



Executive Briefing

2011 Medicare / Medicaid Foreign Language Compliance

By Elisabete Miranda, President Translation Plus, Inc

Introduction

This briefing provides background and an overview of the responsibilities that Medicaid / Medicare based insurance plan sponsors face with regard to communicating with individuals with Limited English Proficiency (“LEP”).

Background

Title VI of the Civil Rights Act of 1964 provides that no person shall “on the ground of race, color, or national origin, be excluded from participation, be denied the benefit of, or be subject to discrimination under any program or activity receiving Federal financial assistance”. In 1974, the Supreme Court determined that Title VI prohibits conduct that has a disproportionate effect on persons with LEP because such conduct constitutes national origin discrimination. In 2000 an Executive Order was issued with companion guidelines from the Department of Justice setting forth objectives and principles for federal agencies to follow in issuing guidelines to non-Federal organizations regarding their obligation to provide meaningful access to LEP persons¹. Since Medicare and state Medicaid programs involve federal funding they both fall under these LEP mandates. The Centers for Medicare & Medicaid Services (“CMS”) is the authority for guidelines to participating plan sponsors regarding LEP requirements.

CMS Language Thresholds

CMS guidelines requiring plan sponsors to make translated marketing materials available have changed for plan year 2012. For plan year 2011, translation to a particular language was required if 10% of the people in a Plan Benefit Package (“PBP”) service area *spoke that language at home*. For 2012, translation to a particular language is required if 5% of the people in a PBP that speak that language *speak English less than very well*. This change was facilitated by new statistics first made available in the Census Bureau’s 2009 Community Survey. Since roughly half the people in any particular ethnic group speak English less than very well, the halving of the translation threshold is pretty much offset by the change to the smaller population that isn’t fluent in English. Some plans that were just below the old 10% threshold may now be required to translate, while others that were just above the old threshold will no longer be required to translate.

A listing of PBP's that require translated materials based upon 2011 population data is available to plan sponsors at CMS' HPMS website. This information can be used for 2011 as long as the PBP services area didn't change after May 6, 2011. If a PBP service area changed after that date, then the plan sponsor must perform its own analysis using the process set forth in Appendix A of the June 15, 2011 CMS Memo to Medicare Sponsors².

Regardless of the percentage of non-English speakers in PBP service area, all plan sponsors must have appropriate interpreter services available to their call center personnel to answer questions from non-English speaking beneficiaries.

Documents That Must Be Translated

Although the plan sponsor is responsible for identification of all materials required for translation, CMS has identified a minimum set that must be available in printed form and on the sponsor's web site³:

- Enrollment instructions and forms*
- Summary of Benefits*
- Plan ratings information
- Required Written Notices covering annual benefits changes, grievance procedures, future plan availability, and limited income Extra Help
- Evidence of Coverage*
- Annual Notice of Change of Coverage
- Provider Directory*
- Pharmacy Directory (if applicable)*
- Formulary (if applicable)
- Transition Letter (if applicable)
- Any changes to the materials listed above

* Translated materials that must be uploaded by the plan sponsor to CMS' HPMS Marketing Module

Additional materials not listed above may be required if they are "vital documents" or if their unavailability could be considered a discriminatory practice.

CMS Provided Translations

CMS will provide translations of some specific model marketing materials in Spanish and Chinese. While this may seem like it should produce substantial cost reductions, companies like Translation Plus were already basing their pricing on a one time, no charge, translation of the model documents. The costs associated with the provision of final documents are associated with:

- Translation of about 10% of content that varies from the model – and from plan to plan

- Editing and correcting tables
- Reformatting the body of documents (since translations from English to other languages typically expands text by 20%)
- Professional proofreading of the final documents

The few cents per word spent with a professional translation company enables the plan sponsor to meet deadlines, have all content read from beginning to end by a professional linguist, and receive an Affidavit of Accuracy that assures conformance to both CMS and HHS requirements regarding communication with individuals that have Limited English Proficiency.

CMS Document Submission Deadlines

After the English version of required materials has been approved, the plan sponsor must upload the following materials into HPMS:

- The approved English version of the material
- The translated version of the material
- A letter of attestation signed by an individual able to legally bind the organization attesting to the accuracy of the translated materials.

Technically, to avoid violating CMS anti-discrimination guidelines⁴, translations should be posted to plan sponsor web sites and available for mailing by the later of September 30th or the same time that the English language versions are available. From a practical perspective, this isn't always possible and CMS accepts "a reasonable timeframe" to have translated plans available – which barring extenuating circumstances is generally considered to be within 30 days after the English versions are approved.

Penalties

The plan sponsor is responsible for proactively uploading translated versions of materials to CMS' HPMS, posting translated materials on their websites, meeting requests for translated materials in a reasonable timeframe, and insuring that translation or interpretation activities accurately convey the meaning and intent of its marketing materials. The basic remedies for failure to meet this standard include demerits that can result in ratings changes as well as the prohibition of distribution of marketing materials until they have been modified and approved. Since an attestation by an executive of the plan sponsor accompanies submissions, failure to make good faith efforts to insure that information is accurately conveyed can result in "Federal civil action and/or criminal prosecution⁵".

Language Translation Standards

The Department of Health and Human Services Civil Rights Division has published general guidelines for quality and accuracy of translation⁶.

These guidelines state that “the permanent nature of written translations, however, imposes responsibility on the recipient [of the translation] to take reasonable steps to insure that the quality and accuracy of the translations permit meaningful access by LEP persons”. Key components of the guidelines for competency of translations include:

- Consistency with the expected reading level of the audience
- Knowledge of the target audience’s regional variations in vocabulary, phraseology, and expressions
- The use of several individuals to check each other’s work

CMS Phone Interpretation Standards

Regardless of the percentage of non-English speakers in a plan area, all plan sponsors call centers must be able to accommodate non-English speaking / reading enrollees and prospective enrollees.

The Health and Human Services general guidelines for quality and accuracy of interpretation include⁷:

- Demonstrated ability to communicate information accurately in both English and the second language
- Regional cultural awareness in both languages
- Proper interpretation of terms of art, legal, or technical concepts
- Advanced knowledge of the content of documents likely to be discussed
- Adherence to the same confidentiality standards as the plan sponsor
- Role adherence – without deviation into counselor or legal advisor

CMS performs audits of phone interpretation performance that consider the suitability of interpreters, availability of at least 150 languages, average hold times, answer times, and disconnect rates. Even if they have Spanish speaking agents in their call centers, almost every plan will need an outside phone interpretation supplier for less common languages.

About the Author

Elisabete Miranda is the President of Translation Plus an organization that specializes in helping health insurance companies communicate across languages and cultures in their respective client base. Her company has over 900 healthcare, marketing, and insurance experts that deliver CMS and Title VI compliant translation and phone interpretation services to large health insurance clients like Humana and Horizon as well as targeted providers like Fallon and NY Presbyterian. Elisabete is an expert in multicultural and multilingual communications who has acted as a cultural consultant to healthcare projects targeting various ethnic communities in the U.S. She was honored by Ernst & Young as one of 2010’s Winning Women and is a member of the Board of Directors of the primary industry trade group, the Association of Language Companies.

¹ For more information see “[Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons](#)” pages 2 – 4

² CMS Memo “[2011 Update for Marketing Material Language Lookup & Translated Materials Monitoring](#)” issued by Cynthia G. Tudor and Danielle Moon

³ “[CMS Medicare Managed Care Manual, Chapter 3 Medicare Marketing Guidelines](#)” Sections 30.6 – 30.11

⁴ See Note 3 Section 30.6

⁵ See Note 3 Appendix 11

⁶ See Note 1 pages 9 – 10 and 14 – 16

⁷ See Note 1 pages 9 - 13