for People with Disabilities, Cont.

- Interpreter requirements similar to LEP requirements.
- Physical accessibility requirements.
- Reasonable modifications to policies, practices, or procedures to avoid disability discrimination.

Compliance Program

- Designate a responsible employee – Civil Rights or Section 1557 Coordinator.
- Implement grievance procedures.
- Applies only to covered entities with ≥ 15 employees.
- May be incorporated into existing policies and procedures .

Posting of Notices

- Full notice, with taglines in the top 15 languages:
 - In significant publications and significant communications targeted to beneficiaries, enrollees, applicants, and members of the public
 - In conspicuous physical locations where the entity interacts with the public; and
 - In a conspicuous location on the covered entity's eb site accessible from the home page of the covered entity's Web site.

Enforcement

- Existing enforcement mechanisms:
 - Title VI, Title IX, Section 504 and the Age Act apply for violations of Section 1557.
- Informal enforcement, termination of Federal financial assistance; referral to the DOJ; and any other means authorized by law.
- Individual private right of action.

Section 1557: Recent litigation

- *Franciscan Alliance, Inc. v. Burwell*
 - Preliminary injunction enjoins OCR from enforcing provisions that prohibit discrimination on the basis of gender identity and termination of pregnancy.
 - Argument: HHS exceeded its authority under the Administrative Procedures Act in defining “on the basis of sex.”

Section 1557: Uncertain future

- Injunction is limited in scope
- OCR's public statement indicates continued enforcement of Section 1557 regulations to the fullest extent consistent with the Court's order.
- Uncertain enforcement priorities of the new administration.

Questions?

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