

WINTER 2017 NEWSLETTER

Antidiscrimination laws and regulations protecting the workforce have been in existence since the 1960s. New regulations that protect patients as well went into effect in July 2016. It's a perfect time to review the situation in your practice! Guided by several attorneys with whom we frequently work, we have developed a list of the most frequently asked questions and answers (FAQs). This newsletter touches on the highlights – it's the tip of a very large and continually changing iceberg.



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ANTIDISCRIMINATION LAWS – PATIENT AND WORKFORCE PROTECTION

Protection for Patients

Let's work backwards starting with the newest regulations. Early in 2016 the Department of Health and Human Services (HHS) finalized regulations under Section 1557 of the Patient Protection and Affordable Care Act (ACA). The section prohibits certain covered entities from discriminating on the basis of race, color, national origin, sex (including gender identity), age, or disability with respect to any health program or activity. The regulations went into effect on July 18, 2016.

- **To what entities do the new protections apply?**

The new nondiscrimination regulations apply to entities that both operate a health program or activity and that receive federal financial assistance administered by HHS. The definition of federal financial assistance means HHS grants, loans, subsidies, contracts or other arrangements by which the federal government provides assistance through funds, services of federal personnel, or property. Medicare (other than Medicare Part B payments), Medicaid, and the Children's Health Insurance Program all fall within the definition of federal financial assistance.

- **What steps can we take regarding the new protections for patients?**

Take a hard look at the programs you have in place regarding language assistance and respect for gender identity. If you have 15 or more employees, you must designate one individual as responsible for compliance, and you must put a grievance procedure in place. Notices about the grievance procedure must be posted along with taglines in the top 15 languages spoken by individuals with limited English proficiency in the state.

With respect to gender identity, you are required to respect the gender with which the patient identifies. Gender is no longer a binary concept. Rather, it is defined as an individual's internal sense of gender – i.e. male, female, neither, or a combination of male and female. That identity may be different from an individual's sex assigned at birth. A partial list of steps that can be taken to comply with the law includes:

(1) revision of forms that request gender identity, (2) development and dissemination of information about processes for designating or changing gender identity, (3) training coding staff to use modifiers to avoid erroneous claims denials, (4) revision of procedures to ensure that all staff and communications use the names preferred by patients, (5) revision of staff training materials, (6) ensuring that electronic health records allow data correction and linking of accounts (e.g. electronic linking of Jane Doe's medical record with those of John Doe), (7) review/revision of check-in procedures, (8) review/revision of disciplinary policies, and (9) application of grievance policies to gender identity issues.

Protection for Job Applicants and Workforce Members

The new nondiscrimination rules apply specifically to patients. Other laws and regulations that apply to your workforce have been on the books for years.

- **What's the purpose of antidiscrimination legislation and programs that protect workforce members?**

In order to give all workers a fair opportunity to get and keep jobs, the United States Congress, state legislatures, and in some cases local governments have passed laws that prohibit discrimination in the work place. They fall into two major categories: equal employment opportunity (EEO) laws and affirmative action programs. Both are directed toward achieving social equity in the workforce for members of minority groups, women, people with disabilities, and others who are members of a legally protected group. Decisions on hiring, promotion, dismissal, pay increase, benefits, work assignment, leave of absence, and other aspects of employment cannot be based on age, race, color, religion, gender, or national origin.

Protective legislation for a person or group that has historically been treated differently from other people or groups of people at work is nothing new. Federal, state, and local laws were first passed in the 1960s. Since then, numerous executive orders and court decisions have added protections to additional groups.

- **What specific federal laws deal with Equal Employment Opportunity?**

The important federal laws that impact EEO are the Equal Pay Act of 1963; Title VII of the Civil Rights Act including all amendments; the Age Discrimination in Employment Act of 1967, as amended by the Older Workers' Benefit Protection Act; the Vocational Rehabilitation Act of 1973, the Genetic Information Nondiscrimination Act of 2008, the Vietnam Era Veterans Readjustment Act of 1974; the Pregnancy Discrimination Act of 1979; and the Americans with Disabilities Act (ADA) of 1990, including the Americans with Disabilities Amendment Act of 2008. The Family and Medical Leave Act of 1993 applies to leave for employees after the birth or adoption of a child; to care for a seriously ill child, spouse, or parent; or in the case of the employee's own serious illness. It also may include "military caregiver leave" in certain circumstances.

- **What federal laws deal with affirmative action?**

The original basis for affirmative action programs was Executive Order 11246, issued in 1965 and later amended by Executive Order 11375. Over the years, Congress mandated affirmative action programs through grant authorization statutes included in the Law Enforcement Assistance Act (LEAA), General Revenue Sharing, the Vocational Rehabilitation Act of 1973, and the Vietnam Era Veterans Readjustment Act of 1974.

- **What impact do state and local laws have on the federal requirements?**

As you might guess, state law varies. North Carolina has several governing laws. The Equal Employment Practices Act (NC Gen. Stat. Ann. 143-422.1 to 143-422.3) makes it illegal for an employer to discriminate on the basis of race, religion, color, national origin, age, sex, or handicap (disability). Another statute prohibits discrimination on the basis of traits for sickle cell or hemoglobin C or other genetic information. Still another statute deals with discrimination on the basis of AIDS or HIV condition. As residents of North Carolina know only too well, more recent laws such as HB2 have generated a great deal of controversy not only in the LGBT community, but throughout the state and the country. Aside from the huge economic impact of HB2, many criticize not only the content of the law, but the fact that it overrode a local law that was meant to expand, not shrink, protection.

- **Do the EEO and affirmative action requirements apply to all employers?**

Size matters. The EEO Act of 1972 strengthened the provisions of the original 1964 Civil Rights legislation by extending antidiscrimination programs to state and local governments, labor organizations, and employers with 15 or more full- or part-time employees/members. Most state laws, including those in North Carolina, impose similar prohibitions against discrimination. In some cases, state laws are broader than federal law and apply to employers with fewer than 15 employees/members.

The Family and Medical Leave Act applies to employers with 50 or more employees. Smaller companies that are legally exempt from the requirement retain the right to set up programs. Should they do so, however, they should be clear that they are not providing statutory FML, lest they leave themselves open to an employee's asserting a contract claim. Furthermore, employers that are not quite at the 50-employee level should be mindful of the way in which the 50 is counted. Once they hit 50 as legally defined, they are required to offer FML.

The federal Age Discrimination and Employment Act applies to private businesses with 20 or more employees and to the federal government as an employer. It prohibits age discrimination against those who are 40 years or older. Read the fine print carefully. You can't treat employees under 40 more favorably, but you can treat older workers more favorably. For example, you might offer continuation of health insurance benefits to current employees who are 50 or older.

Affirmative action applies to fewer organizations than EEO. Executive Order 11246 requires that federal contractors and subcontractors with 50 or more employees and contracts of \$50,000 or more establish and maintain affirmative action programs. The approved plan must be maintained so that it can be produced for the Office of Federal Contract Compliance Programs (OFCCP) in the event of audit, and it must be updated each year.

- **Are there exceptions to the EEO requirements?**

There is an important exception to the EEO requirements called a bona fide occupational qualification (BFOQ). It applies when religion, sex, age or national origin is a business necessity. Race can never be considered a BFOQ. Here's an example of a special circumstance that would qualify as a BFOQ. If the employer were a religious organization that employs counselors who respond to inquiries from those interested in becoming members of that religion, the organization would be allowed to make membership in that religion a requirement for the counselor position.

- **Why should my practice concern itself with compliance with EEO and affirmative action requirements?**

There's a very practical reason to comply with EEO and affirmative action requirements. Should a job candidate, a workforce member, or someone else raise a concern and file a complaint with the Equal Employment Opportunity Commission (EEOC), the burden on you will be onerous. Preparation, investigation, and litigation are time consuming and expensive. Practices caught up in contentious situations generally require professional defense that doesn't come cheap. Aside from cost and time, compliance makes good business sense. Demonstration of respect for all employees' rights can improve morale.

In North Carolina, where the 2016 passage of HB2 and subsequent federal challenges to the state law has created an awkward situation for all employers, be mindful of the law. Although Title VII of the Civil Rights Act of 1964 does not explicitly include sexual orientation or gender identity, the EEOC and courts have said that sex discrimination includes discrimination based on an applicant or employee's gender identity or sexual orientation.

- **What's the best starting place for establishing clear antidiscrimination programs in my practice?**

Effective antidiscrimination programs must have support from the very top. The practice owner should commit to eliminating discrimination in all aspects of practice operations. Philosophy, standards, and expectations must be clear and communicated orally and in writing. There's little value in posting signs in the break room and handing out a list of questions that can/cannot be asked in interviews if the practice owner isn't on board.

- **How should we document our antidiscrimination philosophy and programs?**

We recommend that antidiscrimination philosophy and policies and procedures be part of every practice's Operating and Employee Manuals. Here's sample language that several of our clients use at the beginning of their Employee Manuals: Our practice is an equal opportunity employer and will not discriminate in recruiting, hiring, training, promoting, transferring, discharging, compensating or any other term or condition of employment on the basis of race, religion, color, age, sex, national origin, or on the basis of disability if the employee can perform the essential functions of the job with a reasonable accommodation if necessary. Subsequent language deals with reporting of problems, investigation of complaints, corrective action, and commitment not to retaliate against those who testify as a witness.

- **Should we post information indicating our commitment to antidiscrimination in the workplace?**

Yes. As the saying goes, if you've got it, flaunt it. We recommend that you post appropriate information in the break room so all employees are reminded of the practice's commitment on a daily basis.

- **How can we provide effective workforce training on antidiscrimination?**

We have three suggestions. First, schedule regular staff training sessions for everyone in the practice. That means the owner, all clinicians, and all administrative staff. Explain the laws, the way in which the practice currently responds to them, changes (if any) that need to be made, and the importance of having everyone's commitment. Leave plenty of time for questions so workforce members can talk about specific concerns.

Second, include antidiscrimination in the formal orientation program that is required for every workforce member. Third, designate one individual as the antidiscrimination go-to person who can answer questions and respond to concerns that are raised. That individual may be the Practice Manager or Human Resources Manager if you have one.

- **In what ways can we ensure that the recruitment process is fair and inclusive?**

In most situations, job candidates have the opportunity to meet not only with the direct supervisor but also with others in the practice with whom they will work. Each and every workforce member must understand what questions can be asked during interviews. Here are a few examples from our much longer list.

- **Age:** Ask if the job applicant is of legal working age, and do not ask any other age-related questions orally or in writing.
- **Availability for weekend work:** In the position description, clearly state the days and hours when the employee is needed. Do not ask the candidate what religious holidays he/she observes. If the subject comes up, indicate that you will make a “reasonable” effort to accommodate religious needs.
- **Citizenship:** Do not ask questions about an individual’s citizenship during either the application or the interview processes. Federal immigration laws require verification of both identity and work history of new employees after they have accepted an offer of employment but within specific timeframes at the beginning of employment through the “I-9” verification process.
- **Credit inquiries:** Don’t ask applicants anything about the amount that they owe.
- **Criminal background:** Don’t ask questions during the interview, but mention that you require authorization to do a criminal background check for every workforce member prior to the start of work.
- **Disability or handicap:** Ask only about the applicant’s ability to perform the essential functions of the job, with or without reasonable accommodation. Don’t ask about physical or mental health, previous collection of workers’ compensation benefits, or whether or not a reasonable accommodation is needed (unless and until you have made what is called a “conditional job offer”. A conditional job offer is an offer that is subject only to certain limited, well-defined exceptions).
- **Drug or alcohol use:** Be aware of distinctions between the use of illegal drugs and drinking alcohol. The former is often treated as *per se* illegal, but the latter may not be, depending on the circumstances. Also be aware that alcoholism may be a protected disability. The best practice is to leave the testing and any questions to the post-offer, pre-employment physical exam conducted by a physician trained in what is/is not a permissible area of inquiry and how to ask the relevant questions.
- **Height and weight:** Ask about applicants’ ability to perform the job, not about specific weight or height.

- **Family status:** Ask questions that are related to the job. For example, ask applicants where they see themselves professionally within the future. Do not ask applicants about marital status, number and age of children and family responsibilities. Where relevant, such as where there is significant overtime or travel, ask open-ended questions about whether or not anything would limit or interfere with the applicant's ability to undertake those tasks.
- **Financial status:** Don't ask questions about applicants' financial status. Credit checks may be appropriate for certain positions, but where utilized, there are specific procedures that must be followed under the Fair Credit Reporting Act.
- **Gender:** Ask applicants about availability to work during normal work hours. Avoid questions about gender roles or pregnancy.

What's Next for Your Practice?

The best way to determine what's next for your practice is to start with an honest self-examination. Your practice may be one that's been in existence for many years but has knowingly or unknowingly ignored the law. Or your practice may be a new one that made a commitment to antidiscrimination from the start. As you are well aware, there is volatility in antidiscrimination laws at both national and state levels, but that doesn't excuse your practice from ensuring that you have appropriate patient and workplace protections in place. Here are some preliminary questions to ask:

1. Are you and your workforce familiar with the new regulations that apply to patients, and have you taken the required steps to comply with the rules?
2. With respect to your workforce and job applicants, do you have an antidiscrimination policy? If so, what are the elements?
3. Have you stated your commitment and policies and procedures in writing?
4. Is responsibility for antidiscrimination against both patients and workforce members/job applicants clear?
5. Do you train your workforce during orientation and on a regular basis?
6. Have there been any complaints, and if so, what corrective action did you take?

If you need assistance, please contact us at 919.383.5998 or margie@satinskyconsulting.com. Be mindful that this article is not considered to be legal advice. Should you need legal guidance, reach out directly to an attorney.