

Language Access and the Law In Health Care: Overview

Who has language access rights under the law? Limited English Proficient (LEP) patients and disabled patients have language access rights under the law. Those rights may also extend to the parents of minor children and/or to spouses or family members in certain circumstances. Patients need not be U.S. citizens to have language access rights under American law.

What is the source of the legal authority for language access rights? On the federal level, both Title VI of the Civil Rights Act of 1964 and the Americans with Disabilities Act provide language access rights to LEP and disabled patients. On the state level, all 50 states now have language access laws. The Department of Health and Human Services' Culturally and Linguistically Appropriate Service (CLAS) standards mandate the provision of language access rights for LEP patients. Language access rights also figure prominently under the new Joint Commission cultural competence accreditation standards.

Who must comply with the language access laws? If your hospital or clinic receives Medicare or Medicaid, you have a legal duty to provide language assistance services. This legal duty escalates if:

- a) your primary market has a higher percentage of LEP individuals than surrounding areas;
- b) you provide care to LEP patients frequently;
- c) your organization provides acute and particularly emergency care and
- d) your organization has above average financial resources.

What must I do to comply with the language access laws? Briefly, you must provide “meaningful access” or “effective communication” to language assistance services. In other words, medical providers must assure that patients understand the medical advice that they are given. Specifically, you must:

- Ask the patient about their primary oral language and preferred written language.
- Determine whether the patient needs an interpreter. (Be sure to ask the patient!)
- Inform the patient of their right to a competent interpreter at no charge to them.
- Use a qualified interpreter during patient medical exams, to obtain a patient’s history and informed consent, and when giving treatment or hospital discharge instructions.
- Provide translated written documents in the patient’s preferred written language. (Only “vital documents” must be translated. Vital documents would include intake forms, consent forms and forms that affect the patient’s legal rights or medical services and benefits. Patient discharge forms and medication instructions should be translated.)

Best Practice: Although not explicitly required by law, ask the patient to repeat back, in their own words, your treatment or discharge instructions to check for understanding.

Who determines which language assistance services will be used? Providers, not patients, have the legal right to determine which language assistance services will be used. However, with that right comes the responsibility to assure that whatever resources are used actually work.

What happens if I fail to provide “meaningful access” to language assistance? Failing to provide meaningful access to language assistance resources can be seen as a form of national origin discrimination under Title VI of the Civil Rights Act of 1964 and/or disability discrimination under the Americans with Disabilities Act. Physicians who fail to provide meaningful access face four major legal

risks: medical malpractice, informed consent, breach of the legal duty to warn and breach of the patient's privacy rights.

What are the most frequent types of legal language access violations?

- Providers who refuse to provide language access services or who use untrained personnel to provide them.
- Providers who attempt to charge for or otherwise recoup the cost of, language assistance services directly from the patient.
- Providers who insist that patients must provide their own interpreters and, in effect, condition the receipt of medical services on patients providing their own interpreter.
- Providers who deny medical care to a particular class of patient because of the additional costs of providing language access services to those patients.
- Providers who subject LEP or ADA patients to lengthy delays as a result of the lack of readily available interpreters.

How vigorously are the language access laws enforced? The Obama Administration is already more aggressive about enforcement than the Bush Administration. In addition, all 50 states now have language access laws and state attorney generals have begun to actively enforce these laws. Finally, both the Joint Commission and the NCQA have recently issued new cultural competence accreditation standards that require adherence to the language access laws as a means of improving patient quality and safety.

Who are the major targets of language access enforcement actions? Hospitals have been the most frequent source of Office of Civil Rights enforcement actions and settlement decrees. However, physicians, clinics, health plans and nursing homes have also been successfully sued on these grounds.

Other key points to keep in mind:

- A health care provider must pay for an interpreter or auxiliary aid even if the cost exceeds the provider's charge for the appointment.
- A patient may not bring their own interpreter and bill the health professional for the cost.
- A substantial number of reported cases establish that a provider's failure to address language barriers will result in a lack of informed consent.

Use of family members, friends or minor children as interpreters. It is not illegal to use patients' friends, family members or minor children as interpreters. However, it is **highly inadvisable** on quality and safety grounds. Absent an emergency, minor children should **never** be used as interpreters. Providers must intervene and provide an alternative form of language assistance if they believe that the use of friends or family members is not resulting in effective communication.

Circumstances that would justify such an intervention may include but are not limited to:

- a) family member or friend is not competent in English;
- b) family member or friend is not competent in the patient's primary oral language;
- c) using a family member or friend would compromise patient privacy and confidentiality;
- d) using a family member or friend would create a conflict of interest with the patient's best interests; or
- e) family member or friend is not proficient in the use of medical terminology.

What if the patient refuses your offer of an interpreter but you as a physician believe that the patient needs one to communicate effectively? Patients may refuse an offer of an interpreter. However, if the provider believes that an interpreter is needed, an interpreter must be used. **Best Practice:** apologize to the patient and tell them that **you** need the interpreter in order to provide them with high quality care.

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