

## Insights

### **New HHS Guidance: Safeguarding Patient Rights in Hospital and Long-Term Health Facility Visitation Policies**

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By: Stephanie T. Eckerle, Christopher J. Kulik, and Chloe N. Craft

On January 25, 2024, the Office for Civil Rights (“OCR”) at the U.S. Department of Health and Human Services (“HHS”) issued new guidance to U.S. hospitals and long-term care facilities regarding their duties under the Centers for Medicare and Medicaid Services (“CMS”) regulations. Specifically, OCR emphasized hospitals’ and long-term care facilities’ obligation to ensure that their visitation policies do not unlawfully discriminate against patients or residents based on religion or any other protected class under federal civil rights law.

OCR also hosted a recent webinar entitled “Ensuring Religious Non-discrimination in Patient Visitation.” The webinar unpacked recent guidance, entitled “FAQs on Patient Visitation at Certain Federally Funded Entities and Facilities,” and illustrates the importance of considering the religious needs of patients and others when instituting visitation policies.

For context, hospitals and long-term care facilities participating in the Medicare and Medicaid programs must meet specific requirements under the Code of Federal Regulation (the “CFR”). Both OCR and CMS enforce prohibitions set forth in non-discrimination regulations—OCR enforces prohibition on religious discrimination, whereas CMS enforces the regulations regarding non-discrimination on the basis of other protected classes. The requirements that OCR has chosen to highlight in its recent guidance are 42 C.F.R. § 482.13 and 42 C.F.R. § 483.10. Section 482.13 outlines a patient’s rights at a hospital and the actions a hospital must take to protect those rights. Section 483.10 outlines a resident’s rights at a long-term care facility and the actions a long-term care facility must take to protect those rights.

First, regarding OCR’s recent guidance, hospitals and long-term care facilities must have written visitation policies for their patients and residents, respectively. The written policy must not restrict, limit, or otherwise deny visitation privileges based on race, color, national origin, religion, sex, gender identity, sexual orientation, or disability. However, the written policy may limit a patient or resident’s visitation rights for a clinically necessary or reasonable restriction.

Many hospitals and long-term care facilities implemented legitimate safety restrictions on patients and residents’ visitation rights during the COVID-19 pandemic. A few of the examples OCR pointed out were:

- Limiting the number of visitors allowed inside a building or room at a given time.
- Limiting visitations by screening visitors for COVID-19 and limiting access to those visitors who tested positive.

When making these legitimate safety restrictions, OCR emphasized that hospitals and long-term care facilities should state the clinical reasoning for any limitations on visitation rights in writing in the visitation policy.

Second, hospitals and long-term care facilities must inform their patients or residents of their visitation rights, including any clinical restrictions on such rights. While informing the patients or residents of their visitation rights, hospitals and long-term care facilities must also inform patients and residents of their right to receive the visitors

whom they designate and to withdraw consent from seeing visitors. Both CFR sections state that patients and residents have the right to approve individuals for visitation "including, but not limited to":

- Spouses (including same-sex spouses)
- Domestic partners (including same-sex domestic partners)
- Other family members
- Friends

During OCR's recent webinar and in their recent guidance, OCR highlighted a few other examples of individuals that a patient or resident may give consent to visit to, including:

- Members of the clergy
- Chaplains
- Ministers
- Faith leaders
- Support persons for patients and residents with disabilities (this right is separate from the right to visitation and, in some ways, much stronger)

OCR shed light on additional circumstances that generated an increase in concern over the last several years, particularly during the COVID-19 pandemic. OCR gave specific examples of violations of patients' and residents' visitation rights stemming from those circumstances, including:

- Preventing family members from bringing kosher or halal food that meets the patient or resident's religious dietary restrictions while allowing other family members to bring food
- Subjecting certain religious groups to more rigorous screening processes before visitation
- Prohibiting visitations from clergy members

OCR emphasized that certain safety restrictions implemented throughout the COVID-19 pandemic, while facially legitimate, ultimately led to violations of patient and resident rights. For example, OCR stated that if patients can meet with their faith leaders through the chaplaincy program, a hospital must also allow patients of other faiths to meet with their religious leaders. If a hospital limits visitation but allows patients to see the hospital's in-house chaplaincy program only, legitimate safety restrictions may turn into a violation due to the lack of accommodation of other religious needs. Significantly, OCR advised that the hospital must not subject the outside faith leaders to additional requirements or restrictions when allowing faith leaders outside the chaplaincy program to visit.

When drafting your hospital or long-term care facility visitation policy, it is essential to consider OCR guidance and all federal law requirements. For questions regarding your visitation policy or efforts related to compliance with healthcare regulations, please contact Stephanie T. Eckerle, Christopher J. Kulik, or Chloe N. Craft or your regular Krieg DeVault healthcare attorney.

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